

THE LAW OF COSTS.

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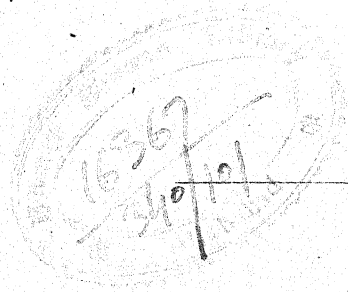
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PREFACE.

WE had the pleasure, so long ago as 1913, to announce to the learned public that, in response to the suggestions of many of our esteemed and learned constituents all over the country, it was our intention to take up, in the Lawyer's Companion Series, the several topics of Law not directly or fully dealt with by our Indian Statutes and to make, in dealing with such special subjects, a slight departure from the usual plan of the Lawyer's Companion Series. We first issued the Law of Benami Transactions and next the Law of Receivers both of which were very well received by the learned profession. The great success that has greeted these two publications encouraged us to next announce the publication of a similar book on the Law of Costs.

The necessity of a treatise on the Law of Costs is general and obvious. It is said easily enough that the question as to costs in a particular case before the Court is a matter more or less entirely within the discretion of that Court. But, at the same time, that discretion cannot be arbitrarily exercised, and the exercise of the same has been made subject to well-defined principles. What the nature of that discretion is, when and how it is to be exercised, the powers of Court in that respect, the principles as to taxation of costs, the right of appeal in matters of costs and a number of kindred topics are as fully capable of a thorough and a logical treatment as any other subject-matter hitherto dealt with in the Lawyer's Companion Series. The few provisions which may be found scattered here and there in the general body of our Statute Law laying down in effect that costs are in the full discretion of the Court, which must exercise such discretion, not arbitrarily, but judicially (S. 35, Civ. Pro. Code, 1908, 9 W.R. 6 and 7 C.W.N. 647) are very aphoristic and their implications have, in their application to the infinitely varying circumstances of each particular case, grown into great detail, so much so that we may safely say that the subject

is yet regulated very much by case-law. A glance at the book will show how fully and exhaustively the subject has been dealt with—its origin and development being traced from the earliest times known to legal history.

The Indian case-law has been incorporated up to the latest date of the publication. In a subject where the Indian Statute is very general in its provisions, resort has naturally to be had to the valuable guidance afforded by English and American precedents which justly form a repository of general legal principles applicable almost to all modern societies. We beg to express our grateful thanks to the authors and compilers of the following works which we may mention as the more important of the many excellent works consulted in the preparation of the present book:—American Cyclopædia of Law and Procedure, Halsbury's Laws of England, Encyclopædia of the Laws of England, Mayne on Damages, Daniell's Chancery Practice, Seton's Judgments and Orders, Mews' Digest, the Annual and the Yearly Practice, Marshall on the Law of Costs, Morgan and Wurtzburg on the Law of Costs, Gordon on Costs, etc., etc., etc., and to many others to which references have been made in the body of the book.

Before concluding this note, we think it is our duty to hereby expressly acknowledge with thanks the many valuable services rendered to the late Mr. T. V. Sanjiva Row and the unfailing counsel and guidance ungrudgingly given to us, by Mr. C. S. Somanatha Sastrigal, B.A., B.L., First Grade Pleader, Trichinopoly (one of the learned compilers whose name appears on the title page of this book), who, with the idea of more vigorously practising at the Bar, has been obliged, to our great regret, to sever his connection with our publications.

THE LAWYER'S COMPANION OFFICE,
MADRAS.
Dated 14th November, 1918.

T. A. VENKASAWMY ROW.
T. S. KRISHNASAWMY ROW.

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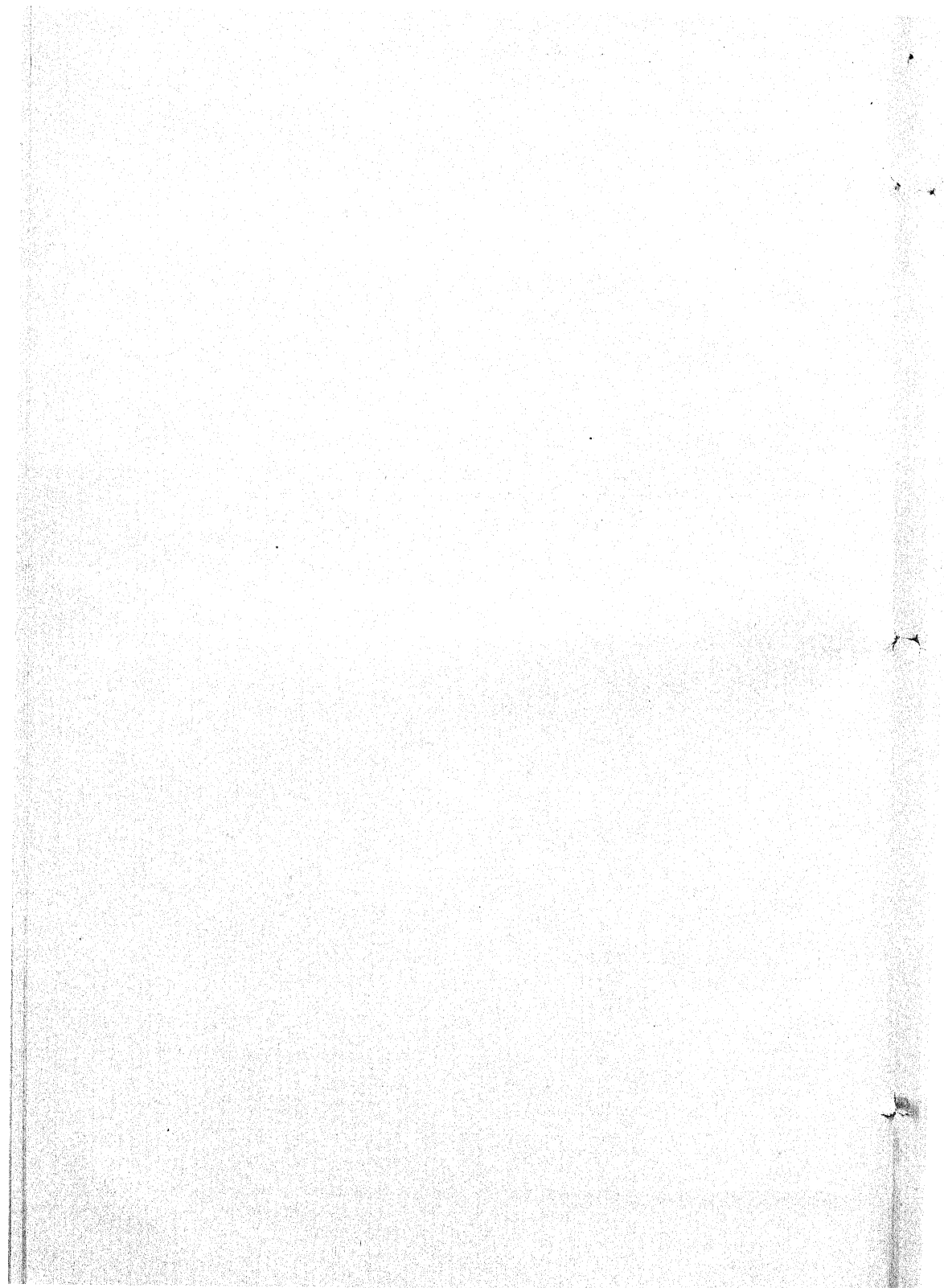


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* At p. 840 read A W N (1908) 5 as A W N (1908) 53 and 3 M L T 22 as 3 M L T 221.

† At pp. 789 and 790 read 2 Suther 628 as 3 Suther 405.

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THE
LAW OF COSTS
IN
BRITISH INDIA.

CHAPTER I.
INTRODUCTORY.

Nature of costs in general.

Definition.

Terms explained—

“Costs.”

“Taxed costs.”

“Extra costs.”

“Costs as between solicitor and client” or “attorney and client.”

“Costs between party and party, etc.”

“Full costs.”

“Proportionate costs.”

“Double or treble costs.”

“Costs in the cause” or “costs in the action.”

“Costs of the day.”

“Costs to abide the result.”

“Costs in any event.”

“Costs in proportion.”

Award of costs not always a complete compensation.

Position of the Law of Costs in general jurisprudence.

History and origin of the Law of Costs—Costs in ancient and modern systems of law.

Costs in (i) Ancient Roman Law.

(ii) Hindu Law.

(iii) Early English Law.

Jurisdiction to award costs.

(i) Derived from Acts of the Legislature.

(ii) Inherent power of Courts.

Award of costs by a Court trying suit without jurisdiction.

Provisions of the Code of Civil Procedure regarding the power of Courts to award costs.

Provisions of English Statutes as to the power of Courts to award costs.

Costs, how incurred in British India—Levy of Court-fees—History of such fees in British India.

Policy of the Indian Legislature with regard to the levy of Court-fees—Theory that "Justice ought not to be taxed" examined.

Award of costs, by what law governed :—

(i) By the law of the country where the suit is tried.

(ii) By the law which is in force at the time when suit is terminated.

English law as to costs, applicability of, in this country.

Construction of Statutes relating to costs.

Costs, nature of—not to be awarded by way of penalty.

Costs given by way of indemnity to innocent party.

Court cannot award as costs expenses not incurred by the party.

Order as to costs—What does it include.

Costs given up to a particular date—What does it include.

Order as to costs, when made by Court.

Duty of Court to state by whom costs are to be paid.

Order as to costs not generally made when suit is adjourned or at original hearing.

Exception to the above rule.

Costs are in the discretion of Courts.

Discretion not to be fettered by any hard and fast rule.

Extent of discretion :—

(i) It is very wide in its nature.

(ii) It extends not only to the incidence but also to the *quantum* of costs.

Discretion how exercised :—

(i) To be exercised judicially—Meaning of "Discretion."

(ii) To be exercised according to recognized principles of law and on grounds relevant to the action.

(iii) To be exercised in favour of the successful party where such party is not guilty of any misconduct.

(a) What constitutes success within the meaning of the above rule.

(b) What constitutes failure within the meaning of the above rule.

(iv) Court must give its reasons as to why its discretion is exercised in any particular manner.

(v) Exercise of discretion in proceedings conducted under Acts which are silent as to costs.

(vi) Exercise of discretion by ordering payment of a gross sum in lieu of taxed costs—Practice of Courts in England.

(vii) Discretion of Court in the matter of awarding costs, cannot be delegated to others.

Partial success—Costs in proportion.

What may or may not be considered in determining question of costs : —

(i) Conduct of parties :

(a) In the course of the litigation.

(b) Before litigation.

Litigation being proper, though not absolutely necessary.

Novel and doubtful questions being involved in the case.

Decision of the case depending upon a ruling not fully circulated.

Decision of the case being involved in great doubt and difficulty.

Decisions being conflicting in respect to the question involved.

Parties being misled by new rule of Court.

Reported case afterwards overruled.

Costs occasioned by mistake of Court.

Costs occasioned by mistake of parties.

Costs where the case of both parties is false.

Costs of collusive suit.

Costs when there is difference of opinion among Judges.

Plaintiff instituting suit without previous notice.

Plaintiff instituting suit merely to enforce a legal right.

Defendant insisting on his strict legal rights—Moral considerations.

Defendant relying on inconsistent case.

Defendant relying on statute of limitation.

Defendant succeeding on a technical objection (as) Plea of Statute of Frauds.

Where the Court does not adjudicate on the merits of the cause.

Where Court grants relief on ground not set out in the pleadings.

Where judgment is on an issue conceded by defendant.

Where defendant disclaims all interest in the suit property.

Where defendant's admissions and conduct induced a supposition of his liability for the claim.

Where plaintiff has good reason to think defendant liable.

Defendant's wrong committed in ignorance—and being slight in its nature.

Defendant not confining his defence within proper limits.

Defendant making unsuccessful defence, but on reasonable grounds.

Defendant withholding information.

Plaintiff proceeding by an unnecessarily more expensive method—Unnecessary costs not allowed.

Plaintiff unnecessarily multiplying actions.

Plaintiff bringing several actions for small amounts against same defendant—Oppressive conduct.

Plaintiff bringing action in superior Court—Exaggeration of claim.

Want of objection by defendant to plaintiff incurring unnecessary expenditure.

Expenses caused by the trial of wrong and unnecessary issues.

Successful party refusing to submit to arbitration.

Where both parties at fault.

Scandalous matter in pleading.

Negligence of party.
 Misleading advertisement.
 Losing party not allowed to cross-examine witnesses.
 Witness guilty of exaggeration.
 Costs refused on ground of public policy—*Particeps criminis*.
 Where plaintiff has entered into an usurious bargain.
 Hearing for costs alone.
 Re-opening of question of costs after compromise of suit.
 Determination of the amount for the purpose of fixing right to costs.
 Who liable for costs.
 Costs of abandoned suit or proceeding.
 Costs of *ex parte* applications.
 Costs of interlocutory applications.

Nature of
 costs in
 general.

"COSTS are certain allowances authorized by statute to reimburse the successful party for expenses incurred in prosecuting or defending an action or special proceeding. They are in the nature of incidental damages allowed to indemnify a party against the expense of successfully asserting his rights in Court. The theory upon which they are allowed to a plaintiff is that the default of the defendant made it necessary to sue him, and to a defendant, that the plaintiff sued him without cause. Thus the party to blame pays costs to the party without fault.⁽¹⁾" In contemplation of law the word "damages" emphatically includes costs.⁽²⁾ It is so considered by Lord Coke and in various other authorities.⁽³⁾ "Costs" therefore properly fall under the *nomen generale* of damages.⁽⁴⁾ In every litigation of a civil nature, there comes a stage when, the questions of law involved in the case are resolved, and the questions of fact are also decided, and the Court comes to the conclusion that the defendant has either done or not done some

(1) *Stevens v. Boston Cent. Nat. Bank*, 168 N.Y. 560; 61 N.E. 904, Cyc. of Law and Procedure, Vol. XI, p. 24.

(2) See Addison on Torts, 6th Ed., p. 786.

(3) *Ibid.*

(4) *Per* Lord Ellenborough, C.J., in *Phillips v. Bacon*, 9 East 303; Co. Litt. 257-a. It may be noted that in England prior to the Statute of Gloucester, 6 Edw. I, c. 1. (3 Bl. Cons. 399) which was the first statute that directed that costs should be given to a successful plaintiff in an action at law, the Courts were in the habit of including costs, and making them recoverable as damages, in those actions in which damages were given. But because these damages were frequently inadequate to the plaintiff's expenses, therefore, the Statute of Gloucester ordered costs *eo nomine* to be also added. See note 55, *infra*. See also Stephen's Commentaries of the Laws of England, 12th Ed., 1895, Vol. III, pp. 608, 609.

act belonging to a class of acts commanded or forbidden by law. If he has done an act forbidden or if he has not done an act commanded, the tribunal trying the case assigns to him the legal penalty or the measure and mode of compensation which he is to make to the injured plaintiffs.⁽⁵⁾ One of the modes in which compensation is awarded to the injured plaintiff is to award him the expenses incurred by him in the successful prosecution of the suit. Similarly, if the Court should find that the defendant has not done any act forbidden by law, or that he has done all commanded by law, and that he has been unnecessarily dragged into Court by the plaintiff, the Court awards costs to the successful defendant as compensation for the expenses incurred by him in the successful defence of the suit. These expenses which the Court awards to a party to a suit or other proceeding as compensation for the loss to which he has been put by the fault of the other party are called "costs."

Hence the term "costs" has been defined as "the expenses incurred by the parties in the prosecution or defence of a suit." (6)

(5) See Amos' Science of Jurisprudence, 1872, p. 341: "When a person brings an action in law against another and succeeds, it is only fair that the defendant, besides paying the sum which he ought to have paid, should also recoup the expenses incurred by the plaintiff in prosecuting a rightful claim; on the other hand, when the action fails, the defendant is justly entitled to be repaid the expenses he has incurred in defending a wrongful claim. That costs should follow the event may therefore be taken as the first principle of the law relating to this subject, but there are many special circumstances which interfere to modify its application. The action, though successful, may be in its nature frivolous or vexatious, or it may have been brought into a higher Court where a lower Court would have been competent to deal with it, and on the other hand, the defendant although he has escaped a judgment against him, may by his conduct have rendered the action necessary or otherwise justifiable. In such cases, the rule that costs should follow the event would be felt to work an injustice, and exceptions to its operation have therefore to be decided. The law as to costs, simple as it may appear, is, in reality, highly complicated." See Ency. Britannica, 9th Ed., Vol. VI, p. 451, Heading "Costs." "It cannot be disputed that at common law costs are awarded to a successful party as an indemnity for the expenses legitimately and reasonably incurred in fighting the action. As stated by Bramwell, B., in *Harold v. Smith*, (1860) 5 H. & N. 381, costs, as between party and party, are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who receives them. Therefore, if the extent of the damnification can be found out the extent to which costs ought to be allowed is also ascertained. It would, therefore, follow that a successful party cannot recover anything beyond expenses actually incurred or for which he is liable." *P. Nusserwanji & Co. v. S. S. Wartenfels*, 18 Bom. L.R. 118 at pp. 120-121.

(6) Bouvier's Law Dictionary. The following definition of the term "costs" and the term allied with other expressions may also be noted:—"Costs are the expenses of an action recoverable from the losing party." Anderson's Law Dictionary. Costs are in

Terms explained.—
“Costs”

“Taxed costs”

“Extra costs”

“Costs as between solicitor and client” or

“attorney and client”;

“Costs between party and party.”

The term “costs” is applied to “such sum of money as the Court or a Judge orders an unsuccessful litigant to pay to his

the nature of “an allowance to a party for expenses incurred in conducting his suit.” Anderson’s Law Dictionary. Costs are “the sums prosecuted at law as charges for services enumerated in the fee bill.” (*Ibid.*) Costs are expenses incurred on litigation, client, being what are payable in every case to the attorney or counsel by his client whether he ultimately succeeds or not, or between party and party, being those which the law gives or the Court in its discretion decrees, to the prevailing against the losing party. (*Ibid.*) See also ref. (9), *infra*. “The word costs seems to have a technical meaning and is usually applied to the legal charges of a proceeding.” *Brower v. Maiden*, 4 Fed. Cas. No. 1, 970, Gilp. 294. In the prosecution and defence of actions the parties are necessarily put to certain expenses, or as they are commonly called “costs;” consisting of money paid to the King and Government for fines and stamp duties; to the officer of the Courts; and to the counsel and attorneys for their fees, etc. Law Dictionary by Sir Thomas Edlyne Thomlins Kt., London, 1820, Heading “Costs.” Costs (*Expensae Litis Lat.*) are expenses incurred in litigation or professional transactions, consisting of money paid for stamps, etc., to the officers of the Court or to the counsel, attorneys and solicitors, for their fees, etc. See Wharton’s Law Lexicon, 1867, 4th Ed., p. 247. Costs in law mean “the sum fixed by law or allowed by the Court for charges of a suit awarded against the party losing in favour of the party prevailing, etc.; as, the Jury find that the plaintiff recover of the defendant £10 for costs of suit or with his cost.” Imperial Dictionary, Vol. I, p. 599, Heading “Costs.”

“Costs only”
“Costs of and incident to all proceedings.”

Neither “Costs only” (S. 49, Jud. Act, 1873) nor its synonym “Costs of and incident to all proceedings” (R. 1, Order 65, R.S.C.) includes costs to which a person is entitled, as of right, by virtue of a contract or relationship (*e.g.*), Mortgagee and Trustee costs (*Colterell v. Stratton*, 8 Ch. 295; 42 L.J. Ch. 417; 28 L.T. 218; 21 W.R. 234; *Turner v. Hancock*, 20 Ch. D. 303; 51 L.J. Ch. 517; 46 L.T. 450; 30 W.R. 480; *Re Channel*, 8 Ch. D. 492; 47 L.J. Ch. 583; 38 L.T. 750; 26 W.R. 595; *Ex. p. Wainwright*, 19 Ch. D. 140, 153; 51 L.J. Ch. 67; 45 L.T. 562; 30 W.R. 125; *Re Beddoes*, 1893, 1 Ch. 547; 62 L.J. Ch. 233; 68 L.T. 595; *Re Isaac*, 1897, 1 Ch. 251; 66 L.J. Ch. 160). Such costs are not, properly speaking, costs at all; they are charges and expenses and can only be forfeited by misconduct, and their allowance or disallowance is appealable (*Re Channel*, *supra*). Stroude’s Judicial Dictionary, 1903, 2nd Ed., Vol. I, p. 415, Heading “Costs.”

Costs—“All proper costs and charges incident and reasonable.”

“All proper costs and charges incident and recoverable under” a petition means “party and party costs” *Re Grundy*, 17 Ch. D. 108; 50 L.J. Ch. 476; 44 L.T. 541; 29 W.R. 581. Stroude’s Judicial Dictionary, 1903, 2nd Ed., Vol. I, p. 415.

“Costs”—
Agreement as to.

An agreement as to “costs” of proceedings before Irish Land Judges, includes the expenses of survey. (*Re Orme*, 25 L.R. Ir. 104.) Stroude’s Judicial Dictionary, 1903, 2nd Ed., Vol. I, p. 415.

“Costs” under certain special Acts.

On the Corrupt and Illegal Practices and Prevention Act, 1883, “Costs” includes “Costs, charges and expenses” [(S. 64); so on a Local Government Act, 1888, “Costs” includes “charges and expenses.” (S. 100), and in Local Government (Scot.) Act, 1889, it “includes expenses” (S. 105)]. Stroude’s Judicial Dictionary, 1903, 2nd Ed., Vol. I, p. 415.

Costs “attending” and “costs consequent” on an application, etc.

Costs “attending” application under Ss. 2, 5 and 6, W. 4, c. 69, held to include the costs attending the re-investment of the purchase-money which was the subject-matter of the application; “but it was on the peculiar circumstances and the L.J.J. strained the words to meet that case” (*Per Kindersley, V.C., Re Eastern Counties Ry.*,

opponent to compensate the latter for the expense to which he has been put by the litigation. The sum so awarded seldom, if ever,

6 W.R. 492). In that later case it was held that costs "consequent" on a conveyance of land compulsorily taken did not include fines on copyholds which had to be purchased for the reinvestment of the money paid on the conveyance. Stroude's Judicial Dictionary, 1903, 2nd Ed., Vol. I, p. 415.

The "Costs and charges of executing" a will do not include fines payable by devisees of copyholds. (*Cole v. Jealous*, 5 Hare 51). Stroude's Judicial Dictionary, 1903, 2nd Ed., Vol. I, p. 416. "Costs and charges."

In the phrase "costs, charges and expenses," "charges and expenses" are obviously wider than technical "Costs":—As the phrase is used in Ss. 21 (10), 46 (6), Settled Land Act, 1882; *Re Smith*, 1891, 3 Ch. 65; 6 L.J. Ch. 618; 64 L.T. 821; 39 W.R. 590. As to what is included in the phrase generally see *Harvey Voller*, 57 L.T. 239; *Re Mansel*, 33 W.R. 727; 54 L.J. Ch. 883; 52 L.T. 806; *Re Bennet*, 1896, 1 Ch. 778; 65 L.J. Ch. 422; 74 L.T. 157; 44 W.R. 419 (Eng.). Stroude's Judicial Dictionary, 1903, 2nd Ed., Vol. I, p. 416. "Costs, charges and expenses."

"Costs in the cause"—properly so called are "those costs only which the successful party in the suit would be entitled to or taxation in the absence of an order to the contrary in the particular proceeding, and this, necessarily, includes costs incurred subsequent to final judgment" (*Thompson v. Parish*, 5 C.B.N.S. 691-N). Cf. *Pugh v. Kerr*, 6 M. & W. 17; 9 L.J. Ex. 255. Stroude's Judicial Dictionary, 1903, 2nd Ed., Vol. I, p. 416. Costs in the cause.

Vide *Rigby v. Okell*, 7 B. & C. 57; *Baines v. Bromley*, 50 L.J.Q.B. 465; 6 Q.B. D. 691; 44 L.T. 915; 29 W.R. 706; *Sparrow v. Hill*, 29 W.R. 705; 49 L.T. 917. Stroude's Judicial Dictionary, 1903, 2nd Ed., Vol. I, p. 417. Costs of the cause.

"Costs of conveyances" (S. 82, Lands Cl. Act, 1845) includes the costs of registering the vendor's title pursuant to the Local Registration of Title (Irish) Act, 1891, 54 & 55 Vict. c. 66 (*Re Belfast & N. Counties Ry.*, 1895, 1 Ir. R. 297). "Costs of conveyance."

See Stroude's Judicial Dictionary, 1903, 2nd Ed., Heading "Execution".

"Costs of execution."

See Stroude's Judicial Dictionary, 1903, 2nd Ed., Vol. I, pp. 416-417.

"Costs of lease."

"Costs of summoning jury and expenses of witnesses" to be payable by a Railway on a compensation assessment, does not include the general costs of the enquiry. *R. v. Gardner*, 6 L.J.K.B. 130; 6 A. & E. 112; 1 N. & P. 308. Stroude's Judicial Dictionary, 1903, 2nd Ed., Vol. I, p. 417. "Costs of summoning jury," etc.

Costs de incremento, costs of increase, are the extra expenses incurred, such as witnesses' expenses, fees to counsel, attendances, and Court-fees. Morris' Law Lexicon, 4th Ed., 1905, p. 96. Costs de incremento or costs of increase.

DIVES COSTS are the ordinary costs as distinguished from those paid by a person suing *in forma pauperis*. Morris' Law Lexicon, 4th Ed., 1905, p. 118. Dives costs.

"SECURITY, may consist of (a) a personal promise, or (b) an obligation of property (called a *real* security) to satisfy the loss secured against, e.g., the case of a mortgage; (b) may be on a *specific* property, or on property of a certain general description, which is called a *shifting* or *floating* security. Some kinds of security originate in legal proceedings, e.g., security for costs, security to keep the peace." Morris' Law Lexicon, 4th Ed., 1905, p. 318. Costs, security for.

fully recoups the successful party for the expense which he has incurred.⁽⁷⁾ According to the practice of the Courts in England the Court may, if it think fit, direct payment of a lump sum without taxation,⁽⁸⁾ and this rule is often acted on in Chambers in the Chancery Division. But in all ordinary cases when the Court awards costs it directs that they be taxed; and a taxing-master very rarely allows the full amount which the successful party has to pay to his own solicitor. The amount allowed on taxation is called "taxed costs;" and this, as a rule, is all that the unsuccessful party has to pay to his opponent. The difference between "taxed costs" and the amount which the successful party is liable to pay to his own solicitor, is known as "extra costs;" and this the successful party must pay out of his own pocket. Sometimes, however, the Court or Judge orders that the costs payable by one party to another should be taxed "as between solicitor and client;" and then the taxation is conducted on a far more liberal scale.⁽⁹⁾ But

"Costs to abide the event."

As to this, see Stroude's Judicial Dictionary, 1903, 2nd Ed., Heading "Event." See also *Numberumal Chettiar v. Krishnajeel*, 26 M.L.J. 356=(1914) M.W.N. 310; *Godavarthi v. Godavarthi*, 28 M.L.J. 441 (442).

"Costs to follow the event."

As to this, see Stroude's Judicial Dictionary, 1903, 2nd Ed., Heading "Event." As to the distinction between the expression costs "to abide the result" and "to abide and follow the result," see the judgment of Seshagiri Ayyar and Kumarasawmi Sastri, JJ. in *Godavarthi v. Godavarthi*, 28 M.L.J. 441 (442).

"Judgment with costs."

As to this, see Stroude's Judicial Dictionary, 1903, 2nd Ed., Heading "Judgment."

"Costs of Assizes and of Quarter and petty sessions."

As to this, see Local Government Act, 1888, S. 100, Stroude's Judicial Dictionary, 2nd Ed., Vol. I, pp. 416-417.

"Costs of maintenance" of Criminal lunatic.

As to this, see 47 and 48 Vic., c. 64, S. 16; Stroude's Judicial Dictionary, 2nd Ed., Vol. I, pp. 416-417.

"Costs of realization."

As to this, see Stroude's Judicial Dictionary, 1903, 2nd Ed., Heading "Realization."

"Costs of suit."

As to this, see Stroude's Judicial Dictionary, 1903, 2nd Ed., Heading "Suit."

"Costs of issues."

The expression "costs of issues" has been said to mean costs of trying the issues. *Eyre v. Thorpe*, 2 Dowl 768; Law of Costs by W. E. Gordon, London, 1884, Ch. XXI, p. 163.

"Costs of reference."

As to this, see Stroude's Judicial Dictionary, 1903, 2nd Ed., Heading "Reference."

(7) See Mayne on Damages, 8th Ed., 1909, p. 10.

(8) Order 65, r. 23 of the Rules of the Supreme Court in England.

(9) "Costs in actions or suits are either between attorney or solicitor and client, being what are payable in every case to the attorney, or solicitor, by his client, whether he ultimately succeed or not; or between party and party being those only which are allowed in some particular cases to the party succeeding against his adversary, and those are either interlocutory, given on various motions and proceedings in the course

it often happens that even after a taxation of this kind the successful party is still called on to pay some portion of his

of the suit or action, or final, allowed when the matter is determined." Wharton's Law Lexicon, 1867, 4th Ed., p. 247. Costs as between attorney and client are costs "payable in every case to the attorney, by his client, whether he ultimately succeed or not." Costs as between party and party are those costs "which are allowed, in some particular cases, to the party succeeding as against his adversary. As between party and party, they are interlocutory or final. The former are given on various interlocutory motions and proceedings in the course of the suit. The latter (to which the term of costs is most generally applied, and the rules respecting which are of the most consequence) are not allowed till the conclusion of the suit." Law Dictionary, by Sir Thomas Edlyne Tomlins, Knt., London, 1820, Vol. I, Heading "Costs." "The Court makes a distinction with regard to the principle upon which the officer of the Court is to proceed in the taxation of costs, by allowing a larger proportion of actual expenditure to parties holding particular characters than it allows in ordinary circumstances. This distinction is marked by the terms of "costs as between party and party" which are the ordinary costs allowed by the Court; and "costs as between solicitor and client," which are the costs allowed by the Court to parties filling the characters alluded to. (Originally, in cases of notorious frauds, the Court of Chancery made the defendant pay exemplary costs, but this practice was discontinued, from the difficulty of carrying it into execution: *Waltham v. Broughton*, 2 Atk. 43.) See also Daniell's Chancery Practice, 7th Ed., 1901, Vol. I, p. 956. For certain cases where costs as between attorney and client were allowed see the *East Indian Railway Co. v. Kally Dass Mookerjee*, 26 C. 465=3 C.W.N. 781 and the cases therein referred to. See also *Obhoy Churn Sen v. Debendronath Mullick*, 8 C.L.R. 437. In a suit for damages against a Railway Company for loss of life through an accident resulting from the negligent conduct of the Company, costs were allowed as between attorney and client. The *East Indian Railway Co. v. Kally Dass Mookerjee*, 26 C. 465=3 C.W.N. 781. (*Narayan Jetha v. The Municipal Commissioner of Bombay*, 16 B. 254, *Sorabji Ratanji v. Great Indian Peninsula Railway Company*, 7 B.H.C.R. (O.C.) 119, Note, and *Ratanbai v. Great Indian Peninsula Railway Company*, 7 B.H.C.R. (O.C.) 120, Note, *Not F.*) The purchaser at auction sale of certain property, subject to a mortgage other than the mortgage in execution of the decree on which the property was sold in Court auction, applied to be made a party in the suit brought by the other mortgagee, after paying the amount due to the plaintiff for principal and interest, and prayed that, upon his paying the plaintiff the costs of the suit to be taxed as between party and party, the plaintiff should be directed to re-convey the property to him free from all incumbrances: *Held*, that the practice in such cases was to make the costs payable as between attorney and client, and not as between party and party. *Obhoy Churn Sen v. Debendronath Mullick*, 8 C. L.R. 437. Solicitor and client costs may be awarded notwithstanding persons interested beneficially are not actually before the Court, but only by means of a representation order. "To hold otherwise might be very pernicious, as persons might then be made parties unnecessarily and costs might be increased for the mere purpose of inducing the Court to allow costs" (*Per Kekewich, J., Re Davies*, (1891) 64 L.T. 824). See also *Re Medland*, (1889) 41 Ch. D. 476, C.A. "In the taxation of costs certain principles are observed. In some cases costs are to be taxed "as between party and party," in others as between "solicitor and client." No definite rules can be laid down with respect to the difference between the costs to be allowed on one principle of taxation and those allowed on the other." *Encyclopædia Britannica*, 9th Ed. Vol. VI, p. 452 Heading "Costs," "Costs are (a) of a solicitor, (b) of a litigant. Costs of a litigant are usually taxed as between party and party, which does not include the whole expenses of the

solicitor's bill, *e.g.*, if any item of expense has been unnecessarily incurred "(10).

"Full costs."

Sometimes a statute may use the word "full costs." In such cases the Court or the master allows the ordinary costs as between party and party.^(10-a)

"Proportionate costs."

As a general rule, in case of partial decree, costs should be awarded to both parties in proportion to the amount decreed and dismissed⁽¹¹⁾. If a plaintiff claims in respect of two distinct matters, and succeeds as to one and fails as to the other, the costs will be apportioned so as to give each party the costs applicable to that matter upon which he has succeeded⁽¹²⁾. The general rule is that if a plaintiff recovers a less amount than he claimed in the plaint, his costs should be apportioned according to the amount recovered, and not to the sum claimed.⁽¹³⁾

litigant: occasionally, as in the case of trustees, costs are allowed *as between solicitor and client*, which includes substantially the whole costs of the action." Morris Law Lexicon, 4th Ed., 1905, p. 96.

(10) Encyclopædia of the Laws of England, 2nd Ed., Vol. IV, p. 43.

(10-a) *Jamieson v. Trevelyan*, 10 Ex. 748; 24 L.J. Ex. 74. There is no distinction between "costs" and "full costs." *Irvine v. Reddish*, 5 B. & Ald. 796. The "full costs" to which a successful defendant is entitled are the ordinary costs as between party and party, and not solicitor and client costs. *Avery v. Wood*, 61 L.J. Ch. 75; (1891) 3 Ch. 115; 65 L.T. 122; 39 W.R. 577; C.A. Eng. The Court knows no distinction between costs generally and full costs. *Irwin v. Reddish*, 1 D. & R. 413; 5 B. & Ald. 796. The term full costs has the same meaning as ordinary costs. *Jamieson v. Trevelyan*, 10 Ex. 748; 24 L.J. Ex. 74; 1 Jur. (N.S.) 334; 3 W.R. 172 (Eng.). Full costs mean all fair and reasonable costs, to the exclusion of disbursements of extra liberality or generosity on the part of the person entitled to such costs. *Flattery v. Malone*, 1 Moll. 463. "Full costs" cannot be allowed where the parties are only entitled to costs in proportion to the value of their separate interests in the suit. *Luchman Chunder Geer Gossain v. Ram Joy Mozoomdar*, 7 W.R. 159.

(11) *Ninhooora v. Heera Ram Misser*, 1 Hay 277.

(12) *Tarachand Mookerjee v. Jadonath Mookerjee*, Marsh 79=1 Hay 141=1 Ind. Jur. O.S. 102.

(13) *Velu Pillai v. Ghose Mahomed*, 17 M. 293=4 M.L.J. 140. (Ref. to in *Periakaruppan v. Palaniappa*, 13 M.L.J. 210). For some cases where proportionate costs were decreed, see *Soudamoney Dossee v. Juggo Mohun Sen*, 1 Hyde, 172; *Bamascondery Deba v. G. Rogers*, 7 W.R. 127; *Bykhunt Nath v. Moheshsuree*, 4 W.R. Mis. 9; *Bama Soonduree Debia v. George Rodgers*, 8 W.R. 55. As regards costs, the rule of proportion, observed in India, does not prevail before the Judicial Committee. On all the important points, if the respondent is held to be wrong, he must pay the costs. *Grish Chunder Lahiri v. Shoshi Shikhareswar Roy*, 27 C. 951, P.C.=27 I.A. 110=4 C.W.N. 631=10 M.L.J. 356=2 Bom. L.R. 709=7 Sar. 687. The plaintiff claimed as damages a larger sum than the appellate Court ordered. No costs were given in the appeal. *Held*, following the practice of the Courts in India that, as the plaintiff recovered a less amount than he laid claim to in his plaint, his costs in the Court below were to be apportioned to the amount recovered, and not to the sum claimed, *Mohun Doss v. Gokul Doss*,

Under some of the older statutes the successful party was "Double or treble costs."⁽¹⁴⁾ given double and sometimes treble costs.⁽¹⁴⁾

The discretionary jurisdiction in cases where double and treble costs have been provided by statute is not absolute. These costs are really penal. ⁽¹⁵⁾

Costs incurred in the general proceedings in the action are technically termed "Costs in the action" or "Costs in the cause."⁽¹⁶⁾ "Costs in the cause" or "costs in the action." "By the general term "Costs of the cause" is meant all such costs

5 W.R. 91, P.C.=10 M.I.A. 563=2 Sar. 202=1 I.J.N.S. 269=1 Suth. 644. Where the Court granted a certain amount as costs to a party to a suit, the High Court would not interfere with such exercise of discretion. *Per* Davies, J. (*contra*). Where the Court granted costs in opposition to the uniform practice of granting costs proportionate to the amount decreed, the High Court could interfere in the matter and set it right. *Periakaruppan v. Palaniappa*, 13 M.L.J. 210.

(14) As to which see Yearly Practice, 1914, p. 1039.

(15) See Dictum of Lord Hatherley, *Garnett v. Bradley*, (1878) 3 App. Cas., at p. 957. As to the mode of calculation of double and treble costs, see Tidd's Practice, 9th Ed., p. 987. Where the plaintiff recovers single damages, he is entitled to single costs; unless more be expressly given him by statute. But if double or treble damages be given by statute, in a case, where single damages were before recoverable, the plaintiff is entitled to double or treble costs although the statute be silent respecting them. Law Dictionary by Thomas E. Tomlins, Knt., London, 1820, Vol. I, Heading "Costs." For a case where the statute gives double costs see 8 & 9 Vic., C. 100; *Hasker v. Wood*, 54 L.J. Q.B. 419; 33 W.R. 697 (Eng.) O.A.

(16) See *Muhammad Sadiq v. Ghous Muhammad*, 11 A.L.J. 975. For form of order limiting costs to be "costs in cause or action," see Seton, 246. See Daniell's Chancery Practice, 1901, 7th Ed., p. 956, Vol. I. As to when costs of interlocutory proceedings are considered as "costs in the action," certain rules exist, with respect to the costs of interlocutory proceedings being, or not being, "costs in the action;" and those costs which do not come within the definition of costs in the cause under these rules, cannot be obtained as such without the special direction of the Court. (*Garðner v. Marshall*, 14 Sim. 575, 588; see, however, *Hind v. Whitmore*, 2 K. & J. 458; *Finden v. Stephens*, 12 Jur. 319.) Where interlocutory applications have been ordered to stand to the trial and are not then mentioned to the Judge, the costs of such applications are to be treated as costs in the action and taxed accordingly, and need not be mentioned in the judgment. Where interlocutory applications have been disposed of, but the costs have been reserved, such costs are not to be mentioned in the judgment or order, or allowed on taxation, without the special direction of the Judge. (*British Natural Premium Provident Assn. v. Bywater*, (1897) 2 Ch. 531.) With respect to applications to extend the time for taking any proceedings, it has been provided that the costs of such applications are to be in the discretion of the taxing master, unless the Court or a Judge shall have specially directed how such costs are to be paid or borne (O. LXV, 27 (24); and with respect to interlocutory applications, by motion, it appears that (see memorandum 1 S. & S. 357; and see *Morg. & Wurtz*, 46-73) (1) The party making a successful motion is entitled to his costs as "costs in the action" (*Hindu v. Whitmore*, 2 K. & J. 458, 463; *Mounsey v. E. Lonsdale*, 6 Ch. 141; and see *Harris v. Hilliard*, 20 L.T. 216, where plaintiff was held entitled, as costs in the cause, to the costs of a motion for an injunction, in lieu of which damages had been granted); but the party opposing it is not entitled to his costs as "costs in the action" (1 S. & S. 357). If the object of the motion be in the nature of an indulgence to the party applying, he will have to pay the

as are necessary for the enforcing of the plaintiff's claim, or establish the defendant's answer, to the action, according as the one or the other is successful, and independent of such costs as were altogether improperly incurred by the successful party, by reason, where he is plaintiff, by claiming more than he could establish, and, where he is defendant, by raising an unfounded defence or perhaps counter claim." (17) The party who succeeds in the action and in other words who "wins the event" is in general entitled to the costs of the cause. If the unsuccessful party wins certain issues, he gets the costs of them as costs in, but not of, the cause. "Costs, costs in the cause" do not mean that costs will follow the event, but that those costs remain to be dealt with by the Court at the hearing. (18)

"Costs of the day."

Under the old English practice, where a plaintiff gave notice of trial and neglected to proceed to trial in accordance with such notice, or where he did not countermand such notice in due time,

costs, although the motion is granted; *Browne v. Lockhart*, 10 Sim. 420; *A. G. v. Corp. of Halifax*, 18 W.R. 37 (Eng.); see *Morg. & Wurtz*, 51. (2) The party making a motion which fails is not entitled to his costs as "costs in the action;" but the party opposing it is entitled to his costs as "costs in the action;" (1 S. & S. 357; see also *White v. Lisle*, 4 Mad. 214, 226, Eng.; *Corcoran v. Witt*, 13 Eq. 53. The rule applies to motions to obtain or to dissolve an injunction: *Marsack v. Reeves*, 6 Madd. 108, 109 (Eng.). (3) Where a motion is made by one party, and not opposed by the other, the costs of both parties are "costs in the action" (1 S. & S. 357). This rule does not apply where the motion is rendered necessary by the other party's default; *Morg. & Wurtz*, 54; *Morg. Chy. Acts, &c.*, 478. To these rules may be added (4) Where an action is dismissed with costs a defendant is entitled to his costs of unsuccessfully opposing a motion for an injunction as "costs in the action" (*Stevens v. Keating*, 1 Mac. & G. 659, 663; *Finden v. Stephens*, 12 Jur. 319; *Betts v. Clifford*, 1 J. & H. 74; *Corcoran v. Witt*, 13 Eq. 53. As to the right of a defendant to the costs incurred during a stay of proceedings under an order that the plaintiff should give security for costs of preparing affidavits with a view to fulfilling his undertaking to furnish them, see *Whitely Exerciser, Ltd. v. Gamage*, (1898) 2 Ch. 405). Where a plaintiff succeeded in the suit, but was ordered to pay the costs of it up to a certain day which was after an injunction obtained in the suit had been dissolved, it was held that the usual rules did not apply, and that he must pay the costs of the motions to obtain and dissolve the injunction (*Webster v. Manby*, 4 Ch. 372). Where a motion by the plaintiff is ordered to stand over till the hearing, no direction being given as to costs, and ultimately a judgment with costs is made in the plaintiff's favour, the motion cannot be treated as unsuccessful, and the plaintiff will be entitled to his costs of it as costs in the action (*Mounsey v. E. Lonsdale*, 6 Ch. 141; *Fritz v. Hobson*, 14 C.D. 542; *Gosnell v. Bishop*, 38 C.D. 385; *British Natural Premium Provident Association v. Bywater*, (1897) 2 Ch. 531; but where a motion had been ordered to stand over till the hearing, both parties having given an understanding, and no direction being given as to the costs, and the suit was subsequently dismissed for want of prosecution, it was held that the motion was unsuccessful, and the defendant entitled to his costs of it as costs in the cause (See *Corcoran v. Witt*, 13 Eq. 53). See also *Daniell's Chancery Practice*, 7th Ed., 1901, Vol. I, pp. 956-957.

(17) *Marshall on Costs*, p. 198.

(18) *Templeton v. Laurie*, 2 Bom. L.R. 244=25 B. 230. See also *Ref. (6) supra*.

or where after entering the cause for trial he withdrew the record, he was liable to the opposite party for all such costs as had been occasioned thereby; and these costs were usually called "*costs of the day*" (19).

The words "costs would abide the result" do not mean costs will follow the result. The discretion ordinarily vested in a subordinate Court, to decide how the costs shall be borne, is not curtailed by the mere use of the phrase "costs would abide the result" in an order of the appellate Court (20). "Costs to abide the result."

The liability to pay costs which are ordered to be paid by one party "in any event," is not affected by a subsequent settlement on the terms that the record shall be withdrawn, and that there shall be "no costs" (21). "Costs in any event."

Where the Court decrees to the plaintiff "costs in proportion" it must be taken to mean as if costs were given in proportion to the amount decreed and dismissed (22). "Costs in proportion."

The award of costs is not always a complete compensation for the successful party (23). Mr. Mayne in his work on Damages (24) says: "No doubt the theoretical idea of damages is, that they are to be a compensation and satisfaction for the injury sustained (25). Practically, however, there can hardly ever be a case in which they are completely so. Take the simplest instance, Award of costs not always a complete compensation."

(19) Provision is however now made by rules of Court in respect of these matters. See English R.S.C., O. 36, r. 19, & r. 34. When one of the parties makes default, as in failing to proceed to trial according to notice at the time appointed, he becomes liable to the other for what are called "*Costs of the day*". Encyclopædia Britannica, 9th Ed., Vol. VI, p. 452. See also on this point the Civil Rules of Practice being the rules framed by the Madras High Court for the Mofussil Courts in the Madras Presidency, r. 72, which provides that "except where an adjournment is granted with the consent of all parties or is necessitated by the business of the Court, or by the act or default of any other party, the party desiring an adjournment shall be ordered to pay the costs thereof including the expenses of re-summoning the witnesses if any, and the fee of the pleader, of the other party." See also *Shanks v. Savage*, 7 C. 177; Civ. Pro. Code (V of 1908), O. XVII, r. 1 (2).

(20) *Godavarthi Peria v. Godavarthi Lakshmi Devamma*, 24 Ind. Cas. 96. (*Fani Bhusan Roy Chowdhury v. Bama Sundari Devi*, 4 C.W.N. 343, *Diss. from.*) As to the difference between the expressions costs "to abide the result" and "to abide and follow the result" see *Godavarthi v. Godavarthi*, 28 M.L.J. 441=(1915) M.W.N. 330=29 Ind. Cas. 203. See also *Numberumal Chettiar v. Krishnajeet*, 26 M.L.J. 356=(1914) M.W.N. 310.

(21) *Walter v. Bewicke*, (1904) 90 L.T. 409, C.A.

(22) *Ram Suhaye Singh v. Oodeet Singh*, 4 W.R. 9.

(23) See Encyclopædia of the Laws of England, Vol. IV, 2nd Ed., p. 43; Mayne on Damages, 8th Ed., 1909, p. 10.

(24) See Mayne on Damages, 8th Ed., 1909, p. 10.

(25) 2 Bl. Com. 438.

viz., the non-payment of a debt. Put out of the question every element of mental suffering caused by the delay. There may be a clear amount of pecuniary loss flowing in the most direct manner from it. The creditor may become insolvent, and be permanently ruined. He may have to borrow money at an extravagant rate of interest. Even if nothing of the sort happens, still his taxed costs of suit never repay the party to whom it is granted the full amount he has expended in the action; for none of this, however, can he be compensated. The amount of the debt, with interest, and taxed costs (26) is all he can recover" (27).

Position of
the Law of
Costs in
general juris-
prudence.

"Laying out of view the rules which form the "Public Law" and the "Criminal Law," all the commands and rules which constitute the "Private Civil Law" create two classes of rights and duties, the "Primary" and the "Remedial". The primary rights and duties form the body of the law; they include all the rights and obligations of property, of contract and of personal status; they are the very end and object of all law. If mankind were so constituted that disobedience to legal rules were impossible, then, the law would be entirely made up of the rules which create these primary rights and duties. But since all these primary rights and duties may be violated, another branch of law becomes necessary which may enforce obedience by means of the "Remedies" which it provides. All possible remedies are either substitutes or equivalents given to the injured party in place of its original primary rights which have been broken, or they are the means by which he can maintain and protect his primary rights in their actual form and condition. Remedial rights are those which a person has to obtain some appropriate remedy when his primary rights have been violated by another. Remedial duties are those devolving upon the wrong doer in such case to give the proper remedy prescribed by law." (28) The right to costs and the duty to pay costs belong to the class of remedial rights and duties (29).

(26) As to what are taxed costs and as to how they are not a complete compensation to the injured party, see *Encyclopædia of the Laws of England*, 2nd Ed., Vol. IV, p. 43, cited *supra*.

(27) See *Mayne on Damages*, 8th Ed., 1909, p. 10.

(28) *Pomeroy's Equity Jurisprudence*, Vol. I, s. 90, pp. 90—97.

(29) These remedial rights and duties have been classified by Professor Pomeroy in his *Work on Equity Jurisprudence* (Vol. I, s. 112, pp. 119-124) under the following heads:—(i) *Declaratory remedies* or those whose main object is to declare, confirm and establish the right, title, property, or estate of the plaintiff, whether it be equitable or legal. (ii) *Restorative remedies* or those by which the plaintiff is restored to the full enjoyment of the right, property, or estate to which he is entitled, but which use and

From the earliest times the administration of justice, the task of affording proper remedies to aggrieved persons, was found to be a matter of some trouble and expenditure to the state; and we find that the state has always attempted to recoup itself in some way or other for this trouble and expense to which it is put in the matter of administration of justice. In modern systems of law, the party making an application to the Court for any relief is generally obliged to pay a certain amount in the shape of Court-fees as a condition precedent to the Court taking any steps in the matter of such application.^(29-a) No doubt there are some small exceptions to this rule.

History and origin of the Law of Costs. Costs in ancient and modern systems of law.

enjoyment are hindered, interfered with, prevented or withheld by the wrong doer. (iii) *Preventive remedies* or those by which a violation of a primary right is prevented before a threatened injury is done, or by which the further violation is prevented after the injury has been partially effected, so that some other relief for the wrong actually complained of may be granted. (iv) *Remedies of specific performance* or those by which the party violating his primary duty is compelled to do the very acts which his duty and the plaintiff's primary right require from him. (v) *Remedies of reformation, correction or re-execution*, or remedies by means of which a written instrument, contract, deed, or other muniment of title which for some reason does not conform to the actual rights and duties of the parties thereto, is reformed, corrected or executed. (vi) *Remedies of succession or cancellation* or those by which an instrument, contract, deed, judgment or sometimes even a legal relation itself subsisting between two parties, is, for some cause, set aside, avoided, rescinded or annulled. (vii) *Remedies of pecuniary compensation*, or those in which the relief consists in the award of a sum of money. These remedies whose final object is the recovery of money, are of three distinct species, which differ considerably in their external form and incidents, but which agree in their substance,—in the intrinsic nature of the final relief. They are the following,—*FIRST*: Those in which the relief consists simply in the recovery of a general pecuniary judgment; that is, a judgment to be enforced or collected out of the debtor's property generally—any property which he may own liable to be taken in satisfaction. *SECONDLY*: Those cases in which the relief is not a general pecuniary judgment, but is a decree for money to be obtained and paid out of some particular fund or funds. *THIRDLY*: There is another species of pecuniary award among two or more parties having claims either upon one common fund or upon several funds. The final relief in all these cases is simply pecuniary. (viii) *The remedy of accounting*. This is closely analogous to the remedy of compensation, and is generally used in connection with and auxiliary to some forms of it. (ix) *Remedies of conferring or removing official function (i.e.)*, those employed to remove and to appoint trustees of private trusts and under certain circumstances to remove and to appoint or provide for the election of the managing officers of private business corporation. (x) *Remedies of establishing or destroying personal status*. In this may be included suits to obtain a divorce and to annul a marriage. Professor Pomeroy concludes this classification with the remark "The remedial powers of equity are so broad and so flexible that there may be many other special forms of remedy belonging to its general jurisdiction, but depending so closely upon the peculiar circumstances and relations of the litigant parties that they do not admit of classification" (Pomeroy's Eq. Jur. Vol. I, 3rd Ed., S. 112, pp. 119-124). *N.B.*—The remedy by award of costs belongs to class VII cited above.

(29-a) It has been laid down that one of the main purposes of the passing of the Court Fees Act (VII of 1870) was to levy fees for services to be rendered by courts and

Thus, in the case of pauper suits and appeals, the party moving the Court is not obliged *in the first instance* to pay any Court-fee. In such a case the Court is empowered to direct in the final order by whom or out of what funds or in what proportions the costs of such proceedings are to be paid.^(29-b) This and such other cases are only exceptions. The general rule is that the party moving the Court must pay a certain amount, which, no doubt, is fixed by law, before the Court can proceed to give any relief to the party applying for the relief. Thus S. 4 of the Court Fees Act, ⁽³⁰⁾ which applies to the High Courts and the Courts of Small Causes in the Presidency Towns, declares as follows:—"No document of any of the kinds specified in the first or second schedule to this Act annexed, as chargeable with fees, shall be filed, exhibited or recorded in, or shall be received or furnished by, any of the said High Courts in any case coming before such Court in the exercise of its extraordinary original civil jurisdiction; or in the exercise of its extraordinary original criminal jurisdiction; or in the exercise of its jurisdiction as regards appeals from the judgment of two or more judges of the said Court, or of a division Court; or in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence; or in the exercise of its jurisdiction as a Court of reference or revision; unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document."⁽³¹⁾

Similarly S. 6 of the same Act,⁽³²⁾ which regulates the fees to be paid in Courts other than those specified above and in public offices declares that "Except in the Courts hereinbefore mentioned no document of any of the kinds specified as chargeable in the first or second schedule to this Act annexed shall be filed, exhibited or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of

public officers. See the judgment of Miller, J. in *Gavaranga Sahu v. Botokrishna Patro*, 32 M. 305 (310), (F.B.)=6 M.L.T. 129=19 M.L.J. 340=1 Ind. Cas. 507. As to whether the Court Fees Act, 1870, was enacted for the purpose of regulating "fiscal questions for the purpose of obtainment of money from the tax payer in order to achieve such results as the State had in view to carry on the administration of the country," see the judgment of Mahmood, J. in *Balkaran Rai v. Govind Nath*, 12 A. 129=A.W.N. (1890) 39 (F.B.).

(29-b) See the Code of Civil Procedure (Act V of 1908), O. XXXIII, rr. 10--16.

(30) Act VII of 1870.

(31) See S. 4 of the Court Fees Act (VII of 1870).

(32) Act VII of 1870.

the said schedules as the proper fee for such document." (33) The amount and manner of the payment of such fees are fixed by definite legislative enactments or by rules framed by competent authorities under powers conferred by the Legislature. But in early times, the practice seems to have been somewhat different. No doubt ancient governments were not in any way oblivious to the necessity of demanding payment as a price for the administration of justice. The necessity for such payment was felt by those governments as keenly as at the present day. Only the manner in which the amount was levied was different in some respects. Instead of demanding a fee from the applicant in the first instance, it appears that ancient governments recovered the fee due to the State, which was generally fixed at a certain proportion of the amount in dispute, from the losing party, or, more properly speaking, from the party who, in the opinion of the Court, was to blame in the matter of such litigation. Sometimes a sum was demanded both from the winning party and the losing party (34). The party winning had to pay a portion of the amount recovered by him as the price of the services rendered by the officers of the State in the successful assertion of his rights; and the amount which the losing party had to pay was in the nature of a penalty for improperly refusing to do the duties cast on him by law. One other point of difference may also be noticed between the ancient conception of costs and the modern conception of the same. The modern idea of costs is that it is by way of recompense which the party at fault is to make to the innocent and the winning party for the trouble and expense to which he has been put in the successful assertion of his rights. Consequently, it has been laid down that the Court has no power to award as costs to a party any sum in excess of what has actually been spent by him (35). This is a natural consequence of the idea

(33) See S. 6 of the Court Fees Act (VII of 1870).

(34) Thus, it was the practice under the Mahratta Government to levy a tax from both parties, that from the winner being termed *Harki* and that from the loser *Gunhegari*. See Whitley Stokes' Hindu Law Books, p. 120.

(35) See *P. Nusser Wanji & Co. v. S. S. Wartenfels*, 18 Bom. L.R. 118 at pp. 120, 121. Thus it has been laid down by the Allahabad High Court in the case of *Abdul Shakur Khan v. Ata-ullah*, A.W.N. (1887) 227 that the Court has no power to award as costs any amount which the party had not actually expended in the litigation. Similarly it was laid down by Lord Cranworth in the case of *Clarke v. Hart*, (1858) 6 H.L. C. at p. 667 that "costs are never to be considered as penalty or punishment, but merely as a necessary consequence of a party having created a litigation in which he has failed." To the same purpose are the observations of Jessel, M.R., in the more

that costs are in the nature of damages or compensation. But the ancients viewed costs not so much in the nature of damages, as of penalty. The party who, by his improper conduct, causes the litigation is sought to be punished, as it were, by the levy of a penalty by the State. The cause of the existence of the difference between these two conceptions is not far to seek. In modern times, the party moving the Court is required to pay some amount at the first instance; and, if such party wins, the award of costs at the end of the litigation is by way of recompense to him for the initial payment made by him. But among the ancients it does not appear that any initial payment was demanded or paid⁽³⁶⁾. Consequently, there is no expense which any party had incurred for which recompense must be made. The state, which, in modern times, takes the fees in the first instance, formerly demanded it from the party or parties at the end of the litigation. In modern procedure, the innocent or winning party pays it in the first instance to the state and recovers it from the party at fault or the losing party at the end of the litigation. Under the older practice, the losing party or the party at fault was made to pay it to the State directly at the end of the litigation when the matters in dispute were enquired into and the final decision of the Court had been made as to the respective merits or demerits of the case of each party^(36-a). When the amount is directed to be paid to a party to recompense him for the initial expenses incurred by him, it is said to be in the nature of damages

recent case of *Willmott v. Barber*, (1881) 17 Ch. D. at p. 773 C.A. A reference to the ancient systems of law would show that these modern notions regarding the principles on which costs are awarded, were not the same as those that prevailed in olden times. Even the early Regulations relating to the subject of levying an institution fee on Civil suit passed by the Indian Government aimed at putting down more vexatious litigation rather than thereby recouping the successful party or the State for the trouble or expense to which he or it has been put. (See Ben. Reg. XXXVIII of 1795 and VI of 1797 cited in the first report of Commissioners appointed to consider the Reform of Judicial Establishments of India, 1856.)

(36) It may also be noted that no institution fee was ever paid even in the early Supreme Courts established by Royal Charters in our country; nor was any demanded under the original system of Lord Cornwallis for the administration of Civil Justice in India. The State defrayed the expense of all judicial establishments. See the first report of the Commissioners appointed to consider the reform of judicial establishments of India, 1856.

(36-a) Thus in the recent case of *Paryag Sahu v. Kasi Sahu*, 14 C.W.N. 659 at p. 661=11 C.L.J. 549=6 Ind. Cas. 258 his Lordship Chatterjee, J., said "Hindu Courts of Justice did not allow costs to the successful litigant, but imposed upon the party who took a false plea a fine payable to the King, equal to the claim," Yajna-
valkya, Chap. II, Verse II.

or compensation. When it is required to be paid to the State, it is said to be in the nature of penalty.

When we look to the early origin of the law of costs we find that the purpose of the state in levying costs of litigation was to put down unnecessary and vexatious litigation. Every State, of whose early law and history we have any continuous record, has, from the earliest times, found it one of its duties to make rules or adopt means by which unnecessary or vexatious litigation may be put to an end to or minimized. Such a task is by no means found to be easy even in modern times. In the first place it is a primary function of the State to provide means for the redress of just grievances, for affording proper reliefs to injured parties, and for enabling persons to successfully assert their rights when the same are violated or attempted to be violated. It is also equally an important function of the State to see that a party is not unnecessarily dragged into Courts to answer for faults which he never committed or to redress injuries which he never caused or to respect rights which he never violated. Thus it is equally the function of the state to afford all legal means to encourage the proper assertion of legitimate rights and, at the same time, to do all in its power to discourage improper litigation. To draw the line between these two functions, the State has always found it to be no easy matter, especially, when it is remembered that the propriety or the impropriety of a litigation is a matter which is often to be determined only at the end of the litigation, and, not at the commencement of it.

One of the modes by which improper litigation was sought to be prevented in ancient systems of law was by the imposition of a penalty on the party at fault (37).

Thus, viewing the early origin and history of the law of costs, we find that it was more in the nature of a penalty imposed on a person for his improper conduct than in the nature of damages to be paid to the winning party for the trouble and expense to which he had been put by successfully asserting or defending his rights in a Court of Law.

As a matter of illustration we may take the laws of Ancient Rome, of Ancient India, and the early English Law, and see that

(37) See Institutes of Justinian by J. Moyle, D.C.L. 5th Ed., Oxford, Bk. IV, Title XVI, pp. 201-203; 17 Rich. II, c. 6; and extracts from Hindu Smritis cited *infra*.

in all these systems of law costs had their origin as a means which the State adopted for putting down unnecessary and improper litigation.

Costs in
(i) ancient
Roman Law.

First with regard to the laws of Ancient Rome it was found necessary by the framers of the Code of Justinian⁽³⁸⁾ to make provisions for the purpose of preventing reckless litigation. They had set apart a particular chapter for dealing with the subject of penalties for reckless litigation. On this subject the framers of the Code say, "It should here be observed that great pains have been taken by those who in items past had charge of the law to deter men from reckless litigation, and this is a thing that we too have at heart. The best means of restraining unjustifiable litigation, whether on the part of a plaintiff or of a defendant, are money fines, the employment of the oath, and the fear of infamy. Thus, under our constitution, the oath has to be taken by every defendant, who is not permitted even to state his defence until he swears that he resists the plaintiff's claim because he believes that his cause is a good one. In certain cases where the defendant denies his liability the action is for double or treble the original claim, ^(38-a) as in proceedings on unlawful damage, and for recovery of legacies bequeathed to religious places. In various actions the damages are multiplied at the outset; in an action on theft detected in the commission they are quadrupled; for simple theft they are doubled; for in these and some other actions the damages are a multiple of the plaintiff's loss, whether the defendant denies or admits the claim. Vexatious litigation is checked on the part of the plaintiff also, who under our constitution is obliged to swear on oath that his action is commenced in good faith; and similar oaths have to be taken by the advocates of both parties, as is prescribed in other of our enactments. Owing to these substitutes the old action of dishonest litigation has become obsolete. The effect of this was to penalize the plaintiff in a tenth part of the value he claimed by action; but, as a matter of fact, we found that the penalty was never exacted, and therefore its place has been taken by the oath abovementioned, and by the rule that a plaintiff who sues without just cause must compensate his opponent for all losses incurred, and also pay the costs of the action. In some actions condemnation carries infamy with it, as in those on theft, robbery, outrage,

(38) Institutes of Justinian, Book IV, Title XVI.

(38-a) This shows the penal character of costs in the early systems of law.

fraud, guardianship, agency and deposit, and also in the action on partnership, in which infamy is incurred by any partner who suffers condemnation. In actions on theft, robbery, outrage, and fraud, it is not only infamous to be condemned, but also to compound, as indeed is only just; for obligation based on delict differs widely from obligation based on contract. In commencing an action, the first step depends upon that part of the Edict which relates to summons; for before anything else is done, the adversary must be summoned, that is to say, must be called before the Judge who is to try the action. And herein the praetor takes into consideration the respect due to parents, patrons, and the children and parents of patrons, and refuses to allow a parent to be summoned by his child, or a patron by his freedman, unless permission so to do has been asked of and obtained from him; and for non-observance of this rule he has fixed a penalty of fifty *solidi* " (39).

(39) Institutes of Justinian translated by J.B. Moyle, D.C.L., 5th Ed., Oxford, at the Clarendon Press, London, 1913, Book IV, Title XVI, pp. 201-203; see also Campbell's Compendium of Roman Law, 2nd Ed., London, Stevens and Haynes, 1892, pp. 162-163. "In the earlier procedure vexatious litigation in plaintiff has been restrained in four ways: "*Actoris quoque Calumnia Coercetur Modo Calumniae iudicio, Modo Contrariis, Modo iureiurando, Modo restipulatione*" (Gaius IV, 174). In actions where there was a *sponsio Poenalis*, the defendant could require that the plaintiff should promise him by *restipulatio* an equivalent sum in the event of his being unable to prove his case. In other suits, if absolved, he could often bring against him an action in the nature of "malicious prosecution." By the *actio Calumniae* he might recover 1-10 (in interdicts $\frac{1}{2}$) of the value in dispute in the previous action, but had to prove that the other had sued him knowing that he had no ground of action, "*Calumniae vim in adfectum*" (Gaius IV, 178). By the *counter indicium*, which was an alternative to this, but which lay only against an unsuccessful plaintiff in certain specific actions (e. g., *iniuriae*, Gaius IV, 177) and in which it was unnecessary to prove malice he could similarly recover damages equivalent to some fraction of the amount claimed in the previous action. Neither of these *indicia*, however, lay, nor could the defendant claim a *penal restipulatio*, if he had compelled the plaintiff to take the *Iusiurandum Calumniae* (i.e.) to swear that to the best of his belief he had a good cause of action (Gaius IV, 181). Under Justinian the *penal sponsio* and *restipulatio* in the two actions specified had disappeared, and the *Iudicia Calumniae* and *Contrarium* were also obsolete, though they had still been in use in the age of Diocletian Cod. Hermog 53. In lieu of these precautions, the plaintiff had in all cases "*Pro Calumnia iurare*" (Cod. 2, 59, 2 Pr.) and the unsuccessful litigant had to pay his adversary's costs. (Cod. 3, 1, 13, 6). See *Imperatoris Instintani Institutionum*. By J.B. Moyle, D.C.L., 5th Ed., 1912, pp. 614-615. In the *Legis Actio Sacramenti* of the Romans, which is by far the most ancient proceeding known to us, and out of which all the later Roman Law of Actions may be proved to have grown, we find the Roman Praetor taking security for the *Sacramentum*, and which security always went into the coffers of the State (See Maine's Ancient Law, Chapter X). In this action "the disputants state their case to him, and agree that he shall arbitrate between them, it being arranged that the loser, besides resigning the subject of the quarrel, shall pay a sum of money to the umpire as remuneration for

(ii) Hindu
Law.

Similarly the framers of the Ancient Indian Codes found it necessary to provide for the prevention of reckless litigation. The method generally adopted by them to effect such a purpose was to levy a penalty on the party who is responsible for the litigation in which he has failed. The following are the provisions of the Mayukha (40) on this subject. It says: "If a rich debtor, (41) through dishonest perverseness pay not his debt, the king shall compel him to discharge it, and may take from him twice the sum (as a fine). Yajnavalkya (42) says "A debtor shall be forced to pay to the king ten in the hundred of the sum proved against him; and the creditor, having received the sum due, must pay five in the hundred (towards defraying the charges of judicature)." "Ten in the hundred" has been explained to mean, ten besides (or over) every hundred (awarded to his creditor). A tenth share (from the debtor) and a twentieth (from the creditor) is here meant. The result is that these two shares belong to the king; and the balance goes to the creditor. Taking a tenth share relates to a poor debtor; for in respect to a rich one Narada (43) records this distinction.—

his trouble and loss of time (Maine's Ancient Law, Chapter X). We find that the Law of Greece is also similar to the law of Rome as stated above. There, in the Homeric trial scene, is a dispute about the composition for a homicide. "One person asserts that he has paid it, the other that he has never received it. The point of detail, however, which stamps the picture as the counterpart of the archaic Roman practice is the reward designed for the Judges. Two talents of gold lie in the middle to be given to him who shall explain the grounds of the decision most to the satisfaction of the audience." The difference between the Roman Law and the Grecian Law was that in the Roman *Legis Actio* the remuneration of the Judge was reduced to a reasonable sum (not such a big sum as to talents as in the Grecian Homeric trial scene) and that, instead of being adjudicated by one of a number of arbitrators by popular acclamation (as in Greece) in Rome the amount was paid as a matter of course to the State which the Praetor represented. "Many observers of the earliest judicial usages of modern Europe have remarked that the fines inflicted by Courts on offenders were originally *Sacramenta*. The State did not take from the defendant a composition for any wrong supposed to be done to itself but claimed a share in the composition awarded to the plaintiff simply as the fair price of its time and trouble. Mr. Kemble expressly assigns this character to the Anglo Saxon *bannum* or "*fredum*" (Maine's Ancient Law, Chap. X).

(40) Chap. V, S. IV, cl. (8) of the Vyavahara Mayukha.

(41) Digest, 1st 368; Stranger Elem. (1st 307).

(42) Digest, 1st, 372-8; Strange's Elem. 307. This was the practice under the Mahratta Government, which levied a tax upon both parties, that from the winner being termed Harki, that of the loser Gunhegari. (See Whitley Stokes' Hindu Law Books, p. 120, Note.) It also appears that in the early English system the state "claimed a share in the composition awarded to the plaintiff as the fair price of its time and trouble." See Maine's Ancient Law, Chap. X and Note (39), *supra*.

(43) Digest, 1st, 371 and 375.

"But if a rich debtor, through dishonest perverseness, pay not his debt, and the king is forced to cause payment, he may then take twenty as his share." (44)

(44) See the Vyavahara Mayukha, Chap. V, S. IV, Cl. 8 on "Recovery of Debts" Whitley Stokes' Hindu Law Book, p. 120. As to the corresponding provisions of the Mitakshara on the subject, see Mitakshara, Chap. II, S. 3—See the same cited in Macnagten's Principles and Precedents of Hindu Law, 3rd Edition, two volumes in one, Higginbotham & Co., 1874, Vol. I, pp. 175-176. The following are some of the important provisions of the Mitakshara on the subject:—"In the case of a denial when the claimant proves his allegation, the defendant, being cast, is to pay the amount and an equal amount to the king" (Yajnavalkya cited in the Vivadatandava, Veeramitrodya, Smriti Chandrika, Dipakalika, and Subodhini, and by Viswarupa, Mitramissa, Balambatta). A person bringing a false claim is to discharge twice the amount of his claim. A denial of the claim alleged by the plaintiff being made by the defendant, and he being cast, or compelled to submission by the witnesses or other evidence, shall pay the amount claimed to the plaintiff, and to the king an equivalent fine as a mulct. But if the plaintiff cannot establish his claim he becomes the false claimant, and hence he is to pay to the king a fine equal to twice the amount claimed; and the same rule obtains in a plea of former judgment or special plea. In these circumstances, the plaintiff concealing the fact, and being overcome by the defendant, shall pay a fine to the king equivalent to twice the amount obtained; but, if the defendant cannot establish his former judgment and special plea, then he is the false claimant, and being overcome by the plaintiff, is to pay to the king a fine equal to double the amount claimed, and the amount claimed to the plaintiff. In a case of confession there is no fine. The text above quoted relates only to actions for debt, because the fines applicable to other cases have been propounded separately; and it is not applicable generally because in cases where there is no property claimed it could not apply; and, although there is a special provision, "The debtor shall be caused to pay to the king," etc. Yajnavalkya cited in the Dipakalika, Vivadahangarnava, Vivadarnavasetu, Madhaviya and Smriti Chandrika, which also relates to actions for debt. On the next ground may be admitted to be applicable to all cases, and thus interpreted:—"A denial of the allegation being made by the person against whom it is brought, and he being overcome by the complainant, shall pay a fine proportionate to the several causes of action. The connective participle may be used affirmatively, and the term "to the king" may be considered as a mere recital. If the complainant cannot prove his allegation, he becomes a false claimant and shall pay a fine in money equivalent to twice the fine prescribed for each cause of action. In this instance, as in the former, the same rule obtains in cases of a plea of former judgment and special plea." See also Mitakshara, Chap. III, S. 4—"Digression concerning fines and other penalties"—cited in Macnagten's Principles and Precedents of Hindu Law, 3rd Ed., 2 Vols. in one, Higginbotham & Co., 1874, Vol. I, p. 209. The author says:—"The king shall cause the usurper of pledges, etc., to restore the property to the rightful owner, and to pay a fine equivalent to the value of that property, or correspondent to his ability" (Yajnavalkya cited in the Vivadatandava). In the case of mortgages and the rest down to the case of the property of learned students, he, who by virtue of long possession usurps, should be made to restore the property to the rightful owner. This is merely a repetition of a former text, and the rule respecting the payment of a fine equivalent to the value of property usurped, is a positive injunction. (2) Where in the case of usurping lands, houses, etc., an equivalent fine may not be possible, reference must be made to the penalty hereafter propounded for a removal of land marks and invasion of boundaries. If on account of the great wealth of the usurper, his arrogance would not be subdued by the payment of

It may also be noted that the earliest regulations regarding the subject of Court fees were passed for the purpose of preventing vexatious litigation. (See Preamble to Ben. Reg. XXXVIII of 1795 and VI of 1797.)

an equivalent fine, he must be amerced according to his ability. He must be made to pay so much as is sufficient to subdue his arrogance. "It has been declared, that a fine is levied for the purpose of correction, and by that the arrogant must be subdued. Hence it would appear that the purpose of a fine is entirely penal. But where the offender has not property equivalent to that usurped, he must be amerced in such manner as may subdue him to distress." The following extracts from the several Smṛiti and Nibandha writers may also be of interest as throwing light on the subject of costs and judicial taxation in ancient India. These are collected from Colebrooke's Digest of Hindu Law, 4th Ed., Vol. I. pp. 247-253. Menu says:—In a suit for debt which the defendant denies, let him (*the king*) award payment to the creditor of what, by good evidence, he shall prove due, and exact a small fine, *according to the circumstances of the debtor*. "Which the defendant denies," means which he disowns.—*The Ratnacara*. Vrihaspati says:—A debtor is considered as appealing to judicature, when he says, "I will pay whatever shall by law be declared to be due." "Consequently the debtor, who affirms that he owes nothing, the king shall compel to pay to the creditor what shall be proved due by oral testimony and so forth. The king shall exact a small fine, because the defendant denied a just debt."—(*The Ratnacara*.) Cullucabhatta states 'according to the circumstances of the debtor.' For instance: in a case of denial, the king shall exact, according to the circumstances of the man, a less fine than the full amercement of twice the amount of the debt, which will be mentioned. Vrihaspati has directed a fine on the creditor who enforces payment of a debt not proved by evidence, ordaining, that "he who constrains a debtor exempted from such constraint shall be fined according to law." What sort of fine should be imposed? Menu replies to that question. "In the double of that sum which the defendant falsely denies, or on which the complainant falsely declares, shall those two men, wilfully offending against justice, be fined by the king" (Menu). The defendant who denies the debt offending intentionally, or the claimant who prefers a false claim for so much money, shall be fined in twice the amount contested; because these two men the debtor and creditor offend against justice. (*The Ratnacara*). This text, ordaining a fine equal to double the amount contested, must be understood of the case where the debt is denied, knowing it to be just, or claimed, knowing it to be false. Such is the opinion of Cullucabhatta. Yajnyawalkya says:—Should a debt, *which was denied*, be proved by evidence, the defendant must pay the sum, and an equal fine to the king; and he who prefers a false claim must pay twice the sum which he demanded. "Denied" means "disowned." If the debtor affirm, "I owe it not," should that debt be proved or established by the evidence of witnesses or the like, he must pay a fine to the king equal to the debt contested; but if a false claim be preferred, the claimant must pay a fine to the king equal to twice the sum for which he sued. This text of Yajnyawalkya, prescribing a fine on the debtor equal to the amount of the debt, must be adduced where there is no intentional offence. There is not any inconsistency.—(*The Ratnacara*). Some hold, that since the person who shall receive the sum is not mentioned in the text of Menu (literally translated, "those two men, wilfully offending against justice, shall be forced to pay a fine equal to double that sum"), the meaning of the precept, that the debtor shall be forced to pay twice the sum, is, that he shall pay the sum in question to the creditor, and a fine of the same amount to the king. Consequently, a fine on the debtor, equal to twice the sum contested, is not ordained; the creditor alone shall pay a fine equal to double the sum contested, if he prefer a false claim. And this

Similarly we find that the earliest statutes in England relating to the awarding of costs aimed at the putting down of vexatious

also coincides with the text of Yajnyawalkya; for both direct, that in whatever case a fine equal to the debt shall be paid by the debtor, in a similar case twice the sum must be paid by the creditor. That cannot be; for it is unreasonable to impose a double fine for an equal offence. Colebrooke's Digest of Hindu Law, 1874, 4th Ed., Vol. I, pp. 248, 249.] Similarly Catyayana says:—Any creditor who harasses a debtor appealing to judicature, shall forfeit that claim, and pay an equal fine. In the same spirit Yama declares:—If a rich debtor, through dishonest perverseness, pay not his debt, the king shall compel him to discharge it, and may take from him twice the sum as a fine. A text of Vyasa says:—After denying the claim, should the party himself acknowledge the due, it is considered as a *tardy* acknowledgment, and the fine ordained is half of that *which is imposed in the case of obstinate denial*. According to Vyasa:—The claimant shall pay twice the sum for which he preferred a false claim. The rule shall be the same in respect of either party who may be confuted, if a consideration be *specially* pleaded; and likewise in respect of either party who may be cast, should a former decision be alleged. ["A consideration" in the above text means a special cause. (The Ratnacara). The following text explains a special cause:—*Nareda*:—When the defendant acknowledges the *receipt* of the sum, as declared by the plaintiff, but alleges a consideration, it is deemed a special plea (Pratyavascanda). The defendant or debtor acknowledges the *receipt of the sum* but answers, "it is true I received the money, but it was given by thee as a gratification for the accomplishment of thine own business." In this case also the rule is the same; either party being cast, whether he be claimant or defendant, shall be fined in twice the amount. For instance, at the close of the suit, if the gift of the sum as a gratification be proved, the claimant shall be fined in twice the amount; if the debt be proved, the debtor *shall be fined in the same amercement*. Catyayana has explained the *plea* of prior decision. According to Catyayana:—If a man, though cast at law, revive the suit, he should be considered as one previously confuted, and is called an appellant from a former decision (Prannyaya). For instance: a creditor cast in a suit formerly instituted before one umpire, again declares before another Judge, "this man is my debtor." That claimant should be answered by the defendant with this plea; "he has been already cast by me;" and that plaintiff is called an appellant from decision, or one whose suit has been already decided. In that case, whoever is cast shall be fined; whether the claimant be cast or the defendant, in consequence of the former decision appearing to be unjust, or on other grounds. "Likewise;" that is, he shall be fined in double the sum.] Another text of Menu is: "A debt being admitted by the defendant, he must pay five in the hundred as a fine to the king; but if it be denied, and *proved*, twice as much: this law was enacted by Menu." [This text is expounded by Cullucabhatta, Chandeswara, and others, as relating to fines. Consequently, a debt being first disowned, but afterwards voluntarily admitted by the debtor, on his being merely brought into Court, he must pay an amercement of five in the hundred, or a twentieth part of the debt. But if it be denied, and the debtor persist in disowning it even in Court, and if it be proved with much trouble by a writing or by the evidence of witnesses or the like, *he must pay* twice as much, or ten in the hundred. Cullucabhatta concurs in this exposition.] Nareda says:—If a rich debtor, through dishonest perverseness, pay not his debt, the king may take only a twentieth part of the sum, *if circumstances be very favourable to the debtor, or if he acknowledge the debt in Court*. [That sum which a rich debtor withholds through dishonest perverseness the king shall compel him to pay to his creditor, and may himself take as a fine a sum amounting to a twentieth part of the debt:

litigation. On this subject, the following remarks of Professor Pomeroy in his work on Equity Jurisprudence, may also be noted.

and this must be understood when the debtor voluntarily confesses the debt in Court ; for it corresponds with the text of Menu ordaining five in the hundred. And this alternative in respect of moderate fines should be regulated by the qualities of the debtor, his class, and his circumstances. (The Ratnacara.) Yajñawalkya says:—A debtor shall be forced to pay to the king ten in the hundred of the sum proved against him ; and the creditor, having received the sum due, must pay five in the hundred *towards defraying the charges of judicature*. [The sum being proved, the debtor shall be forced to pay ten in the hundred as a fine to the king, making good that amercement out of his own funds. The very same gloss is delivered in the *Dīpācalica* ; and this must be acknowledged as the opinion entertained by the author of the *Mitacshara*. It concerns the denial of a debt ; for it coincides with the text of Menu, “ if it be denied, twice as much.” The last part of the text of Yajñawalkya conveys this sense ; the creditor also, having recovered his debt awarded by the king, must pay five in the hundred or a twentieth part to him as wages, or *towards defraying the charges of judicature*. A man, subject to amercement under these texts, shall be forced to pay double the debt, a sum equal to the debt, or ten in the hundred, the fine being mitigated according to the degree of virtue he possesses, or other circumstances taken into consideration. This is declared. But if the debtor, coming into Court, confess the debt, he shall only be forced to pay half as much. This is also declared. Consequently a priest, a virtuous soldier or the like, and a very indigent debtor, must pay five in the hundred ; but if he persist in his denial even in Court, ten in the hundred ; for this conduct is supposed to be preceded by knowledge of the fact ; but if he were unconscious, half as much. In general, a rich soldier and the like shall be fined in a sum equal to the debt, or in half that amercement, according to circumstances as abovementioned, if he deny the debt through ignorance ; but twice as much if he were conscious of owing the sum. On this subject Chandeswara has said in his gloss on the last hamistich of the text (273), ‘ he shall be fined in twice as much as is the amount of the debt.’ That is liable to objection ; for it would be a vain repetition of the double sum mentioned in another text of Menu (265). In like manner should the various fines on the creditor, in the case of a false claim, be regulated according to class and so forth.] Colebrooke’s Digest of Hindu Law, 1874, 4th Ed., Vol. I, p. 251 (252). Vishnu:—If a creditor sue before the king, and fully prove his demand, the debtor shall pay, as a fine to the king, a tenth part of the sum proved ; and the plaintiff, having received the sum due, shall pay a twentieth part of it *towards defraying the charges of judicature*. [This can be no objection ; for Chandeswara describes, as a secondary fine, the sum which must be paid by the creditor ; ‘ although the creditor be void of offence, the king may exact, as a fine, a twentieth part of the sum for enforcing payment of it.’ Consequently the debtor must pay the sum in the presence of the king, and discharge the debt due to his creditor ; and the creditor, having received his due, must pay, as a fine, the tenth or twentieth part of the sum ; such is the construction *according to this opinion*. But we hold it proper to reject this interpretation, for the reason abovementioned.] Colebrooke’s Digest of Hindu Law, 1874, 4th Ed., Vol. I, p. 253. “ The king shall make the debtor pay to him ten in the hundred of the awarded (claim), and the successful creditor to pay five in the hundred.” The Vyavahara Mayukha by V.N. Mandliff, Bombay, 1880, p. 205. “ If a rich man of weak understanding and of very mean tribe, from a principle of fraud and obstinacy, refuses to pay his debts, the Magistrate shall oblige him to discharge the money claimed, and fine him double the sum ” * * * “ If a rich man, of an excellent education, and of a superior caste, from a principle of fraud and obstinacy, refuses to pay his debts, and the creditor commences a suit against him, the Magistrate shall cause the money in dispute to be paid, and shall fine the debtor one-twentieth of the sum

He says:—"As the business of the Chancery Court increased and (iii) Early English Law, became regular and constant, the practice was established in the reign of Richard II, of addressing the suitor's bills or petitions directly to the Chancellor and not to the King or his Council. During the same reign (45 & 46) a statute was passed by Parliament for the purpose of regulating the business of the Court and restraining its action, which enacted that, when persons were compelled to appear before the Council or the Chancery on suggestions founded to be untrue, the Chancellor should have power to award damages against the Complainant, in his discretion". (47)

The fact that costs were regarded in the nature of penalty in the early English statutes would also be apparent from the fact that until very recently several statutes in England gave power to the Courts to award double and sometimes treble costs. Such double and treble costs are clearly penal in their nature. (48)

recovered." "If a debtor and creditor are of equal castes and, on the debtor's refusal to pay his debts, the creditor should commence a suit, the Magistrate shall cause the money in dispute to be paid and shall also fine the debtor one tenth of the sum recovered" * * * When a creditor procures payment of his money by application to a Magistrate, he shall give him one-twentieth of the sum recovered for his interposition." A Code of Gentoo Laws by N. B. Halhed, London, M. D. C. C. L. XXXI (1871) pp. 21, 22.

(45 & 46) 17 Rich. II, Chap. 6.

(47) Pomeroy's Equity Jurisprudence, 3rd Ed., 1905, San Francisco, Vol. I, S. 37, pp. 38-39; see also Holdsworth's History of English Law, Vol. I, Methuen & Co., London, 1903, p. 198. 17 Rich. II, Chap. 6 which was passed in the year 1394 A. D., empowered the Chancellor to take security for costs and to give damages. Coke (4 Instit. 83) says that this power only arose after the truth or untruth of the allegation had been established, (i.e.) on or after hearing. It gave no power to award costs at all stages of the suit. See Holdsworth's History of English Law, 1903, Vol. I, p. 198. This power to award costs conferred in 1394 (A.D.) on the Chancellor by 17 Rich. II, c. 6, was again recognised and enlarged in 143 (A.D.) by 15 Henry IV, c. 4 (Coke, 4th Instit. 83, 84). Lord Hardwicke, in *Corporation of Burford v. Lenthall*, (1743) 2 Atk. 551, said that "the Court had an inherent power to deal with costs *arbitrio boniviri*." See also *Andrews v. Barnes*, (1888) L.R. 39 C.D. 133. Holdsworth's History of the English Law, 1903, Vol. I, p. 198, Note (8) & (9).

(48) "By 5 & 6 Vict., c. 97, S. 1, all local and personal Acts giving double and treble costs were repealed, and costs as between party and party were substituted for such costs. By S.2 of the same Act provisions in public Acts giving double and treble costs are also repealed and a "full and reasonable indemnity" substituted therefor. Section 2 of 5 & 6 Vict., c. 97, has been repealed by the Public Authorities Protection Act, 1893 (q. v. post, p. 1098). Under 8 & 9 Vict., c. 100 (which is, however, now repealed by the Lunacy Act, 1890), double costs were recovered by the defendant in *Hasker v. Wood*, (1835) 54 L.J.Q.B. 419, C.A. The costs under the indemnity which is substituted for double costs by 5 & 6 Vict., c. 97, S. 2, are not subject to the discretion of the Judge, or to the provisions of the County Courts' Act, and even though less than 10*l* be recovered, the successful plaintiff is entitled by them as a matter of right (*Reeva v. Gibson*) (1891) 1 Q.B. 652, C.A.; action for infringement of dramatic

Whatever may be the ancient conception of costs, it is clear that, in modern law, both in this country and England, costs are considered only as damages awarded to the innocent party for the trouble and expense to which he had been put by the improper conduct of the other party. (49)

Having so far dealt with the early history and origin of the law of costs, and its nature and incidents both in ancient and modern systems of law, we shall now briefly examine the general principles on which the jurisdiction of Courts in the matter of awarding costs is based,—and see whether such jurisdiction is to be deemed to be inherent in Courts or whether they vest on express grant by the legislature.

Jurisdiction
to award costs
(i) Derived
from Acts of
the Legis-
lature.

It has been declared by the Supreme Court of Bengal, as early as 1830 that the power to award costs is the creation of the legislature, and, without the authority conferred by the legislature, Courts have no power to award costs. (50) The same has been expressed in more explicit terms by the Bombay High Court in the recent case of *Yonosuke Mitsue v. Ookerda Khetsy* (51). In that case it was laid down that "the power to award costs is derived entirely from Acts of the Legislature, and in making the award the Court cannot base its decision on provisions which have been repealed and are no longer effective at the time its order is passed" (52).

copyright under 3 & 4 Will. 4, c. 15, S. 2); and see *House Property Co. of London v. Whiteman*, (1913) W.N. 130. By the Prisons Act, 1865 (28 & 29 Vict., c. 126), S. 49 double costs are given to any person, sued for anything done in pursuance of the Act, upon judgment being given against the plaintiff." The Yearly Practice, 1914, p. 1089.

(49) See *Abdul Shakur Khan v. Ataullah*, A.W.N. 1887, p. 227; *Clarke v. Hart*, (1858) 6 H.L. Cas. at p. 667 and other cases cited at Ref. (35) *supra*. See also *Nusser Wanjî & Co. v. S. Waterfels*, 18 Bom. L.R. 118 at pp. 120 (121).

(50) *D. Bryce v. Smith*, Bignell (1830) 54 at p. 61=1 Ind. Dec. Old Series, 425 at p. 428.

(51) 21 B. 779.

(52) *Yonosuke Mitsue v. Ookerda Khetsy*, 21 B. 779. The following remarks by the learned editors of the Madras Law Journal with regard to a recent decision of the Calcutta High Court as to the inherent powers of the Court to award costs may be noted. *Jogendra Chandra Sen v. Wazid-un-nissa Khatun*, 34 C. 860, is one of the several recent cases in which the Calcutta High Court has laid down that the Civil Procedure Code is not exhaustive and that the Court has in various matters inherent powers independent of the statute. While fully concurring in this general principle, we doubt the correctness of the decision on the facts of this particular case. Two questions were raised, viz., (i) as to the power of the High Court to make an order as to costs when dismissing an application for leave to appeal to the King in Council, and (2) as to the mode of realising the costs awarded. As to the first, the learned Judges say that 'there is an inherent power in the Court to make an order as to costs as it did in the present case.' With deference, we must say that this general proposition is by no means beyond doubt. (See *Guardians*

A similar view is laid down in several of the English text books. Justice Stephen in his Commentaries on the Laws of England (53) says:—"It is proper to state, that to a judgment costs are now a necessary appendage—"victus victori in expensis condemnandus est,"—though the common law did not allow any (54); so that costs depend entirely upon statute (55); and there are many cases of vexatious

of *West Ham Union v. Churchwarden, etc., of St. Matthews*, L.R. (1896) A.C. 477, and the cases cited by Sir E. Clarke *arguendo*.) We are unable to see why the Court should not have held that the costs were properly awarded under S. 218 of the Code (Act XIV of 1882). No doubt it occurs in Part I of the Code relating to 'suit' but this circumstance, we think, cannot restrict the generality of the language of the section which authorises the Court to award costs "when disposing of any application under this Code." 19 M.L.J. 10 (Journal portion). In this connection the following remarks of Seshagiri Ayyar, J., in the recent case of *V. V. Srinivasa Aiyangar v. V. Kannappa Chetti*, 30 M. L.J. 120 at pp. 122, 123 may also be noted. "The learned Judge for whose opinion I entertain a high regard starts with the proposition that a party is "*prima facie* entitled to receive all the reasonable costs incurred by him." In his view, the right to be reimbursed is the inherent right of every litigant who comes to Court. I am unable to find any authority for this position. The right to have costs from the losing side is given by the statute. Every man has the inherent or Common law right to claim redress from a tribunal established by the Sovereign authority. He is entitled to plead his own cause before the Judge; but the right to be represented by another in stating his claim is a privilege. This has been conferred on litigants by Sovereign authority. S. 10 of the Letters Patent and Order III of the Code of Civil Procedure deal with this question. In a very instructive essay by Mr. Nagabhushanam, a learned vakil of this Court, the history in this country of the concession to be represented by another in the conduct of a case is fully given. The British Government had traditions in this behalf reaching to ancient times. Consequently it was early enacted that parties were entitled to have the assistance of pleaders in placing their claims before the Court. I do not think there is any ground for holding that this right to representation is anything more than a statutory right conferred on litigants by the Sovereign power although it is a privilege hallowed by authority and is recognised as just and right by every civilised nation. As regards the costs to be paid to the successful litigant, in my opinion, it is more in the nature of a penalty imposed on the losing party for having compelled the successful party to seek redress in a Court of law, than it is in the nature of a right. The Court does not award the winning party all the expenses incurred by him, but only such costs as in its opinion, are sufficient compensation for the trouble he has been put to. The disability to which the losing party is subjected is the result of statutory law; and Courts should exercise the power to mulct the judgment-debtor in costs within the limits imposed by the statute." Per *Seshagiri Ayyar, J.* in *V. V. Srinivasa Aiyangar v. V. Kannappa Chetti*, 30 M.L.J. 120 (126).

(53) Stephen's Commentaries on the Laws of England, 12th Ed., 1895, Vol. III, pp. 608-609.

(54) Cod. 3, 1, 13; see Civ. Pro. Code (Act V of 1909), O. XX, r. 6, which says that every judgment should make provision for costs.

(55) Thus it has been said by his Lordship Fulton, J., of the Bombay High Court that "the power to award costs is derived entirely from Acts of the Legislature." See

proceedings, in which the legislature at one time provided, that the

Yonosuke Mitsue v. Ookerda Khetsy, 21 B. 779 (783). "The rules relating to costs in the English Courts of Equity have, from the earliest times, been materially different from those which prevailed in the English Courts of common law; though, in both, the same general principle has been observed, that the successful party was entitled to be recouped for all expenses necessarily incurred by reason of the litigation in accordance with the rule of the civil law: "*Victus victori in expensis condemnandus est.*" The Court of Chancery assumed from its commencement the power to deal with all questions of costs, without the aid of the legislature. See *Corporation of Burford v. Lenthal*, 2 Atk. 551. Hence, the costs of a Chancery suit have always been in the discretion of the Judge who tried the case; though he was bound, of course, to exercise his discretion judicially, and materials must exist upon which the discretion can be exercised (*Civil Service Co-operative Society v. General Steam Navigation Co.*, (1903) 2 K.B. 756; *F. King & Co. v. Gillard & Co.*, (1905) 2 Ch. 7.) But, in any Court of common law, the right to costs is, and always has been, entirely the creature of statute. The old general enactments as to costs are repealed as being inconsistent with the general discretion as to costs given by the Judicature Acts and Rules, though enactments which deal with any special right to costs possessed by a particular class of persons remain unaffected (*Garnett v. Bradley*, (1873), 3 App. Cas. 944; *Rockett v. Clippingdale*, (1891) 2 Q.B. 293; Judicature Act (1890), 53 and 54 Vict. c. 44, S. 5). Again there were formerly Acts entitling parties in certain cases to double, or even treble, costs. All of such Acts which were passed prior to 1842 were repealed in that year by the 5 & 6 Vict., c. 97, ss. 1, 2. But several such Acts have been passed since 1842; and these remain in force (*Hasker v. Wood*, (1885), 54 L.J.Q.B. 419). The Court of Chancery could always award costs as between solicitor and client to a successful party; but in the absence of an express statutory provision to that effect, the Courts of common law had no such power. *Andrews v. Barnes*, (1888), 39 Ch. D. 133; *Mordue v. Palmer*, (1870), L.R. 6 Ch. 22, 32. See also on this point Law of Costs by W.E. Gordon, London, 1884, pp. 1 & 2. By 5 & 6 Vict., c. 97, all provisions as to the award of double or treble costs were repealed; and, under that Act, the adversary was to be entitled only to a full and reasonable indemnity, to be taxed by the proper officer. The first statute which directed that costs should be given to a successful plaintiff in an action at law, was the Statute of Gloucester, 6 Edw. I, c. 1 (3 Bl. Com.; 399; 42 & 43 Vict., c. 59; *Bentley v. Dawes*, 10 Exch. 347); prior to which Act, costs were included in, and were recoverable as part of, the damages, in those actions in which damages were given; but because those damages were frequently inadequate to the plaintiff's expenses, therefore the Statute of Gloucester ordered costs, *eo nomine*, to be also added. But as the general rule, no costs were allowed to the defendant in an action at law, in any shape, till the Statutes 23 Hen. VIII, c. 15, 8 Eliz. c. 2, 4 Jac. I, c. 3, 8 & 9 Will. III, c. 11, and 4 & 5 Ann. c. 3; and these gave the defendant, if he prevailed, the same costs as the plaintiff would have had in case he had succeeded. But even after these enactments, there still remained several points in which the law of torts was defective, both as regards the plaintiff and the defendant; and various provisions were from time to time passed, with the object of amending them (9 Ann. c. 25; 1 Will. 4, c. 21; 3 & 4 Will. 4, c. 42, ss. 31-34; 15 & 16 Vict., c. 76, ss. 81, 146, 223; 17 & 18 Vict., c. 125, ss. 42, 44, 57, 67, 93; 23 & 24 Vict., c. 126, ss. 11, 27, 32); by one of which, it was provided, that if a plaintiff, instead of taking out execution upon a judgment he had recovered, should bring an action thereon, he should have no costs of suit unless the court or a judge should otherwise order (43 Geo. 3, c. 46, s. 4; *Adam v. Ready*, 6 H. & N. 261); and it was also (among other matters) laid down, under these enactments, that though the party who succeeded substantially should have the general costs of the action, yet his adversary, where he succeeded on any particular issue, whether in law or fact, should

party in fault should be punished, by the payment to his adversary of *double* or (sometimes) *treble* costs." (56)

In Scotland, there is no general statute on the subject, costs being in the discretion of the Court; and the Court assumes power at Common Law to give either party his costs. In general the successful party is entitled to his expenses. (57) The American Law is also similar, in this respect, to the English Law on the subject, under that law the power to award costs is generally conferred on Courts by the Legislature. This power is generally granted only in general terms, and much is left to the discretion of the Court. The Courts generally make their own rules and orders regulating the scale of costs to be awarded, the mode of taxation, and such other matters of detail. (58)

In addition to the power conferred by Acts of the Legislature, (ii) ^{Inherent power of Courts.} Inherent it has been laid down in some cases that the Court has also inherent powers to make orders as to costs. (59) Thus, it was held that where

have the costs of the issue on which he was successful (15 & 16 Vict. c. 76, S. 81). Moreover, by the County Courts Act, 1867, in order to prevent the practice of suing in the High Court in matters of small amount, it was provided, that if a plaintiff who resorted thereto and recovered a sum not exceeding 20*l.* in an action founded on a contract,—or no more than 10*l.* in an action founded on tort,—he should have no costs of suit, unless the Court or a judge should certify on the record that there was sufficient reason for his taking that course (30 & 31 Vict., c. 142, S. 5; *Marshall v. Martin*, Law Rep., 5 Q.B. 239); and these provisions are continued by the County Courts Act, 1888 (51 & 52 Vict., c. 43), S. 116,—with this variation, that such costs are now to be allowed by special order; and with this material addition, that if judgment is obtained on a specially indorsed writ (within usually twenty-one days after service of the writ), that judgment shall carry costs. We may further observe, that, in a penal action, no costs were allowed to a plaintiff suing as a common informer, unless they were expressly given by the statute on which he sued; for, as the action itself created the right, he had no claim to damages; and the general rule of law used to be, that where there were no damages, there were no costs (*College of Physicians v. Harrison*, 9 B. & C. 524); but this rule appears to have been now so far repealed, that such costs would go with the judgment, unless the judge interposed his discretion (42 & 43 Vict., c. 59). See Stephen's Commentaries of the Laws of England, 12 Ed., 1895, Vol. III, pp. 608-609.

(56) See Stephen's Commentaries of the Laws of England, 12th Ed., 1895, Vol. III, pp. 608-609.

(57) See a compendium of English and Scotch Law by J. Paterson, Edinburgh, MDCCCLX, p. 398, note (5).

(58) *Tesla Electric Co. v. Scott*, 101 Fed. 524; Cyclopædia of Law and Procedure, Vol. XI, Heading "Costs," pp. 24-25.

(59) This power was always assumed by the English Court of Chancery; see Stephen's Commentaries of the Laws of England, 12th Ed., Vol. III, p. 609; *Corporation of Burford v. Lenthall*, 2 Atk. 551. See also *Jogendra v. Wazid*, 34 C. 860, cited in Ref. 52, *supra*.

a party wrongly applies to the Court for its interference, it has jurisdiction, independently of any statutory enactment, to make him pay the costs occasioned by that wrongful application. (60) In a recent case which came before the Bombay High Court, their Lordships were of opinion that a Court which is put in motion wrongly has inherent jurisdiction to compel the person who puts it in motion wrongly and who brings an innocent party to answer an unfounded claim or an unjustifiable proceeding, to pay the costs. (61)

Award of costs by a Court trying a suit without jurisdiction.

It has been held the award of costs by a Court trying a suit without jurisdiction is not a nullity and such amount is recoverable. (61-a)

Provisions of the Code of Civil Procedure regarding the power of Courts to award costs.

With regard to the power of Courts in British India to award costs in civil proceedings, the Code of Civil Procedure (62) provides as follows :—" Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers. Where the Court

(60) *Chesterfield Rural District Council v. Newton*, (1904) 1 K.B. 62, C.A.

(61) *Pringle v. The Secretary of State for India*, 40 Ch. D. 288 L.L.T. 796=55 L. J. Ch. 815 cited in *Ram Lal Lalubhai v. Bhagubhai Dayabhai*, 2 Bom. L.R. 960 (965). On this subject see also Seton on Judgments and Orders 6th Ed., Vol. I, p. 255. As to the threefold jurisdiction of the Court in respect to costs, (1) statutory ; (2) general, over its own officers ; and (3) in dealing with contested claims, see observations in *Re Park, Cole v. P.*, 41 Ch. D. 326, 331, C.A.; and that, under the general jurisdiction, taxation of part of a bill may be ordered, see *Storer & Co. v. Johnson and Weatherall*, 15 App. Ca. 203 ; affirming S.C., *In re Johnson and Weatherall*, 37 Ch. D. 433, C.A. As to the inherent jurisdiction of the Court to order payment of costs by unsuccessful applicants under a statute silent as to costs, see *Re Bombay Civil Fund Act* ; *Pringle v. Secretary of State for India*, 40 Ch. D. 288, C.A. Where plaintiff sues to enforce a legal right, and there is no misconduct on his part, the Court cannot withhold costs ; *Cooper v. Whittingham*, 15 Ch. D. 501 ; and see *Florence v. Mallinson*, 65 L.T. 354 ; *Upmann v. Forester*, 24 Ch. D. 231 ; *Wittman v. Oppenheim*, 27 Ch. D. 260 ; *Goodhart v. Hyett*, 25 Ch. D. 182 ; and, conversely, there is no power to give costs to an unsuccessful plaintiff ; *Re Foster and G.W. Ry. Co.*, 8 Q.B.D. 515, C.A. ; *Dicks v. Yates*, 18 Ch. D. 76, C.A. ; but this rule does not prevent the Court from giving out of a fund the costs of an unsuccessful application reasonably incurred for the ascertainment of the fund ; *Butcher v. Pooler*, 24 Ch. D. 273, C.A. ; see Seton on Judgments and Order, 6th Ed., Vol. I, p. 255.

(61-a) *Sri Raja Simhadri Appa Rao v. Chelasane*, 30 M. 41=1 M.L.T. 414.

(62) Act V of 1908, S. 35.

directs that any costs shall not follow the event, the Court shall state its reasons in writing. The Court may give interest on costs at any rate not exceeding six per cent. per annum, and such interest shall be added to the costs and shall be recoverable as such." (63)

According to the practice of the Court of Chancery in England the awarding of costs was entirely discretionary. But in the exercise of that discretion the Court was always governed by certain definite principles. (64) The present law of England regarding costs is that "subject to the Judicature Acts and the Rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of the Judicature Act, 1890, (65) the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, are in the discretion of the Court or Judge, who have full power to determine by whom and to what extent such costs are to be paid; (66) provided that nothing contained in the rules is to deprive an executor, administrator, trustee, or mortgagee, who has not unreasonably instituted or carried on or resisted any proceedings, (67) of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division; (68) and provided also that,

Provisions of English Statutes as to the power of Courts to award costs.

(63) See Act V of 1908 (Code of Civil Procedure), S. 35. This section replaces Ss. 218—222 of Civil Procedure Code (Act XIV of 1882). The first clause of the section (S. 35) of the present Code is, with some additions, taken from S. 5 of the English Judicature Act (1890), and, in effect, embodies the provisions of Ss. 218—222 of the previous Code. S. 221 of the previous Code of 1882 has been transferred to O. XX, r. 6, of the present Code (see O. XX, r. 6, cl. (3) of the present Code, Act V of 1908). S. 222 is incorporated in the 3rd clause of S. 35—the direction as to payment of costs being paid out of or charged upon the subject-matter of the suit being omitted. See Amir Ali's Civ. Pro. Code, p. 200.

(64) As to which principles, see 2 Daniell's Chancery Practice, 5th Ed., 1238—1238; and see *Scarborough v. Burton*, 2 Atk. 111; *Bennet College v. Carey*, 3 Bro. C.C. 390; *Millington v. Fox*, 3 M. & C. 338, 352; *Remnant v. Hood*, 6 Jur. N.S. 1173.

(65) 24th Oct. 1890; see J.A. 1890, S. 7.

(66) J.A. 1890, S. 5; O. LXV, r. 1 of the Rules of the Supreme Court in England. As to the effect of the section in extending the jurisdiction of the Court, see *R. v. Mansel-Jones*, 70 L.T. 845; *Re Fisher*, (1894) 1 Ch. 450; *Re Wrexham, Mold, &c. Ry. Co.*, (1900) 1 Ch. 261; and see as to costs generally, Morg. & Wurtz, 1—6; 92—147.

(67) *Charles v. Jones*, 33 C.D. 80; see also *Cottrell v. Stratton*, 8 Ch. 295; *Re Chenmell*, 8 C.D. 492; *Turner v. Hancock*, 20 C.D. 303; *Bew v. B.*, (1899) 2 Ch. 467.

(68) For these rules, see Daniell's Chancery Practice, 7th Ed., Vol. I, 1901, S. III.

where any action, cause, matter, or issue is tried with a jury, the costs are to follow the event,⁽⁶⁹⁾ unless the Judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause,⁽⁷⁰⁾ otherwise order;⁽⁷¹⁾ and where issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact, are, unless otherwise ordered, to follow the event."⁽⁷²⁾

Costs, how
incurred in
British
India—Levy
of Court-fees
—History of
such fees in
British
India.

The manner in which costs are incurred in British India is mostly by way of payment of court fees,^(72-a) as, institution fees, process fees and such other fees prescribed by the Court Fees Act.⁽⁷³⁾ The practice in our country, in respect of the levy of fees, is similar to the practice prevailing in England and other European countries.

The origin of court-fees in British India may be described in the following words of the First Report of the Commissioners

(69) The word "event" must be read distributively: so that where the Court finds for the plaintiff on some of the issues and for the defendant on the others, the defendant is entitled to tax his costs of the issues so found for him, *Myers v. Defries*, 5 Ex. D. 15, 180; and see *Stooks v. Taylor*, 5 Q.B.D. 569; *Ellis v. De Silva*, 6 Q.B.D. 521; *Sparrow v. Hill*, 8 Q.B.D. 479; *Hawke v. Brear*, 14 Q.B.D. 841; *Waring v. Pearman*, 32 W.R. 429, Eng. And the rule is the same where the issues found for the plaintiff are those arising from his claim and the issues found for the defendant are those arising from his counterclaim (*Potter v. Chambers*, 4 C.P.D. 69); and in such a case the party in whose favour the balance is found is entitled to the general costs of the action. *Baines v. Bromley*, 6 Q.B.D. 187; *Lund v. Campbell*, 14 Q.B.D. 821; *Goutard v. Carr*, 13 Q.B.D. 598, n.

(70) *Harnett v. Vise*, 5 Ex. D. 307; *Harris v. Petherick*, 4 Q.B.D. 611; *Jones v. Curling*, 13 Q.B.D. 262; *Williams v. Ward*, 55 L.J.Q.B. 566; *Foster v. Farquhar*, (1893) 1 Q.B. 564; *Huxley v. West London Extension Ry. Co.*, 14 App. Ca. at p. 32. An order may be made that each party should bear his own costs, *Turner v. Heyland*, 4 C.P.D. 432; *Collins v. Welch*, 5 C.P.D. 27; *Harnett v. Vise*, 5 Ex. D. 307; or that the successful party shall pay the costs of the other party, *Harris v. Petherick*, 4 Q.B.D. 611; see judgment of Ld. Russell, C.J., in *Bostock v. Ramsey*, U.D.C. (1900) 1 Q.B. 357; or that one party should pay to the other a fixed sum in lieu of costs, *Bradford Corporation v. Pickles*, (1894) 3 Ch. 53; *Willmott v. Barber*, 17 C.D. 774. An appeal lies on the question whether good cause has been shown, *Jones v. Curling*, 13 Q.B.D. 262; *Huxley v. West London Extension Ry. Co.*, 14 App. Ca. 26, and see *Williams v. Ward*, 55 L.J.Q.B. 566; *Faine v. Chisholm*, (1891) 1 Q.B. 531.

(71) See O. LXV, r. 1 of the Rules of the Supreme Court in England.

(72) See O. LXV, r. 2 of the Rules of the Supreme Court in England, see *Saner v. Bitten*, 11 C.D. 416; *Mason v. Brentini*, 15 C.D. 287; *Ward v. Morse*, 23 C.D. 377; *Atlas Metal Co. v. Miller*, (1898) 2 Q.B. 500. See also Daniell's Chancery Practice, 7th Ed., Vol. I, 1901, pp. 953, 954.

(72-a) The other large item that makes up a party's costs consists in the amount paid as pleader's fees.

(73) Act VII of 1870.

appointed to consider the reform of the Judicial Establishments, etc., of India, 1856. The report says :—

“No institution fee has ever been paid in the Supreme Court, nor under the original system of Lord Cornwallis was there any such fee in the Courts of the Company. *The State defrayed the expense of all the judicial establishments.* An institution fee, in the case of civil suits, was first established by Bengal Regulation XXXVIII of 1795, not as a source of revenue, but, as appears from the preamble to the Regulation, for the purpose of preventing vexatious litigation. By Bengal Regulation VI of 1797, the institution fees were converted into stamp duties; the preamble there assigns the same object; but adds also that of increasing the public revenue. The last purpose is the only one mentioned in Bengal Regulation I of 1814, which further regulates these payments.

The old Regulations and Acts as to court-fees in the three Presidencies are no longer of any practical application. The Madras and Bombay Regulations proceeded to a great extent on the lines of the Bengal Regulations.

With regard to criminal cases, it was found that there were no means of checking litigious complaints in trifling matters before the Magistrate, and therefore a fee of eight annas was first directed to be paid on all complaints of a petty nature before the Magistrate by Bengal Regulation X of 1797. Subsequently a duty of one rupee was levied on offences of a heinous nature. This continued to be the state of the law till 1829, when it was amended by the imposing of a fee of eight annas on complaints of offences of a bailable nature. When this provision was sought to be introduced in Bombay and Madras by the Bill of 1860 there was opposition and consequently fees on complaints were altogether abolished, but were introduced again by the Act of 1867.

The Stamp Act, XXXVI of 1860, was the first General Act of the Governor-General-in-Council relating to judicial and non-judicial stamps in British India and repealed the previous Regulations in force in the three Presidencies. This Act was in turn repealed by Act X of 1862. It was represented to the Government of India that the scale of 1862 was too low and capriciously arranged. Mr. Roberts was proposing from time to time that a scheme should be introduced the objects of which were that there should be a uniform rate of duty of 12 per cent., and that duty should be charged

up to a certain sum and beyond that sum a small duty should be levied and that the money so obtained should be employed in the improvement of the Courts. The last of these recommendations reached the Government of India in 1866. Lord Lawrence had formed the opinion that the greatest evils in the administration of justice arose from the under payments of the lower mofussil judges and the officers of their Courts. The plans which he had been considering for remedying the evils came to maturity in 1866. The first reason which led to the Stamp Bill of 1867 was a proposition on the part of Mr. Strachey that a certain sum of money should be expended in enhancing the salaries of ministerial officers and of the judicial officers of certain Courts. That proposition involved an extra expenditure of several lacs of rupees, and the finances of the country then were ill able to bear the additional burden. To meet that expenditure and, generally that incurred on account of the Courts, a Commission was appointed for considering the stamp laws, and before them was laid the proposal of Mr. Roberts in respect of the amendment of the scale of fees leviable under Schedule B to Act X of 1862. The Commission was appointed with the object: namely, if possible, to derive out of the stamp duties levied in judicial proceedings sufficient revenue not only to meet the increased expenditure to be incurred for the Courts, but also to make the Courts, to a more considerable extent than they did, pay for themselves.

The scheme which the Stamp Commission submitted was accepted in its entirety by the Executive Council, and the scale of 1867 was the result of this Commission.

Act XXVI of 1867 proved repressive of litigation, but a considerable increase of revenue was obtained through its operation. Moreover the Act of 1867 was intended only to be a tentative measure. To give some measure of relief, Act VII of 1870 was passed. The provisions relating to court-fees were scattered over a number of enactments, and the present Act consolidated these provisions relating to court-fees.

The law relating to court-fees and that relating to stamps proper were contained in one and the same Regulation or Act till Act XXVI of 1867 was passed when they were dealt with each separately. In order that for the future there might be no confusion between stamp revenue proper (non-judicial) and the revenue

derived from "judicial stamps" the proceeds of the Act VII of 1870 were designated "Court-fees," and the Act is entitled accordingly."⁽⁷⁴⁾

As regards the general policy of levying a tax on the administration of justice, it may be noted that Bentham was of opinion that justice ought not to be taxed. Mr. Hobhouse, when he asked for leave to introduce the bill of 1867, remarked that he was aware that there was an opinion among certain writers in England that justice should not be taxed, but as far as he knew, that theory did not meet with entire approbation in England ⁽⁷⁵⁾.

Policy of the Indian legislature with regard to the levy of Court-fees—Theory that "Justice ought not to be taxed" examined.

Mr. Maine observed thus on the objection to judicial taxation:—
 "This astounding fact (*i.e.*, 75 per cent. of demonstrably false accusations which was the practical result of the relaxation of the stamp law) might well make them cautious as to minor and therefore less hazardous generalities on the subject of judicial taxes in India. But it still remained to refute the more sweeping generalisation that judicial taxes in all countries were mischievous and improper. It may be observed that the opinion against judicial taxation was extremely modern. For centuries on centuries, there had seemed to be nothing more simple or natural than that the parties to a dispute should remunerate the authority by whom their differences were arranged. ⁽⁷⁶⁾ No doubt in modern Europe the mistake had been made of allowing judicial fees to go into the pocket of the judge himself and not into the exchequer of that state that paid him. This had led in France before the Revolution by a perfectly logical association to the sale of judicial offices; and, in England, though it had always been illegal to traffic in such offices, the same result had practically been obtained by the creation of sinecures which were conferred on relations of the judge. Against such scandals and abuses Jeremy Bentham, now not far short of a hundred years ago, protested with all the vehemence of which he was capable, and it may be stated that the opinion against judicial taxation was entirely produced by Jeremy Bentham, and was not older. It was true that Jeremy Bentham's opinions in this respect had not been practically carried out even in England, and that still large amounts were levied in the form of judicial taxes, in aid of the payments which the state made to its judicial officers. But the

(74) See Statement of Objects and Reasons to Court Fees Act (VII of 1870).

(75) Abstract of the Proceedings of the Legislative Council, Vol. VI, p. 70.

(76) See the Homeric trial scene and the Sacramental action of the Roman Law described in detail in Mayne's Ancient Law, Chapter X.

truth was, that Bentham's name was so great in England that even those views of his which had never been acted upon obtained currency and importance in the shape of common-places. If it should be enquired into as to what were the reasons of Bentham for denouncing judicial taxation as mischievous, the following points may be noticed. Bentham's idea was that all litigation, or all but a very little, was entirely the fault of Government, and therefore he naturally objected that Government which caused litigation should profit by it. Bentham believed that litigation was owing to the complexity of the law, and this litigation might be almost entirely removed by legislation adapted to true principles. He thought that litigation, and therefore the expense of litigation, might be reduced to a minimum, if it were not for the blindness, the stupidity or the cupidity of legislatures in not simplifying the laws. Mr. Maine would quote the panacea expressly prescribed by Bentham for the all but complete suppression of fees and costs; "An all comprehensive Code of substantive law, having for its end in view the greatest happiness of the greatest number, each part of it present to the minds of all persons on whom conformity to its enactments, the attainment of its end depends, and an all-comprehensive code of adjective law, otherwise called a code of procedure, having for its end the giving, to the utmost possible amount, execution and effect to the enactments of the substantive code." This passage was quoted from the Principles of Judicial Procedure as a statement of Bentham's expedient for preventing judicial taxation, and accordingly he argued with perfect logic, that if costs and fees were inevitable, it was the Government and not the litigant that ought to pay them.⁽⁷⁷⁾

Now without entering into the question of the truth of these views, had they any application whatever to India? The simple fact was that the people of India objected to having their laws and institutions simplified, and resented such interference as a breach of the conditions on which the country was governedThe truth appeared to be that the people of the country were not only wedded by custom and religious feeling to a complex system of law, but prided themselves on their usages in proportion to the complexity of those usages. If this were so, the foundation of Bentham's doctrine collapsed, and the doctrine itself had no application to India. The legislature was estopped, by the conditions of

(77) Abstract of the Proceedings of the Legislative Council, Vol. VI, pp. 123-125.

our tenure of the country, from so simplifying the law as to render judicial taxation mischievous. He (Mr. Maine) did not mean to imply that indefinite judicial taxation was legitimate in this country. All he argued was, that it was governed by the same principles as the levying of any other tax, and not by any special consideration of the mischievousness of judicial taxation (78).

Mr. Maine again remarked in the Council the question whether justice might be taxed for the general purposes of the state did not arise in India, and that the last thing which could be attributed to the Commission or to the Government was a policy of taxing litigants, as a separate class, for the benefit of the general finances.⁽⁷⁹⁾

The above observations of Mr. Maine were made in vindication of the policy of the Government in levying taxes for the administration of justice. The Court Fees Act (VII of 1870) was passed into law; and it prescribes certain fees to be paid by suitors before the court can take action in their suit or on their application.^(79-a.)

With regard to the question as to what law governs the award of costs by the Courts of any particular state or country, the general rule is that "the laws of the country where the suit is tried and not the laws of the country where the contract in suit was made govern the subject of costs."⁽⁸⁰⁾

Award of costs by what law governed :
(i) By the law of the country where the suit is tried.

Similarly in America, it has been held that, as between the several states of the United States, the laws of the State where the suit is laid and tried, and not the laws of the State where the contract was made or the cause of action arose, govern the matter of costs.⁽⁸¹⁾

The right to costs and the amount of costs to be allowed, as well as the items taxable and the method of taxation are governed by the law in force at the time when the action terminated, and

(ii) By the law which is in force at the time when suit is terminated.

(78) Abstract of the Proceedings of the Legislative Council, Vol. VI, pp. 123—125.

(79) Abstract of the Proceedings of the Legislative Council, Vol. VIII, pp. 290, 291.

(79-a) See Ss. 4 and 6 of the Court Fees Act (VII of 1870). See also on this point Introduction in Jagannatha Iyer's Commentaries on the Court Fees Act, 1870

(80) *Union Mut. F. Ins. Co. v. Hopkins*, 3 R.I. 110.

(81) *Ibid.* As to whether the question of costs is one of procedure or one affecting vested rights the answer appears to be supplied by the cases of *Freeman v. Moyes*, 1 Ad. and El., 338; *Grant v. Kemp*, 2 C. and M. 636; *Wright v. Haie*, 30 L.J. (Ex. 40); *Kimbray v. Drapper*, L.R. 3 Q.B. 160; cited in *Yonosuke Mitsue v. Ookerda Khetsy*, 21 B. 779 (789). *N.B.*—Of these *Wright v. Haie* is most frequently referred to. It has been doubted and questioned, but apparently never overruled, and there is no good reason for not following it in this country.

not by the law that existed at the time of the commencement of the action ⁽⁸²⁾. Thus, it has been held that in awarding costs the Court cannot base its decision on provisions of statute which have been repealed, and are no longer effective at the time when the order as to costs is made; but the Court is to be governed by the provisions of the legislature then existing. ⁽⁸³⁾ A party has no vested right to costs at the time when he institutes the suit. ⁽⁸⁴⁾ Whether he is entitled to any costs must be determined by the Court at the time when it delivers its judgment or makes its order after hearing the whole evidence in the case and considering the conduct of the parties and all the other circumstances of the case.

English law
as to costs,
applicability
of, in this
country.

It may be noted that English law, as such, has no authority in the Courts of our country; but the general principles laid down in English decisions and English text books which belong more to the province of general jurisprudence than to any peculiarity of English law are being constantly referred to and generally followed by our judges in the decision of the Indian cases. Referring to this subject His Lordship Chief Justice Grey in a case ⁽⁸⁵⁾ that arose in the Supreme Court of Calcutta as early as 1830 stated the law as follows: "The 14th clause of the Charter of this Court, which is the passage that gives us the power to award costs, and without which we should not have had that power, says that we may award costs between party and party, such as we may think it just that one party should pay to another. It does not say that we are bound by the English statutes on the subject, and it has never been thought that the statutes of England as to costs applied here." ⁽⁸⁶⁾

(82) *Begbie v. Begbie*, 128 Cal. 154; 60 Pac. 667 and other cases cited in Cyo., Vol. XI, p. 26. "There is no vested right in procedure" *Per Mahmood, J.* in *Mangul Lal v. Kandhai Lal*, 8 A. 475.

(83) *Yonosuke Mitsue v. Ookerda Khetsy*, 21 B. 779.

(84) *Grace v. Allemus*, 15 Serg. & R. (Pa.) 133. Thus, if a statute repealing or amending a previous statute which was in force at the time the action is commenced contains no saving clause, the provisions of the former statute have no application in taxing costs. *Migs v. Parke*, Moor. (Iowa) 378. See also *Yonosuke Mitsue v. Ookerda Khetsy*, 21 B. 779.

(85) *Bryce v. Smith*, (1830), Bignell 54 at p. 61 = 1 Ind. Dec. Old Series, 425 at p. 428.

(86) *Bryce v. Smith*, (1830), Bignell 54 at pp. 61 (62) = 1 Ind. Dec. Old Series, 425 at p. 428. It is the practice of the Chancery Court to apportion the costs rateably between the issues (*Jenkins v. Jackson*, (1891) 1 Ch. 89; *Knight v. Pursell*, (1879) W.N. 182) and it has been stated there is nothing technical in that practice that may not be followed in India. See Gour's Transfer of Property Act, Vol. II, p. 1439. On this

In another case ⁽⁸⁷⁾ which came before the same Court in the same year it was laid down that "the rules which are adopted in England as to requiring security for costs from plaintiff, are not invariably applicable to this country." ⁽⁸⁸⁾ In a later case ⁽⁸⁹⁾ which came up for decision before the same Court in the year 1849, the Court held that "The Supreme Court is governed in its decisions, as to costs, by its own practice, and not by the rules of the Admiralty Court." ⁽⁹⁰⁾ The law thus laid down as early as 1830 and 1849 has in substance been the law that has been administered ever since by the Courts in this country. English Cases and English Statutes, though not binding on the Courts in this country are often valuable guides in the administration of Indian Law, especially on points on which the Indian Law is silent.

In this connection the following observations of Starling, J., in a recent Bombay case ⁽⁹¹⁾ may well be noted. His Lordship said:—"Now it was argued that the Court has no jurisdiction to order costs to be taxed after payment, on the ground that such jurisdiction is in England given by statute, and that there is no statute applicable here. It is true that various Acts have been passed in England regulating the admission, duties and liabilities of attorneys there, and that by them the Courts in England have to be guided in their decisions; it seems also that the first Act so passed was in 1729. Consequently none of these Acts are in force in this country. What the practice was before 1729, I am unable to say, and I know of no treatise from which the information could be obtained. It is also true that there are no such Acts in India, and the only rules we have are rules of the High Court regulating the admission of attorneys and their right to recover their costs in a summary manner, but that to my mind is no reason why the Court should not exercise a jurisdiction of this kind over its officers according to equity and good conscience guided by the general principles laid down by English cases. Consequently,

subject see Chapter I of the "Law of Receivers in British India" published by the Lawyer's Companion Office, where the subject is dealt with in detail. The observations therein, though made with special reference to the Law of Receivers, would also apply in substance to the subject of "costs."

(87) *Chaund Beebee v. Owen, John Elias*, (1830) Morton 310=1 Ind. Dec., Old Series, p. 1078.

(88) (*Ibid.*).

(89) *The Hydros*, (1849) Perry O.C. 300=4 Ind. Dec., Old Series, p. 274.

(90) (*Ibid.*).

(91) *J. Muncherji Jijibhoy v. Byramji Jijibhoy*, 18 B. 189.

I am of opinion that, upon a proper case being made out, the Court can in a proper manner call a solicitor to account in respect of the amount of his bill even after it has been paid." (92)

It has been said in an old Calcutta case that "The jurisdiction of the old Supreme Courts in India and now the present High Court in respect of costs is in some respects co-extensive with that of Her Majesty's Courts at Westminster; and there are cases (93) which clearly go to show that our Supreme Courts did, in fact, exercise the peculiar jurisdiction of the English Superior Court in regard to dealing with the subject of costs." (94)

Construction
of Statutes
relating to
costs.

It has been held that statutes relating to costs are to be considered penal in their nature, and consequently to be strictly construed. (95) A penalising provision as the one relating to costs should not be extended by analogy to cases which are not intended to be provided for. (95-a)

Costs, nature
of—not to be
awarded by
way of
penalty.

Thus the Court has not power to order the payment of any costs beyond the costs of suit by way of penalty. (96) Thus the

(92) *J. Muncherji Jijibhoy v. Byramji Jijibhoy*, 18 B. 189 at p. 193. "It is to be borne in mind that the solicitor's lien in the High Courts of India is governed exclusively by the law as it existed in English Courts before the passing of St. 23 & 24 Vict., Ch. 127, by which that lien was very much extended. By that law the solicitor had a lien for his costs on any funds or sum of money recovered for, or which became payable to, his client in the suit."—See Morgan on Costs cited by Sargent, C.J., in *Devkabai v. Jefferson, etc.*, 10 B. 248 (253).

(93) *Doe v. Surroop Chunder Ghose*, unreported but cited in *Jointee Chunder Sein v. Anundo Lall Dass*, 14 W.R. O.C. 1 at p. 2.

(94) *Jointee Chunder Sein v. Anundo Lall Dass*, 14 W.R.O.C. 1 at p. 2. "Upon the English authorities it is clear that the expense of a witness qualifying himself to give evidence was not allowable as costs between party and party." *Severn v. Olive*, 3 Brod. and Bing. 72; *Gravatt v. Attwood*, 21 L.J.Q.B. 215; *Small v. Batho*, 21 L.J.Q.B. 254, cited and followed in *Macnair v. Hogg*, 2 Hyde 89 (90).

(95) *Dibben v. Cooke*, 2 Str. 1005; see also the observations of Seshagiri Aiyar, J., in *Srinivasa Aiyangar v. Kannappa Chetty*, 30 M.L.J. 120 at p. 127. The same view is also adopted by the American States. See *Cyclopedia of Law and Procedure*, Vol. XI, p. 27—Heading "Costs."

(95-a) See the judgment of Seshagiri Aiyar, J., in *Srinivasa Aiyangar v. Kannappa Chetty*, 30 M.L.J. 120 at p. 127. "Section 35 of the Code of Civil Procedure makes the award of costs to depend 'upon prescribed conditions and limitations and on provisions of law in that behalf for the time being in force.' Under this section, the Court can deprive a successful litigant of his costs, but cannot make the losing party pay more than what the rules have prescribed." *Per Seshagiri Aiyar, J., in V. V. Srinivasa Aiyangar v. Kannappa Chetty*, 30 M.L.J. 120 (127).

(96) *Wilimott v. Barber*, 17 C.D. 772. As to the power to order a defendant to pay the costs of an unsuccessful plaintiff, see *Dicks v. Yates*, 18 Ch.D. 76, 85. See also the observations of Seshagiri Aiyar, J., in *V. V. Srinivasa Aiyangar v. Kannappa Chetty*, 30 M.L.J. 120 at p. 122.

difference between party and party costs and solicitor and client costs cannot be given by way of damages. (97)

Costs are given by law only as an indemnity to the party who receives them. (98)

Costs given by way of indemnity to innocent party.

As a general rule the Court has no power to award as costs any amount which the party has not actually expended in the litigation; (99) the reason of the rule being that "Costs ought never to be considered as a penalty or punishment, but merely as a necessary consequence of a party having created litigation in which he has failed." (100) It has been stated by Mr. Jessel, M.R., in the case of *Willmott v. Barber* (101) that "a Judge has no power to order any party to pay a sum by way of penalty beyond the costs of the claim and the counterclaim." In a recent case that came before the Allahabad High Court (102) S was joined by G as co-plaintiff in a suit for specific performance of the execution of a deed of mortgage. S was a minor and sued by G as his next friend. It had been agreed that the mortgage should be executed in favour of G only. But S was the owner of half the money due on a previous bond executed by the defendants, which was to form part of the consideration for the mortgage. It was for this reason that S was

Court cannot award as costs expenses not incurred by the party.

(97) *Cockburn v. Edwards*, 18 Ch.D. 449; *Quartz Hill Co. v. Eyre*, 81 W.R. 668 (Eng.). See Daniell's Chancery Practice, 7th Ed., 1901, Vol. I, p. 955. So also "in an action of tort the Court has no power to add to the damages recovered, the difference between party and party and solicitor and client costs of the action, even though the subject-matter of the action is a wrong done by a solicitor to his client (*Cockburn v. Edwards*, (1881) 18 Ch. D. 449, C.A.), nor may the chief clerk of the Court, in assessing damages, include therein the difference between party and party and solicitor and client costs in the action (*Harrison v. McSheehan*, W.N. (1885) 207; cf. *Garnett v. Bradley*, (1878) 3 App. Cas. at p. 957."

(98) *Harold v. Smith*, 5 H. & N. 381; 29 L.J. Ex. 141; 6 Jur. (N.S.) 254; 2 L. T. 556; 8 W.R. 447 (Eng.).

(99) See *Abdul Shakur Khan v. Ataullah*, A.W.N. (1897) 227.

(100) Per Lord Cranworth in *Clarke v. Hart*, (1858) 6 H.L. Cas. at p. 667. "At common law costs are awarded to a successful party as an indemnity for the expenses legitimately and reasonably incurred in fighting the action. As stated by Bramwell, B. in *Harold v. Smith*, 5 H. & N. 381 (1860), costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out the extent to which costs ought to be allowed is also ascertained." *P. Nusservanji & Co. v. S. S. Warienfels*, 18 Bom. L.R. 118 (190).

(101) (1881) 17 Ch. D. at p. 773, C.A.

(102) *Abdul Shakur Khan v. Ataullah*, A.W.N. (1887) 227.

joined as a co-plaintiff. The defendants raised the defence that the action did not lie on the ground of misjoinder. On this an application was made by S to have his name struck out. That application was opposed by the defendants. The Court struck out the name of S and ordered him to pay Rs. 500 to one defendant and Rs. 500 to another. The action proceeded with the same counsel. No extra costs, except the costs of the argument on S's application, were incurred by the defendant by S having been made a party to the action or by his having been struck out. *Held* on appeal by S from the order as to costs, that the Judge was not empowered to decree such costs as these, unless the parties had been put to them in the action, and that the order of the lower Court should be altered, and that S should instead of paying two sums of Rs. 500, pay to each of the defendants the sum of Rs. 32.⁽¹⁰³⁾ The costs which a defeated plaintiff should be required to pay should be only the costs necessarily incurred by the successful party in the defence of the suit. Costs cannot be deemed necessary, if by reasonable diligence on the part of the defendant or his pleader the expenditure of them could have been avoided.⁽¹⁰⁴⁾

Order as to costs—What does it include.

Where the Court gives at the hearing the costs of a suit or proceeding, the subsequent costs of working out the directions of the order of the Court will, in the absence of any direction to the contrary,⁽¹⁰⁵⁾ be included, unless further consideration is reserved.⁽¹⁰⁶⁾ "If, therefore, the subsequent costs are not intended to be included, further consideration should be reserved, or the direction should be confined to the costs up to the judgment."⁽¹⁰⁷⁾ Where the Privy Council specifies a sum as the costs of an appeal to itself, the sum does not include the costs of translation, &c., incurred in the High Court.⁽¹⁰⁸⁾

(103) *Abdul Shakur Khan v. Ataulah*, A.W.N. (1887), 227.

(104) *Seeta Patta Mahadevi v. Suryudamma*, 18 M. 128.

(105) *Slack v. Midland Ry. Co.*, 16 Ch.D. 81. For term of inquiry as to damages after judgment, with direction as to payment of costs, see Seton, 519.

(106) *Krehl v. Park*, 10 Ch. 334; Seton, 257. This will be the case, although the costs not before provided for are reserved, if there are other costs which might be included under these words (*Quarrell v. Beckford*, 1 Mad. 269, 286 (Eng.))

(107) See Seton, 184.

(108) *Mussamut Omateel Fatima v. Ashur Ali*, 15 W.R. 356. Amongst the items which go to make up the costs are the money paid for Court-fees on the plaint, process-fees, exhibits in the case, witnesses' diet-money and expenses, Commissioner's or accountant's fee, cost of translations, and pleader's fee, the last being *ad valorem* according to a fixed scale, irrespective of any private arrangements, between pleader and client. *Umrithonath v. Raghonath*, 6 W.R. (Mis.) 35; *Azimulla v. Secretary of State*, 15 M. 405; affirmed in *Muhammad Alim v. Secretary of State*, 17 M. 162.

Where costs are given up to a particular date they will include costs of briefs, affidavits, &c., actually and properly incurred previous to that date, although the application in support of which they were prepared was not heard until after.⁽¹⁰⁹⁾

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According to the Civil Procedure Code (O. XX, r. 6) the decree of the original Court "must state the amount of costs incurred in the suit" and by whom such costs are to be paid.^(110-a)

Duty of Court to state by whom costs are to be paid.

Under the Code of Civil Procedure, the costs incurred in the suit are to be entered in the decree; this would mean the costs incurred both by the winning party and the losing party and that seems to have been the practice from a long time.^(110-b)

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When the further consideration of the suit or proceeding is adjourned, it is not the usual rule for the Court to make any order as to costs. Such orders would usually be reserved for the final hearing.⁽¹¹¹⁾

Order as to costs not generally made when suit is adjourned or at original hearing.

(109) See *Webster v. Manby*, 4 Ch. 372.

(110) See Seton's Judgments and Orders, 185.

(110-a) *Per* Harrington and Chatterjee, JJ., in *Raghu Nandan Lal v. Rajendra Prosad Narain Singh*, 14 C.W.N. 556 (557) = 11 C.L.J. 207. See, also, *Kashee Chunder v. Bungshee Buddam*, 23 W.R. 89.

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(110-b) *Raghu Nandan Lal v. Rajendra Prosad Narain Singh*, 14 C.W.N. 556 (558) = 11 C.L.J. 207; see *Nubokristo Mockherjee v. Parbulty Churn Bhuttacharjee*, 13 W.R. 23.

(110-c) S. 579 of the old Code of Civil Procedure (Act XIV of 1882).

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Exception to
the above
rule.

But where some of the defendants are dismissed at the original hearing or at any adjourned hearing, the costs of the dismissed defendants may be disposed of at such hearing.⁽¹¹²⁾ So also, where a portion of the plaintiff's case fails or an improper defence is set up by the defendant, the costs occasioned by such portion of the plaintiff's case which has failed or by the defendant's improper defence may be disposed of at the original or subsequent hearing when the Court makes its order as to the failure of such portion of the plaintiff's claim or the impropriety of the defence.⁽¹¹³⁾ In any of the above cases, it would also be open to the Court to reserve its order as to costs for the final decree.⁽¹¹⁴⁾

Costs are in
the discretion
of Court.

No principle is better fixed regarding the law of costs than that the awarding of costs is in the discretion of the Court by which the action is tried.⁽¹¹⁵⁾

(112) See Seton's Judgments and Orders, 185; *Powell v. Elliott*, 10 Ch. 424; Daniell's Chancery Practice, 7th Ed., Vol I, 1901, p. 955.

(113) (*Ibid*).

(114) *Austin v. Jackson*, 11 C. D. 942-N. (1).

(115) As to costs being in the discretion of the Courts, see *Parshram v. Dorabji*, 2 Bom. L.R. 254; *Ganesh v. Narayan*, 4 Bom L.R. 109; *Futeeck v. Mohender Nath Mozoomdar*, 1 C. 385=25 W.R. 226; *Husaini Begam v. The Collector of Musafarnagar*, 9 A. 11=A.W.N. (1886) 245; *Mulhooranath Mozoomdar v. Mohobuttoonissa Bitee*, 20 W.R. 206; *Sheo Dyal Tewaree v. Judoonath Tewaree*, 9 W.R. 61 (where it is stated "that the Court may exercise largest discretion as to costs, but with special reference to all the circumstances of the case"); *Gopeekrist Gosain v. Gunga Persaud Gosain*, 6 M.I.A. 53=4 W R 76 (P.C.)=1 Sar. 493; *S. M. Bhugopati Pal v. Mahomed Ali*, 7 C.W.N. 647 (where it is stated that "a Court has full discretion as to costs, but that discretion must be exercised on general principles and not arbitrarily"); *Periakaruppan v. Palaniappa*, 13 M.L.J. 210; *Ma Lon Ma v. Maung Tun U*, 15 Ind. Cas. 429 (where it is stated that a second appellate Court cannot examine the reasons and review the exercise of the lower Court in the matter of costs). Even if the discretion is exercised wrongly, that is not a sufficient reason for interfering in second appeal. N.B.—This is rather a too strong statement of the case. *Shanmugam Pillai v. Mirakani Rowther*, 21 Ind. Cas. 746; *G. Peria v. G. Lakshmi Devamma*, 24 Ind. Cas. 96; *The Government v. Maharajah Mahatab Chund Bahadoor*, 3 W.R. 109; *Bunwari Lall v. Chowdhry Drup Nath Singh*, 12 C. 179; *Garden Reach Spinning and Manufacturing Co., Ltd. v. Empress of India Cotton Mills Co., Ltd.*, 12 C. 551; *Ramasami Reddi v. Lakshmambal*, (1911) 2 M.W.N. 568; *Kuppuswami Chetty v. Zamindar of Kalahasti*, 27 M. 341; *Chhabba Ram v. Thakur Jawahir Singh*, 60.C. 39; *Madho Singh v. Laliu*, 6 O.C. 52. "The discretion to award costs is no doubt subject to other provisions of the legislature and has been to a certain extent limited in the case of certain suits instituted in the High Court but cognizable by the Presidency Small Cause Courts [See S. 22 of Act XV of 1882, amended by S. 11 of Act I of 1895, which runs as follows :—'If any suit cognizable by the Small Cause Court other than a suit to which S. 21 applies, is instituted in the High Court, and if in such suit the plaintiff obtains, in the case of a suit founded on contract, a decree for any matter of an amount or value less than one thousand rupees, and in the case of any other suit a decree for any matter

No hard and fast rule can be laid down as to how the discretion is to be exercised, and the Court would exercise its discretion according to the circumstances of each particular case. (116)

Discretion not to be fettered by any hard and fast rule.

The discretion conferred is very wide. Thus the costs may be ordered to be paid by the parties in definite proportions or one party may be ordered to pay a fixed amount to the other in lieu of taxed costs. (117)

Extent of discretion—(i) It is very wide in its nature.

Thus where the Court, in decreeing the plaintiff's claim, finds that the plaintiffs were responsible for the litigation by reason of their refusal to produce certificates to collect debts or other documents showing that they alone of the representatives of the deceased creditor were entitled to give a valid discharge for the debt, it may refuse costs to the plaintiffs though successful. (118)

The Court may even make a successful plaintiff pay the whole costs of the other side. (11)

But to lay the whole of the costs of a suit on the winning party is an extreme measure, which is only justifiable in cases in which a

of an amount or value of less than three hundred rupees, no cost shall be allowed to the plaintiff; and if in any such suit the plaintiff does not obtain a decree, the defendant shall be entitled to his costs as between attorney and client. The foregoing rules shall not apply to any suit in which the Judge who tries the same certifies that it was one fit to be brought in the High Court.' *Ismail Ariff v. Leslie*, 24 C. 399 = 1 C.W.N. 188; dissented from in *Yonosuke v. Ookerda*, 21 B. 779; *Sabapathi Mudaliyar v. Narayanaswami Mudaliyar*, 1 M.H.C. 115 (clause 37 of Letters Patent does not give the High Court an uncontrolled discretion as to costs). The section has, of course, no application where the suit is not within the jurisdiction of the S.C.C." *Mirtunjoy Dutt v. Kameen Dasse*, 1 Ind. Jur. N.S. 95; C.P.C. by Ameer Ali, part I, sec. 35, p. 203]. Where A demanded a particular sum as due to him from B, and the latter tendered a less amount, saying that that was all he owed, it was held in an action brought in the High Court that A was entitled to full costs, not being under any obligation to accept the lesser sum and sue for the balance in the Small Cause Court (*Chunder Kant Mookerjee v. Judoo Nath Khan*, 1 C.L.R. 470). For sections of the Code affecting the discretion, see O. XI, r. 3 and O. XXI, r. 72. The power, however, given, though a full power, is subject to the control of the Court of appeal (*Tara Prosunno v. Satish Chandra*, 4 C.W.N. 90; *Pratap Chandra v. Kali Bhanjan*, 4 C.W.N. 600; *Amir Ali's Civil Procedure Code*, 1908, p. 203. The discretion as to the award of costs which a Court has is not taken away by the fact that a party to a suit is protected under the provisions of the Judicial Officers Protection Act (*Ganesh Mahadev v. Narayan Balshet*, 4 Bom. L.R. 109).

(116) *The Friedeberg*, 54 L.J.P. 75; 10 P.D. 112; see also *Badische Anilin v. Levinstein*, 29 C.D., p. 419.

(117) *Willmott v. Barber*, 17 C.D., p. 774; *Mayor of Bradford v. Pickles*. (1894) 3 Ch. 513. This is according to the English practice. See Note 8, *supra*.

(118) *Daulat Ram v. Durga Persad*, 15 A. 333.

(119) *Harris v. Petherick*, 48 L.J.Q.B. 521; 4 Q.B.D. 611; *Fane v. F.*, 18 C.D. 228.

suit may have been wholly unnecessary for the purpose of establishing and enforcing the plaintiff's right.⁽¹²⁰⁾

A Court of appeal is averse to interfere with the discretion of a Judge of first instance in awarding costs, and rarely, if ever, exercises its power, except in cases in which some question of principle is involved and the principle has been violated.⁽¹²¹⁾

As a question of discretion, it must always be remembered by Courts of Justice when exercising their jurisdiction under the discretionary power conferred on them by the Code of Civil Procedure, that when an innocent party is dragged into a *lis* and has to stand the brunt of a trial, he has to undergo much vexation of mind independent of expenses, for wrongly being dragged into a cause, and such circumstances are enough consideration for allowing at least such costs as the law allows to a successful litigant.⁽¹²²⁾

The Civil Procedure Code itself gives the warning to the effect that there should be reason for any orders as to costs which do not follow the event.⁽¹²³⁾

Where the judgment of the lower Court contains no reason for varying the above rule, an appeal on the question of costs may be allowed.⁽¹²⁴⁾

(120) *Keshavrai K. Joshi v. Bhavanji Babaji*, 8 B.H.C. A.C. 142 (143).

(121) *Khushal Sadashiv v. Punam Chand Jusrupji*, 22 B. 164 (167); *Ranchordas Vithaldas v. Bai Kasi*, 16 B. 676.

(122) *Bishen Dayal v. Bank of Upper Burma, Ltd.*, 13 A. 290 (295).

(123) *Bishen Dayal v. Bank of Upper Burma, Ltd.*, 13 A. 290 (295). See the Proviso to S. 220 of the Code of Civil Procedure (Act XIV of 1882); Civ. Pro. Code (V of 1908), S. 35.

(124) *Bishen Dayal v. Bank of Upper Burma, Ltd.*, 13 A. 290 (295). If the plaintiff can show that an order as to costs disallowing costs to the successful plaintiff was made under a mistake or misapprehension of the law, and that the filing of a suit was a necessary proceeding, or if not absolutely necessary, that it was a reasonable and discrete proceeding, then he is fairly entitled to ask an appellate Court to set aside such order. *Keshavrai v. Bhavani*, 8 B.H.C. (A.C.J.) 142 (143). In one case the Privy Council describe an order as "most extraordinary" where a successful respondent was ordered to pay appellants' costs; they say "A case has been cited from Borradaile's Reports, in which the Court appears, in an action under very particular circumstances to have given a most extraordinary decision. First of all in deciding that the defendants should pay the costs to a plaintiff who did not succeed, and then, when that failing, plaintiff appealed, in two stages, to other Courts, and failed also in appeal, in giving the costs in like manner against the respondents, who in all three of the proceedings had succeeded. This is rather too strong a case, their Lordships think, to be cited as an authority, and there appears to have been no objection made by the parties, no appeal from the decision of the Court below as to costs, and, therefore, the point never

The discretion of Courts as to costs extends not only to the incidence, but also to the *quantum* of costs. "The Judge has power to moderate and modify the prescribed scale if he does not think fit to give the full costs."⁽¹²⁵⁾

(ii) It extends not only to the incidence but also to the *quantum* of costs.

The discretion must be exercised judicially,^(125-a) e.g., it is not a judicial exercise of the discretion to order a party who has been completely successful and against whom no misconduct was alleged, to pay the costs of the proceedings.⁽¹²⁶⁾ "Even though the giving of costs is discretionary the Court is governed by definite principles in its decisions relative to the costs of proceedings before it, for it will, in awarding costs, take into consideration the circumstances of the particular case before it, or the situation, or conduct, of the parties, and exercise its discretion with reference to those points. In exercising this discretion, however, the Court does not consider the costs as a penalty or punishment; but merely as a necessary consequence of a party having created a litigation in which he has failed;⁽¹²⁷⁾ and the Court is governed by certain fixed principles which it has adopted upon the subject of costs, and does not act upon the mere caprice of the Judge before whom the cause happens to be tried."⁽¹²⁸⁾

Discretion how exercised
(i) To be exercised judicially—
Meaning of "Discretion."

Discretion when applied to a Court of Justice means a sound discretion guided by law. "It must be governed by rule not by

having been raised, cannot be cited as an authority, *Musst. Keemee Bace v. Luchmun Das Narain Das*, 5 W.R. (P.C.) 59 at p. 80 cited in argument in *Ranchordas v. Bai Kazi*, 16 B. 676 at p. 679. Where the mesne profits claimed were excessive, and the same were left for determination in execution proceedings, held that costs should not be allowed to the plaintiffs in the decree for the entire amount claimed, but only for such amount as may be found due to him in execution proceedings. *Sheikh Moula Buksh v. Ramkishun Misy*, 5 Sud. Dew. Adaw. Rep. Bengal, (1849) 119=10 Ind. Dec. Old Series, p. 728. See also cases noted under Note (151), *infra*.

(125) *Per Fry, L.J., Neaves v. Spooner*, (1888) 36 W.R., at p. 258 (Eng.).

(125-a) *Bhugobati v. Mahomed*, 7 C.W.N. 647; *Kuppuswami v. Zamindar of Kalahasti*, 27 M. 341.

(126) *Kierson v. Thompson*, (1913) 1 K.B. 587, C.A.; and see *Hudsons v. DeHalpert*, (1913) 108 L.T. 416, and *Levy v. Johnson*, (1913) 29 T.L.R. 507; *Keshavrao Krishna Joshi v. Bhavanji Babaji*, 8 B.H.C.R. 142.

(127) *Per* *Ld. Cranworth*, in *Clarke v. Hart*, 6 H.L.C. 633; see also *Wortham v. Ld. Dacre*, 2 K. & J. 437, 439; *Purser v. Darby*, 4 K. & J. 41; *Caton v. C.*, 1 Ch. 137, 149; *Abdul Shuker Khan v. Ataullah*, A.W.N. (1887) 227.

(128) See *Daniell's Chancery Practice*, 7th Ed., 1901, Vol. I, p. 955.

humour. It must "not be arbitrary, vague and fanciful, but legal and regular." (129)

(ii) To be exercised according to recognized principles of law and on grounds relevant to the action.

That discretion must be a judicial one and be exercised strictly according to the principles of the law. (130) Further the discretion can only be exercised on grounds relevant to the action, (131) and although it is not within the power of the Court of Appeal to overrule the exercise of discretion by a Judge who has exercised that discretion upon certain materials which are before him, yet the question of the existence of materials upon which the discretion can be exercised may be the subject-matter of appeal, and if a Judge has decided upon grounds which were not open to him, the Court a of appeal may overrule his decision. (132)

Thus when a plaintiff has no cause of action, the defendant cannot be made to pay the whole cost of the action. (133)

Generally speaking the Court has not power to award the costs of the plaintiff to be paid by the defendant, when the latter has had a verdict. (134)

(129) *Per* Lord Mansfield in *Wilke's* case cited in *Narayana Gajapathi Razagaru v. Surappa Razu*, 3 M.H.C.R. 113 (114); *Harbuns v. Bhairo*, 5 C. 259=4 C.L.R. 23; *Gopaul v. Solomon*, 11 C. 767; *Hirabai v. Dhanjibhai*, 2 Bom. L.R. 845; *Ilerbert v. Ishen*, 18 W.R. 16.

(130) *Per* Vaughan Williams, L.J., *Leckhampton Quarries Co. v. Cheltenham Rural District Council*, (1905) 49 Sol. J. 613, C.A.; *Mullen v. London County Council*, (1907) 51 Sol. J. 82.

(131) *Ibid*; *Edmund v. Martell*, (1907) 24 T.L.R. 25 (Eng.).

(132) *Civil Service Co-operative Society v. General Steam Navigation Co.*, (1903) 2 K.B. 756, C.A.; *Edmund v. Martell*, (1907) 24 T.L.R. 25 (Eng.).

(133) *Dicks v. Yates*, 18 C.D. 76. So also where a plea as to jurisdiction is successful, the Court will give costs to the successful party. *Punchanun v. Brojendra*, 1 Ind. Jur. N.S. 38; *Jardine v. Money*, 14 W.R. 312; *Freck v. Harbey*, 6 C. 418=7 C.L.R. 237. Where a suit is dismissed for want of pecuniary jurisdiction, the defendant ought to get his costs. *Moshingan v. Mozari*, 12 C. 271. In the case of *Nobaen Kishen v. Shih Pershad Patlak*, 7 W.R. 490, the Court ordered each party to bear his own costs where the plea of jurisdiction was taken only in special appeal.

(134) *Gopeynee Dossee v. Gobindram Bysack*, Hyde's Notes, Dec. 2, 1779, Morton 264 (265)=1 Ind. Dec. Old Series, p. 1044. This was an action for assault. A very trivial assault was proved. Chief Justice Impey said, he was inclined to give judgment for one rupee damages, and for the costs of the defendant to be paid by the plaintiff. But on looking into the Charter he inclined to think it could not be done, and therefore he would not do it. (*Ibid*). In the case of *Anderson v. Russomoney Dutt*, November 1840, the Court intimated their intention of making the plaintiff pay the costs of the defendant, the action being a very frivolous one, although the plaintiff had succeeded on demurrer to a special plea, and must have recovered nominal damages if the cause had been set down for assessment of damages. The case however was compromised. 1 Ind. Dec. Old Series, p. 1044 (Foot-note).

So also a plaintiff, if entitled to some part of his claim, should not be deprived of the benefit of the decree by an order as to costs making him liable to defendant for more than he would himself receive.⁽¹³⁵⁾

Again where an action is successfully brought to enforce a legal right and there is no misconduct on the part of plaintiff, the Court has no discretion to refuse him costs.⁽¹³⁶⁾

Where there are no materials on which a Court can exercise its discretion to refuse costs, the Court cannot deprive a successful party of his costs.⁽¹³⁷⁾

The ordinary rule as to the award of costs in a suit is that they should follow the event.⁽¹³⁸⁾ If a party substantially succeeds, he is entitled to his costs.⁽¹³⁹⁾ It has been laid down that as a general rule "costs should follow the result" of the suit or other proceeding.⁽¹⁴⁰⁾ As a general rule, therefore, it may be laid down that the successful party is entitled to his costs unless there are special circumstances that take the case out of this general rule.⁽¹⁴¹⁾

As to what constitutes success within the meaning of the rule that the successful party is entitled to his costs from the losing party, it must be remembered that what is meant is substantial success, not absolute success.⁽¹⁴²⁾ Thus, where a person sues for Rs. 5,000 in damage for an alleged wrong and is awarded only Rs. 3,000, that will be considered to constitute success within the meaning of the above rule. "Where a party substantially succeeds he is entitled to his costs."⁽¹⁴³⁾

(135) *Ram Chunder Chowdry v. Mariott*, 15 W.R. 465.

(136) *Cocper v. Wittingham*, 49 L.J. Ch. 752; 15 Ch. D. 501; *Jone v. Curling*, 13 Q.B.D. p. 265; *Upmann v. Forester*, 24 Ch. D. 231.

(137) *Civil Service Co-operative Society v. General Steam Navigation Co.*, (1903) 2 K.B. 756.

(138) *Mt. Uma Bai v. Mt. Kallu Bi*, 3 C.P.L.R. 185.

(139) *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, 18 B. 474.

(140) *Mt. Uma Bai v. Mt. Kallu Bi*, 3 C.P.L.R. 185.

(141) See *Cyclopædia of Law and Procedure*, Vol. XI, Heading "Costs," pp. 27, 28. The successful party in a suit is entitled to his full costs. This has been laid down from the earliest times, even as early as the days of the old Supreme Court. *Prem Chand*, then *Lal Chand*, *Brother and Heir v. Tarnae Shunkur Canoongoe*, 4 Sud. Dew. Adaw. Rep. Bengal (1848) 218=10 Ind. Dec. Old Series, p. 141. One out of several defendants, who is successful on the part of the defence in which he is personally interested, is entitled to his costs. *Anundchunder Banerjee v. Brindabun Dass*, (1854) 10 Sud. Dew. Adaw. Rep. (Bengal) 525=13 Ind. Dec. Old Series, p. 1154.

(142) See *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, 18 B. 474.

(143) *Per Sargent, C.J.*, in *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, 18 B. 474 (495).

Where the plaintiff succeeds in proving his allegation and gets any substantial relief, he would be entitled to his costs,—(as) where he asks for an injunction and gets damages.⁽¹⁴⁴⁾

Plaintiff would be held to have succeeded if he obtains any substantial relief from the Court, and would then be entitled to his costs.⁽¹⁴⁵⁾ In the above case of *Ghanasham v. Moroba* ^(145 a) the following remarks of Sargent, C.J., may be noted: "We think that the ordinary rule should be observed, and that costs should follow the event. What is the event in this case? It is obviously this, that the plaintiff has succeeded in proving his allegation. He has established his case against the defendant, although, no doubt, he has not got the precise form of relief which he desired. It is true that in his plaint he does not ask for damages as an alternative to an injunction. But he alleges that he has suffered an injury from the defendant, and he comes to the Court for redress. He has proved the injury. He has proved that he is entitled to some relief, and that being so I cannot see why he should be refused his costs, because, in the opinion of the Court, the extent of the injury proved may be sufficiently redressed by giving him damages rather than an injunction. It is to be observed that the defendant throughout has denied that the plaintiff has suffered any injury and has thus compelled him to prove his case. It is true that he paid Rs. 200 into Court; but in his written statement he says expressly that he believes that no damage has been done: that the plaintiff is not entitled to any damages whatever, and that the Rs. 200 are paid into Court merely for the sake of peace and to avoid litigation. Thus the defendant has put the plaintiff to prove his case, and the plaintiff has done so. I think if a party substantially succeeds he is entitled to his costs. The plaintiff must have his costs of the hearing in the Court below, and each party must pay his own costs of this appeal and of the proceedings on the rule for an injunction obtained before trial."

(144) *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, 18 B. 474 (494).

(145) *National Provincial Plate Glass Insurance Co. v. Prudential Assurance Co.*, 6 Ch. D. at p. 769 and *Holland v. Worley*, 26 Ch. D. 578 cited in *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, 18 B. 474 (494).

(145-a) 18 B. 474.

(146) *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, 18 B. 474 (494, 495). A party having sued for possession of an estate by dispossession of a mookurareedar and putneedar on a declaration of the invalidity of their tenures, the lower Court upheld

Failure of plaintiff on the ground of limitation set up by defendant, (147) and failure of plaintiff on the ground that the contract on which he based his cause of action was invalid, (148) are also deemed to be failures within the meaning of the above rule. So also failure on the ground of want of jurisdiction would make the plaintiff liable for costs. (148-a) The same rule would apply when the suit is dismissed for multifariousness (148-b) or on a plea of *res judicata*. (148-c)

As under ordinary circumstances costs should follow the event, when the lower Court does not act on this rule, it should give a sufficient reason for the order it makes. Where the reasons given by the lower Court for disallowing the costs of a successful plaintiff are not satisfactory, the High Court can interfere and reverse or modify the order of the lower Court as to costs. (149) A Court must

(b) What constitutes failure within the meaning of the above rule.

(iv) Court must give its reasons as to why its discretion is exercised in any particular manner.

those tenures, and decreed to the plaintiff merely superior, or proprietary possession. Held, that, as this was a substantial dismissal of the suit as regards the *mookurareedar* and *putneedar*, the costs of these parties in the action should have been thrown on the plaintiff; as also the costs of some co-sharers of the plaintiff, who (they having refused to join in the suit), were made defendants by him, and who filed answers, acknowledging the validity of the tenures. *Rajkishen Soor v. Jugdumba Dasea*, (1853) 9 Sud. Dew. Adaw. Rep. (Bengal) 307 = 13 Ind. Dec. Old Series p. 231. The following observations of the Court in the course of the judgment may also be noted: "The suit is for possession of an estate by means of the dispossession of the *mookurareedars* and the *putneedar*, and to declare their tenures void; those tenures are held good and valid by the lower Court, and the decision is against the plaintiff as regards the points in dispute. The costs of plaintiff as well as those of the defendants should therefore be laid upon plaintiff. The plaintiff further complains that, having made several of his co-sharers defendants *pro forma*, they appeared and filed answers; their costs have been also laid on the plaintiff, although their filing any answer was unnecessary. We cannot find any reason for thinking this portion of the decision wrong, as the parties were brought into Court without any fault of theirs. As they denied the validity of the plaintiff's claim, and that claim has been held on trial invalid, it would be unjust to make them pay their own costs. We therefore modify the order of the principal sudder ameen by making the costs of all parties, plaintiff and defendants, chargeable to the plaintiff." *Rajkishen Soor v. Jugdumba Dasea*, (1853) 9 Sud. Dew. Adaw. Rep. (Bengal) 303 (309) = 13 Ind. Dec. Old Series, p. 232.

(147) *Blashfield v. Blashfield*, 4 Hun. N.Y. 249.

(148) *Welling v. Inoroyd Mfg. Co.*, 15 N.Y. App. Din. 116. See also Ref. (151), *infra*.

(148-a) See cases noted in Note 133, *supra*.

(148-b) *Muthra v. Bundee*, 5 N.W.P. 20; *Kossella v. Beharee*, 12 W.R. 70; see also *Rooddūr v. Coomar*, 13 W.R. 320.

(148-c) The plea must be taken at an early stage of suit not after all evidence is taken; see *Ran v. Luchu*, 6 C. 406 = 7 C.L.R. 251.

(149) See the Judgment of Sundara Aiyar, J., in *Narayana Iyer v. Venkatrama Iyer*, (1912) M.W.N. 866 = 15 Ind. Cas. 202.

give some reason for its discretion in the matter of costs. A party disclaiming all interest in a suit, and unnecessarily made a party, is entitled to costs.⁽¹⁵⁰⁾

Where the plaintiff's suit is dismissed for want of a cause of action, defendant should be allowed his costs. The Court should

(150) *Shunt Buksh v. Lalla Nund Ram*, 11 W.R. 48. So also, where costs are referred to the taxing master for assessment, he should in all cases shew to both parties the reasons he is prepared to submit to the Court for disallowance of any item. *Dashwood v. Magniae*, (1892) W.N. 54 (Eng.). A Court may, however, direct that costs shall not follow the event, but if it does, it must be for good cause, and its reasons must be stated in writing. This is a provision enacted both to secure a proper exercise of discretion and in order that the Court of Appeal may be in a position to control the order. It is not possible to define what is good cause. The rule laid down in *Cooper v. Whittingham*, (15 Ch. D. 501) that "where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part, the Court cannot take away his right to costs," has been adopted in this country in *Kuppuswami Chetty v. Zamindar of Kalahasti*, 27 M. 341, 342 and by the Court of Appeal in England. But the same Court has held (*Forster v. Farquahar*, (1893), 1 Q.B. 564) that misconduct was not necessary to constitute good cause for depriving a successful plaintiff of costs. "Everything which increases the litigation and the costs, and which places upon the defendant a burden which he ought not to bear in the course of that litigation, is perfectly 'good cause' for depriving the plaintiff of his costs." (*Huxley v. West London Extension Ry. Co.*, 14 App. Cas. 32, *Per Halsbury, L.C.* See also judgment of Lord Watson at p. 33.) The Court may consider not merely the conduct of the party in the actual litigation, but may take into consideration matters which led up to it (*Per Lord Russell, C.J., Bostock v. Ramsay Urban District Council*, (1900), 1 Q.B. 360; (1900), 2 Q.B. 616.) Where a defendant has by his misstatements made under circumstances imposing an obligation on him to be truthful, brought litigation on himself, and rendered an action against him reasonable, there is good cause for depriving him of his costs. (*Per Fry, L.J., Sutcliffe v. Smith*, 2 Times Rep. 881.) If the action is frivolous or vexatious, the plaintiff may be deprived of costs (*Macgregor v. Clay*, 4 Times Rep. 715). If the Court thinks that the suit is a vexatious one and that no real damage has been sustained, it may give nominal damages to the plaintiff and award costs to the defendant, as in substance in such a case the defendant succeeds (*Futeek Parcoe v. Mohender Nath Muzoomdar*, 1 G. 335--333 (1876). In England the fact that only a farthing's damages is given, though not conclusive, is *prima facie* good cause; *Moore v. Gill*, 4 Times Rep. 738; *Myers v. Financial News*, 5 Times Rep. 42; *O'Connor v. Star Newspaper*, 68 L.T. 146. Similarly as to smallness of damage and recovery of small sum upon a large claim, *Wood v. Cox*, 5 Times Rep. 272; *Forster v. Farquahar*, (1893) 1 Q.B. 564. In *Mt. Bibee Moseehun v. Mt. Bibee Munoorun*, 24 W.R. 69 (1879), a plaintiff who secured nominal damages was given his costs.) Costs have been disallowed where a party acted with malice and malevolence, (*Kalee Pershad v. Ram Pershad*, 18 W.R. 14, (1872), the defendant having been found entitled to do what he did) as distinguished from mere hardness, in exercising a civil right, (*Muddun v. Alopedeen*, S.D.N.W. 1861, p. 569, cited in *O'Kinealy, C.P.O.*, notes to s. 220 of Act XIV of 1882). It is not possible to formulate any precise rules. As has been well said, "We can get no nearer to a perfect test than the enquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that the costs should follow upon success." (*Per Bowen, L.J. in Forster v. Farquahar*, (1893) 1 Q.B. 569). See Amir Ali's Civil Procedure Code, 1908, pp. 206--207.

generally state its reasons as to why it exercises its discretion in any particular manner.⁽¹⁵¹⁾

(151) *Damodar Khimji v. Dayal Mony*, 11 Bom. L.R. 1187=4 Ind. Cas. 283; *Narayana Gajapathi Razugaru v. Surappa Razu*, 3 M.H.C.R. 113 (115). This principle that the Court must give its reasons as to why its discretion as to costs is exercised in any particular manner was recognized and acted upon even from the earliest times. A reference to the reports of the decisions of the old Supreme and Sudder Courts shows that even in those days the principle was well established. The following are some of the more important of those decisions arranged in chronological order: A decision as to costs was annulled by the Supreme Court of Calcutta as the award of costs in that case was out of proportion to the sum decreed, and no reason given for the same. *Dayal Singh v. Buktawur Panday*, (1847) 7 Sel. Rep. 419=8 Ind. Dec. Old Series, p. 318. In this case the plaintiff sued the petitioner for two annas out of four annas of one third of talook Buddore; and he laid his plaint at rupees 2,286 and odd including *wasilat* and interest thereon up to the date of institution of suit. The plaintiff obtained a decree for the property from the Principal Sudder Ameen, but the amount of *wasilat* and interest was considerably reduced; nevertheless the defendant, petitioner, was charged with costs on the entire sum without reasons assigned for thus acting contrary to the usual practice of the Courts which is, in such cases, to award costs on the amount decreed. This decision was affirmed by the Judge. The appellate Court in remanding the case said,—“I admit the special appeal on the above grounds, and remand the proceedings to the Judge, who will either correct the error, or, in case he should be of opinion the entire costs are justly leviable from the petitioner, record his reasons for the same.” *Per C. Tucker, J., Dayal Singh v. Buktawur Panday*, (1847) 7 Sel. Rep. 419=8 Ind. Dec. Old Series, p. 318. A Judge must record his reasons for awarding or withholding costs against or to a party to a suit. *J. Chunder Butacharij v. M. C. Butacharij*, 3 Sud. Dew. Adaw. Rep. Bengal, (1847) 178=9 Ind. Dec. Old Series, p. 411. It has been held in a case before the Supreme Court at Calcutta in 1848 that where a defendant who has been exempted from all liability is not allowed his costs but made to bear his own, the reasons for such disallowance of his costs must be recorded. *Ishur Chunder Das v. Prankishen Mookerjee*, 4 Sud. Dew. Adaw. Rep. Bengal (1848) 424=10 Ind. Dec. Old Series, p. 291. The costs of the party liberated from all liability must be ordered to be paid by the party who may have wantonly forced him into Court. *Guresh Purshad Beyhane v. Messrs. French, Hodges & Co.*, 4 Sud. Dew. Adaw. Rep. Bengal (1848) 427=10 Ind. Dec. Old Series, p. 291. When a lower Court dismisses a plaint, yet charges a defendant with his own costs, the grounds upon which a defendant is so charged should be clearly explained in the decision. *Mt. Mukbool Fatimah v. Oomutul Fatimah*, 6 Sud. Dew. Adaw. Rep. Bengal (1850) 82=11 Ind. Dec. Old Series, p. 64. For a case where the case was remanded on the ground of an imperfect and apparently inconsistent award in regard to costs. See *Achumbit Lall Nuntah v. Kunhye Lall*, 6 Sud. Dew. Adaw. Rep. Bengal (1850) 84=11 Ind. Dec. Old Series, p. 65. For a case of remand on the ground of apparent want of equity, and insufficient statement of reasons, in the decree of the lower appellate Court as to costs. See *Baker Ali v. Mohummad Sunnah*, 6 Sud. Dew. Adaw. Rep. Bengal (1850) 254=11 Ind. Dec. Old Series, p. 201. For a case of remand, the lower appellate Court having charged the losing parties with fees on several vakalutnamahs, although not only the pleader, but also the defences were one and the same, see *Umurnath Soor v. Fugeerchand Dutt*, 7 Sud. Dew. Adaw. Rep. Bengal (1851) 603=11 Ind. Dec. Old Series, p. 971. For a case where there was a remand, the ground assigned for the refusal of costs on a suit decreed being manifestly against just legal principle, see *Mullick Naem v. Rutooah Singh*, (1851), 7 Sud. Dew. Adaw. Rep. Bengal 755=11 Ind. Dec. Old Series, p. 1091. In one case the decision of the lower Court was reversed

Where the reason given by the lower Court for disallowing the costs of a successful party is unsatisfactory, the High Court can interfere. (151-a)

(v) Exercise of discretion in proceedings conducted under Acts which are silent as to costs.

Courts have, under the general provisions contained in S. 35 of the Civil Procedure Code, the right to award costs even in cases tried under Acts, which contain no provision for the award of costs. It has been held that the Courts in England have a similar power conferred upon them by the corresponding provision of the English Statute. (152)

(vi) Exercise of discretion by ordering payment of a gross sum in lieu of taxed costs—Practice of Courts in England.

According to the practice of the Courts in England the payment of the costs of a cause will not be ordered without taxation; (153) “but, upon interlocutory applications, where the Court or a Judge thinks fit to award costs to any party, the Court or Judge may by the order direct payment of a sum in gross in lieu of taxed costs, and direct by and to whom such sum in gross is to be paid. (154) The Court does not, however, usually order a sum in gross to be paid for the costs of interlocutory applications which are heard in open Court, unless the parties are poor and anxious to put an end to the

on the point of costs; the decision having been founded on a rufunamah and solehnamah, but having made an award of costs contrary to the tenor of those instruments. *Prankishen Dass v. Munhuwry Dassea*, 7 Sud. Dew. Adaw. Rep. Bengal (1851) 57=11 Ind. Dec. Old Series, p. 549. For a case of remand for a new order regarding costs of the regular appeal, that having been formally relinquished by the plaintiff, see *Maharaj Koonwur Baboo Beer Pertaub Sahoe v. Munraj Singh*, (1852) 8 Sud. Dew. Adaw. Rep. (Ben.) 971=12 Ind. Dec. Old Series, p. 753. For a case of remand where full costs were awarded on a partial judgment without assignment of reasons, see *Musst. Arman Bebee v. Ramshunker*, (1852) 8 Sud. Dew. Adaw. Rep. (Bengal) 768=12 Ind. Dec. Old Series, p. 596. For a case of remand for a new decision to be passed by the lower appellate Court, with reference to certain specific instructions as to costs given by the order of remand, see *Goluk Chunder Sein v. Sobhanea Mullick*, (1852) 8 Sud. Dew. Adaw. Rep. (Bengal) 2=12 Ind. Dec. Old Series, p. 2. For a case of remand where the lower appellate Court passed no order for the costs of the respondent and gave no reasons for such omission to make the order, see *Maharaja Dheeraj Muhtabchund v. Syed Hossein Alee*, (1854) 10 Sud. Dew. Adaw. Rep. (Bengal) 226=13 Ind. Dec. Old Series, p. 927. An omission to award costs is not a clerical error, but must be rectified by way of review within the prescribed time, *Ramsahoy v. Rookhoo*, 15 W.R. 414. See also cases noted under Note (124), *supra*.

(151-a) *Narayana Iyer v. Venkatarama Iyer*, (1912) M.W.N. 386=15 Ind. Cas. 202.

(152) The Judicature Act, 1890, S. 5. See also the judgment of Lindley, L.J., in *In re Fisher*, (1894) 1 Ch. at p. 452.

(153) *King v. K.*, 1 Jur. N.S. 972.

(154) O. LXV, 23. See *Stahlschmidt v. Lett*, 7 Jur. N.S. 1271.

matter.⁽¹⁵⁵⁾ In the case of proceedings at chambers, a sum in gross is often ordered to be paid.⁽¹⁵⁶⁾

Where a statute expressly gives a Court or Judge a discretion (viii) as to costs, the exercise of such discretion cannot be delegated.⁽¹⁵⁷⁾ Discretion of Court in the matter of awarding costs cannot be delegated to others. Thus, it has been held that a Judge cannot delegate to a master the discretionary power of allowing costs on the higher or lower scale.⁽¹⁵⁸⁾

If the plaintiff only obtains part of the relief asked for in his plaint he should not, as a general rule, be allowed full costs.⁽¹⁵⁹⁾ Partial success—Costs in proportion.

Costs are not consequential upon partial relief being granted in a suit, involving a much larger subject-matter, a portion of which is still *sub-judice*.⁽¹⁶⁰⁾

But it is not correct in law or justice to say that costs must be invariably awarded in proportion to the amount decreed and dismissed.⁽¹⁶¹⁾

The Court can exercise the largest discretion in the matter; but this discretion is to be exercised with special reference to all the circumstances of the case, special reference being had to the conduct of the parties.⁽¹⁶²⁾

(155) *London and Blackwall Ry. Co. v. Limehouse Bd. of Works*, 26 L.J. Ch. 164; see, however, *Yearsley v. F.*, 19 Beav. 1; *Dakins v. Garratt*, 4 Jur. N.S. 579; *Gover v. Stilwell*, 21 Beav. 182.

(156) *Seton*, 259.

(157) *Lambton v. Parkinson*, 35 W.R. 545 (Eng.).

(158) *Corticene Floor Covering Co. v. Tull*, 27 W.R. 373 (Eng.), C.A. Where a defence had been admitted, the Judge ordered that all proceedings should be stayed, each party to bear his own costs, except such as the master found were occasioned by any proceedings unnecessarily taken by the plaintiff:—*Held* that this was no delegation of the Judge's discretion to the master. *Musman v. Boret*, 66 L.T. 171; 40 W.R. 352. *Cf. Leigh, In re, Rowcliffe v. Leigh*, 26 W.R. 729 (Eng.).

(159) *Mckenzie v. Hackstaff*, 2 E.D. Smith (N.Y.) 75.

(160) *Rajah Leelanund Singh v. The Court of Wards*, 14 W.R. 387. Where a plaintiff has asked for a sum which is in excess of what the Court holds him entitled to, and to which a lower rate of pleader's fee or of stamp-duty applies than to the rest of the claim, the defendant, who succeeds in that part of the case, is entitled to recover the costs applicable to that particular part of the subject matter. (Bayley, J., dissenting). *Bamascondery v. Rogers*, 7 W.R. 127. N.B.—This case was upheld on review in 8 W.R. 55.

(161) *Sheo Dyal Tewaree v. Judocnath Tewaree*, 9 W.R. 61.

(162) (*Ibid.*).

Where a special appellant to the High Court fails as to a portion of his appeal, the costs of that Court are decreed against him.⁽¹⁶³⁾

In some cases, it has been suggested that, in the absence of any provision of the legislature to the contrary, where each party succeeds on one or more of the issues or causes of action, the plaintiff having obtained a judgment for part of the relief prayed, should as the prevailing party, be entitled to costs.⁽¹⁶⁴⁾ In accordance with this view their Lordships of the Bombay High Court expressed an opinion that "A man may sue for Rs. 5,000 in damage for an alleged wrong, and only be awarded Rs. 3,000, but that is not to be considered a ground for depriving him of his costs."⁽¹⁶⁵⁾

Where a suit for damages was partially decreed on a finding of nominal damages, and costs on the amount undecreed were awarded to the defendant with interest, it was held that there was no good reason for such a course, and no ground of justice for saddling the plaintiff with defendant's costs.⁽¹⁶⁶⁾

(163) *Heera Ram Bhutiacharjee v. Ashruf Ali*, 9 W.R. 103. Costs must be decreed only against the parties to the suit (*Jointes Chunder v. Anunto Lall*, 14 W.R. (O.A.) 1) and where there are more than one plaintiff or defendant having distinct interest, the costs must be apportioned proportionately between them. *Bhup Singh v. Zain ul-Abdin*, 9 A. 205. But, where the interests of the parties are separate and distinct, a separate set of costs may be allowed to each. *Kossella Koer v. Beharee*, 12 W.R. 70; but see *Pearce Mohun v. Mirza Gasse*, 11 W.R. 270. And the Calcutta High Court has allowed costs of two counsels engaged by a purchaser, against whom allegations of improper conduct were made by the other party. *In the matter of Beer Nursing Dutt*, 24 C. 891. The uniform practice in the Madras Presidency is to award costs only on the amount decreed. (*Velu v. Ghose Mahomed*, 17 M. 293). It is in accordance with the view of the Privy Council that, if an appeal in substance fails, costs should generally be thrown on the appellant, notwithstanding that the decree has had to be partially modified. (*Jafri Begum v. Syed Ali*, 23 A. 383 (393, 394) (P.C.). An item of costs accidentally omitted from the schedule may be added even after the decree has been executed. (*Ghessum & Son v. Gordon*, (1901) 1 Q.B. 694; S. 206, Civil Procedure Code, Act XIV of 1882.) As to the practice of Courts in awarding proportional costs on partial success or partial failure, the following cases may also be usefully referred to; *Ram Chunder v. Mariott*, 15 W.R. 465; *Shib Pershad v. Gunga Monee*, 16 W.R. 291; *Leekie v. Joygobind*, 7 C.L.R. 114; *Tarachand v. Jadonath*, Marsh 79=1 Hay 141=1 Ind. Jur. O.S. 102; *Radha Pershad v. Ram Parmeswar*, 9 C. 797=13 C.L.R. 22; *Harender v. Advocate-General of Bengal*, 12 C. 357; *Jetha v. Gulraj*, 8 B. 577; *Mohendra Chandra v. Ashulosh*, 20 C. 762; *Luzumon v. Moroba*, 21 B. 502.

(164) See *O'Brien v. Dunlop*, 5 Me. 281, cited in *Cyclopaedia of Law and Procedure*, Vol. XI, Heading "Costs," p. 21.

(165) See *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pat*, 18 B. 474 (494).

(166) *Mussamut Bibee Moseehun v. Mussamut Bibee Munoorun*, 24 W.R. 69.

The following observation of Phear, J., in the course of the judgment may also be noted: "The plaintiff, after a very long harassing course of litigation, has at least succeeded in recovering something. He is certainly entitled to his costs, and there is no ground of justice, so far as we can see, upon which he ought to be made, not only to pay the costs of the defendant, but to pay those costs upon a very substantial estimate. We therefore think that the decree of the lower appellate Court must be varied in this particular. The order for recovery of costs in favour of the plaintiff must extend to all the Courts and the order in favour of the defendant must be omitted. The appellant will have his costs of this Court." (167)

The fact that a suit eventually decreed by the Subordinate Judge for less than 1,000 rupees would have been cognizable by the Moonsiff's Court is no ground for dismissing it, although it is a ground for providing that plaintiffs should not be allowed any more for costs than they could have recovered if they had sued in the Moonsiff's Court. (168)

Courts of equity, by virtue of the discretion universally vested in them by statute have power, in a proper case, to apportion the costs between the parties; (169) and their action in apportioning costs, (170) or in denying a motion for apportionment, (171) will not be disturbed by a Court of appeal, unless it appears from the facts disclosed by the record that there was an abuse of discretion. (172) In equity, where both parties are successful in part the Court may, it has been held, refuse to allow costs to either, (173) or apportion the costs between them as it may, in its discretion, deem fit. (174)

Where on a suit and cross suit, plaintiff in the original suit, mainly succeeded, although each party claimed more than he was

(167) *Mussamut Bibee Moseehun v. Mussamut Bibee Munoorun*, 24 W.R. 69.

(168) *Joy Kishen Doss v. J. N. Turnbull*, 21 W.R. 137. S. 4 of the Rules regarding pleaders' fees does not lay down that, in cases partly decreed and partly dismissed, the portion of the claim as to which judgment is given for the defendant is to be treated as if the defendant had claimed that sum from the plaintiff, and got a decree for it. *Bamasoondery v. Rogers*, 7 W.R. 127, upheld on review in 8 W.R. 55.

(169) *Randolph v. Rossar*, 7 Port 249.

(170) *Bush v. Yeoman*, 20 Iowa 479.

(171) *Koestenbader v. Pierce*, 41 Iowa 204.

(172) *Cyclopædia of Law and Procedure*, Vol. XI, Heading "Costs."

(173) *Phy v. Clark*, 35 Ill. 377.

(174) *Stewart v. McLaughlin*, 11 Colo. 458; 18 Pac. 619.

entitled to, plaintiff in the original suit was allowed the costs therein, and neither party was allowed costs as to the cross suit. (175) In Courts of equity where each party succeeds as to one or more of the causes of action or issues the allowance of costs is within the sound discretion of the Court. Where each party succeeds as to part of the causes of action or issues, the Court denies costs to either as against the other, (176) or the costs may be apportioned between the parties. (177) It may sometimes happen that the fact that a plaintiff succeeds on one ground and fails on another is not of itself sufficient reason for refusal to allow him costs in equity. (178) Where defendant who has filed a cross claim recovers an amount equal to, (179) or in excess of, plaintiff's claim, and judgment is rendered in favour of the defendant, he may be entitled to costs from the plaintiff. (180)

An order decreeing to plaintiff his costs in proportion must be taken to mean as if costs were given in proportion to the amounts decreed and dismissed. (181)

Therefore except where there is a distinct order restricting costs to the plaintiff, the defendant is entitled to his costs on the portion of the claim dismissed, although the order does not in words provide for it. (182)

(175) *Craig v. Tappin*, 2 Sandf. Ch. (N.Y.) 78 ; *Ghanasham Nilkanti Naalkarni v. Moroba Ramchandra Pai*, 18 B. 474 ; *Mussamut Bibee Moseehun v. Mussamut Bibee Munoorun*, 24 W.R. 69.

(176) *Tucker v. Utica*, 35 N.Y. App. Div. 173.

(177) *Strayer v. Stone*, 47 Iowa 333.

(178) *Gaylord v. Goodell*, (Mass. 1899) 53 N.E. 275.

(179) *Maulsby v. Church*, Wils. (Ind.) 362.

(180) *Davis v. Hurgren*, 125 Cal. 48 (American).

(181) *Ram Suhaye Singh v. Oodeet Singh*, 4 W.R. 9.

(182) *Ram Suhaye Singh v. Oodeet Singh*, 4 W.R. 9. The following are some of the more important of the cases which were decided in the early days of the old Supreme and Sudder Courts, wherein the principle of awarding costs in proportion in case of partial success was adopted. In some of these cases, the success, though partial, costs were awarded in full. That was on account of the special circumstances of such cases. These cases were collected from the reports of the decisions of those Courts. The cases are arranged in their chronological order. A, an officer of Police, illegally though for a short time, arrested B, and offered to strike him. On B's suit for damages, laid at 10,000 Rupees, 100 Rupees are awarded and a rateable share of costs only allowed. *Manir-ud-din v. Jai Sankar Sandial*, (1832) 5 Sel. Rep. 271=7 Ind. Dec., Old Series, p. 539. The plaintiff having agreed to receive a fixed sum from the defendant as damages for an assault and false imprisonment, which sum the defendant failed to pay, the plaintiff sued for damages in excess of the amount agreed upon between the parties. The Sudder Dewanny Adawlut, under the circumstances, gave judgment for the plaintiff

The following are some of the important points that may be considered by Courts in the matter of awarding costs:—(i) Conduct of the parties, (ii) Manner of conducting suit, (iii) The fact that the suit itself was instituted without demand made of the

What may or may not be considered in determining question of costs:—(i) Conduct of parties (a) in the course of the litigation.

for the amount he had originally consented to receive, together with all costs of suit. *Muthoornath Mullick v. Mr. Marshall Collyer*, (1839) 6 Ssl. Rep. 345=7 Ind. Dec. Old Series, p. 925. If a plaintiff in ejectment recovers any portion of the premises for which the action is brought he is entitled to his whole costs. *Doe Dem. Ramonoo Mookerjee v. Bebee Jeenuat*, (1843) Fulton 256=1 Ind. Dec. Old Series, p. 796. In a suit for possession with mesne profits, plaintiff had succeeded only in part, and yet the Judge had awarded costs on the claim as laid in the plaint. He had also not given any reason for disallowing various objections put forward by the defendant as regards items of collections and disbursements. The judgment was reversed and the case remanded for consideration on these grounds. *Musst. Jumoona v. Anund Chowdrain and Bharut Chunder*, 2 Sud. Dew. Adaw. Rep. Bengal (1846) 396=9 Ind. Dec. Old Series, p. 241. Where a plaintiff succeeds in his claim only in part, the Court will generally give him only proportionate costs. *Nubungmoni Dasi v. Takoordass Sein*, 3 Sud. Dew. Adaw. Rep. Bengal (1847) 59=9 Ind. Dec. Old Series, p. 314. Costs should be given only in proportion to the amount of *wasilat* decreed in plaintiff's favour and not on the whole amount claimed by them. *K. Chundur Rase v. N. C. D. Chowdrain*, 5 Sud. Dew. Adaw. Rep. Bengal (1849) 113=10 Ind. Dec. Old Series, p. 724. Where two persons claim an equal share in certain property and the claim of one is dismissed, the Court cannot require the defendant to pay the whole of his own costs, but should order the person whose claim has been dismissed to pay a proportionate share of the defendant's costs. *Mudun Mohun Manik v. Kotwal Nurhuree Manik*, 5 Sud. Dew. Adaw. Rep. Bengal (1849) 294=10 Ind. Dec. Old Series, p. 865. This was a case of remand on the ground that the award of the lower appellate Court as to costs appeared to be inconsistent and defective. *Lala Ram Buktsh Singh v. Moyaram Tewaree*, 6 Sud. Dew. Adaw. Rep. Bengal (1850) 362=11 Ind. Dec. Old Series, p. 296. As to a case of remand on the ground that the award of the lower appellate Court as to costs was inconsistent with the main principle of its decision. See *Govind Dass v. Kishen Koond*, 6 Sud. Dew. Adaw. Rep. Bengal (1850) 377=11 Ind. Dec. Old Series, p. 308. For a case of remand, on the ground that costs were charged on the whole amount of a plaint, although less than half such amount was decreed. See *Captain John Ludevick v. Thakoortuktsh Tewaree*, 7 Sud. Dew. Adaw. Rep. Bengal (1851) 419=11 Ind. Dec. Old Series, p. 823. A plaintiff, however, abandoning so much of his case as rests on possession or dispossession, must pay all the costs incurred by the defendant as well as himself in adducing evidence on that point. *Rajah Rajnarain Roy v. Jugunnath Pershad Mullick*, 7 Sud. Dew. Adaw. Rep. Bengal (1851) 774=11 Ind. Dec. Old Series, p. 1107. When a less sum is decreed than the amount sued for, costs will be charged to the losing defendant according to the amount decreed against him. Under this rule where the amount decreed is so diminished as to affect the stamps, and pleader's fees, the losing defendant will only be charged according to the diminished amount but not otherwise. *Lokenauth Holdar v. Teetooram Holdar*, 9 Sud. Dew. Adaw. Rep. Bengal (1853) 902=13 Ind. Dec. Old Series, p. 683. For a case of remand on the ground that the lower appellate Court erroneously awarded the payment of costs to the Collector, only in proportion to the amount decreed, although it admitted that the Collector had improperly been made a party to the suit. See *Musst. Jugdeemba v. The Collector of Chittagong*, 9 Sud. Dew. Adaw. Rep. Bengal (1853) 810=13 Ind. Dec. Old Series, p. 616.

defendant.⁽¹⁸³⁾ As stated by Daniell in his Chancery Practice (7th Ed., Vol. I, p. 973) : "The Court regards, in some respects, the

(183) *Suddasook Koolary v. Ram Chunder*, 17 C. 620 (630). As to the materials on which the Court can act and on which the Court cannot act in the matter of awarding costs. See Yearly Practice, 1914, pp. 1042, 1043.

Certain points considered by Courts in the matter of exercising their discretion in awarding or withholding costs :—(i) Exaggerated claim—Settlement not attempted—Non-payment of admitted amount.

Where the plaintiff has monstrosly exaggerated his claim and no attempt was made to settle matters without coming into Court and the defendant has not paid into Court the amount admittedly due by him, costs should not be made payable in proportion to the amounts decreed and dismissed ; but each party should be made to bear their own costs. Where the plaintiff is entitled to some part of his claim, it could be manifestly improper to take away from him the entire benefit of the decree, by passing an order for costs which would make him liable to the defendant for a larger sum than that which he himself will recover. *Ram Chunder Chowdhry v. E. M. Mariott*, 15 W. R. 465. Their Lordships said in the course of the judgment : "There remains the question of costs. It has been argued on the part of Government that this suit was brought without the slightest foundation ; that it was a monstrosly exaggerated suit ; that no attempt was made to settle matters without coming into Court ; and that the Government were bound to come in and defend their interests, as the plaintiff had made it impossible by his exorbitant demands to come to any settlement. The Government Pleader, therefore, contends that the usual rule in cases in which the decision of the lower Court is partly upheld and partly reversed should be followed, namely, that the costs should be made payable in proportion to the amounts decreed and dismissed. On the other hand, it is contended that the Government, though knowing of the claim made and admitting that a certain portion of it, at all events, was correct, there being no denial on the part of the Commissariat Officer that the Government elephants had been fed on the plaintiff's jheel, made no attempt to settle that portion of the case, and did not even pay into Court the value of the due admitted to have been used for 10 days, but forced the plaintiff to come into Court. We think that, on the whole, the fairest way would be to order that each party should bear their own costs. Had the defendant endeavoured to put a stop to this litigation, and offered to pay into Court the amount due on account of the 10 days forage, we should have had no hesitation in ordering that the costs should be fixed in proportion to the amounts decreed and dismissed on either side ; but to do so in this case would be to take away every advantage which the plaintiff will get from this decree, and to give the Government a pecuniary benefit to which it is not entitled ; for on a calculation made by us of the costs as they would be on this basis, we find that the Government would be a gainer, although it loses the suit, by some 20 or 30 rupees. Now, as we think that the plaintiff is entitled to some part of his claim, it would be manifestly improper to take away from him the entire benefit of the decree, by passing an order for costs which would make him liable to the defendant for a larger sum than that which he will himself recover. We, therefore, modify the order of the Judge as above stated, and direct that each party bear his own costs." *V. Ram Chunder Chowdhry v. E. M. Mariott*, 15 W. R. 465 at p. 467. In the case of *Lachmeswar Singh v. Manowar Hossein*, 19 C. 253 = 19 I. A. 48 = 6 Sar. P.C.J. 133, the Privy Council refused costs as the defendant had set up as his defence an exclusive title in which he had failed. In the course of the judgment His Lordship Hobhouse, J., said : "The costs of the suit have been seriously aggravated by the defendant's claim of exclusive ownership ; and as this claim is unfounded, he ought not to have the costs which otherwise would have been awarded to him. Throughout this litigation the plaintiffs have been asking too much and the defendant conceding too little. There should be no costs in any of the Courts, nor of this appeal." In a suit on a mortgage against the executrix under the will of the mortgagor, who was entitled to a life-estate in the property, where the reversioners under the will who were also

granting of costs to a party somewhat in the light of testimonial for good conduct."

joined as defendants, besides pleading that they were not necessary parties, also contested the claim in the suit, the Court decreeing the claim in full against the executrix alone should award the reversioners as costs, the pleader's fees, not upon the full amount of the claim, but upon one-half of it, as they had also disputed the plaintiff's claim. *Tara Prosunno Mukerjee v. Satishchandra Singh*, 4 C.W.N. 90. In the course of the Judgment their Lordships Banerjee and Gordon, JJ., said: "The power, given by S. 220 of the Code of Civil Procedure (1882) to a Court to apportion costs in any manner it thinks fit, must, under the authorities, be taken to be subject to the controlling power of the appellate Court. But the contention raised on behalf of the respondents is that they were unjustly sought to be made personally liable for the claim in the first prayer of the plaint, and that therefore they were right in entering appearance and were entitled to costs. If their defence had been confined to that one point, namely, that they were not personally liable for the claim and had been unnecessarily made parties, the order, made by the Court below, would not have been open to question; but, as it is, in addition to that ground of defence, the defendants Nos. 2 and 3 disputed the plaintiff's claim upon other grounds in common with the defendant No. 1, and so far as that part of their defence went, they were unsuccessful. That being so, we think, under the circumstances of the case, the proper order for costs was to award them pleader's fees, not upon the full amount of the claim, but upon one half of that amount; and we accordingly reduce the amount of costs awarded to the respondents in that way. Under the circumstances of the case we think the proper order for costs in this appeal will be that the parties bear their own costs." *Tara Prosunno Mukerjee v. Satish Chandra Singh*, 4 C.W.N. 90 (91).

Costs occasioned by the successful appellants' own delay in prosecuting the appeal was disallowed by the Privy Council in the case of *Kedar Lal Marwari v. Bishen Pershad*, 31 C. 332 (P.C.)=8 C.W.N. 609=8 Sar. 599=31 I.A. 57. In the course of the judgment, His Lordship MacNaghten, J., said: "The Dewan's representatives will pay the costs of the appeal. Their Lordships observe that the Record in this case was received in December 1900, but that the case was not set down for hearing till September 1903. They have accordingly directed the Registrar to disallow to the appellants any costs which, in his view, may have been occasioned by delay on the part of the appellants in prosecuting the appeal." In the case of *Gharibullah v. Khalak Singh*, 25 A. 407 at p. 417=30 I.A. 165=5 Bom. L.R. 478=7 C.W.N. 681, their Lordships of the Privy Council said: "The respondents must pay the appellant's costs of this appeal exclusive of the costs of restoring the same, and in view of the great delay which took place in the prosecution of the appeal, their Lordships direct that the appellant only be allowed such costs as he would have incurred if he had prosecuted his appeal with due diligence." An amendment of a decree by allowing the decree-holder the costs of all the remands that took place in the case in which the decree was passed, cannot be made on an application by the decree-holder made after the lapse of 3½ years, and after one of the Judges who made the order had ceased to be a Judge of the Court. *Oodoy Tara Chowdhrair v. Syed Jonab Ali Chowdhry*, 17 W.R. 358. In the course of the judgment in the above case their Lordships said: "It now appears that, prior to the appeal on which that decree was made, there had been several other appeals to this Court, and several remands to the lower Court, and the contention of the present appellant is that the costs incurred by her in the lower Court, and referred to in the decree of February 1868, ought to include all costs incurred in the course of the several remands. The appellant, in fact, comes in now after the lapse of 3½ years, and when one of the Judges who made the order has for some years ceased to be judge of this Court, to ask us to amend the decree of February 1868, by adding that she is to get the costs of (ii) Delay in prosecuting suit or appeal.

In *Cooper v. Whittingham*, 15 Ch. D. 501, the law as to award of costs was laid down by Jessel, M. R., thus (at page 504):

all the remands. It seems to us that after such delay, we cannot make such an order; and it is perfectly impossible for us to say now whether the appellant has any good ground for the contention which she now makes, that she ought to have had these costs. If the appellant considered that she was entitled to them, it was her duty, or that of her pleader, to see that they were expressly provided for by the decree, or to come in within a reasonable time, and ask to have the decree amended." *Oodoy Tara Chowdhrair v. Syed Jonab Ali Chowdhry*, 17 W.R. 358 (359). In the case of *Girdhari v. Sital Prasad*, 11 A. 372 (374) = A.W.N. (1889) 113, his Lordship Straight, J., held that though the plaintiff's claim was not barred by limitation, still, looking to the great delay there has been on his part, he should not be allowed any costs. His Lordship said in the course of the judgment: "Under these circumstances I do not think that the application of the appellants of the 11th June, 1887, was barred by time, and accordingly reversing the decisions of the Courts below, I direct that the Munsif of Etah restore this application to his file of pending applications and dispose of it according to law. But looking to the very great delay that there has been on the part of these appellants, and to the fact that they waited till within two days of the expiry of the three years from the date of the decision of this Court, I should certainly not allow them any costs in this matter. Each party will pay their own costs." N.B.:—This case was followed by the Court of the Judicial Commissioner of the Central Provinces in the case of *Dhannoo v. Antoba*, 12 C.P.L.R. 49 at p. 51. In one case the value of the property in the suit instituted in the Court of a Subordinate Judge was more than Rs. 5,000. The District Judge, after decreeing an appeal from such suit, remanded it for re-trial. The Subordinate Judge, who had previously decreed the suit dismissed it on re-trial. The plaintiff applied to the High Court to set aside the order of remand. His petition was dismissed on the ground that he should have proceeded by way of appeal to the High Court. He then filed a special appeal. Held, that all the proceedings of the lower Courts including the order of remand were illegal, but that the plaintiff was not entitled to costs as he did not appeal before the lower Court decided the case on remand *de novo*. *Tukee Ali v. Saadut Ali*, 5 N.W.P. 137. In reversing the decree of the Sudder Court, the order of that Court that the costs of the application to re-admit the appeal should be paid by the appellants, was confirmed by the Privy Council; but as the appellants were successful in obtaining a reversal of the decree of the Court below, the costs of the appeal in England against such decree were ordered to be paid by the respondents. *Anundmoyee Dossee v. Poornoo Chunder Roy*, 9 M.I.A. 26 at p. 38. Where there is a considerable delay (delay of seven years in the present case) in setting down an appeal for hearing in Privy Council a successful appellant will not be allowed costs unless he clears his imputations of having needlessly protracted the proceedings. *Nanda Lal v. Jagat Kishore*, 20 M.L.T. 335 (P.C.).

(iii) Untenable grounds of appeal joined with tenable ones to bring the case within the rule authorising an appeal to Privy Council as of right.

If grounds of appeal which are absolutely untenable are joined with grounds which are tenable, in order to bring a case within the rule as to the value authorizing an appeal as of right, this matter may be considered in regard to the question of costs. (*Hurro Durga v. Surat Sundari*, 8 C. 332 (P.C.) = 9 I.A. 1 = 6 Ind. Jur. 146 = 4 Sar. P.C.J. 304). The Court said in the course of the judgment: "Their Lordships cannot encourage the joinder of grounds of appeal which are absolutely untenable with grounds which are tenable in order to bring a case within the rule as to value which authorizes an appeal as of right. In the present case the effect of so doing has been a large increase of costs to the respondent. The appellant has thereby disentitled herself to the benefit of the rule under which a successful appellant is ordinarily entitled to the costs of the appeal. (*Hurro Durga v. Surat Sundari*, 8 C. 332 at p. 327 (P.C.) = 9 I.A. 1 = 6 Ind. Jur. 146 = 4 Sar. P.C.J. 304).

"Where a plaintiff comes to enforce a legal right and there has been no misconduct on his part, no omission or neglect which would induce the Court to deprive him of his costs, the Court has no discretion and cannot take away the plaintiff's right to costs."

Where the Subordinate Judge awarded a fourth share to the plaintiff (adopted son), and the defendant (natural son) in his appeal to the District Court did not raise any question about the correctness of that award, but contended in second appeal that, under any circumstances, the plaintiff was entitled only to a fifth share, *held* that, under the circumstances and having regard to the nature of the question, the point might be allowed in the second appeal, but that the appellant could not be allowed the costs of the appeal. (*Giriapa v. Ningapa*, 17 B. 100). In the case of *Nagesh v. Guru Rao*, 17 B. 303 (306) their Lordships Jardine and Telang in varying the decrees of the lower Court in favour of the appellant said: "But as this point was made for the first time in this Court, the appellant cannot be allowed the costs of this appeal."

When an objection as to non-maintainability of the suit was not put forward in the first Court, or in the second Court, nor was anywhere raised by any of the parties, *held*, in second appeal, that each party must bear his own costs. *Rughu Nundun Rain v. Sumessar Panday*, 13 B.L.R. 489=22 W.R. 235.

In the case of *Joynarayan Singh v. Mudhoo Sudun Singh*, 16 C. 13 (16), their Lordships Wilson and Rampini, JJ., said: "We find that this objection to jurisdiction was never taken in the first Court. It was not taken in the grounds of appeal to this Court, and indeed it was raised by the Court itself, and not by either of the parties. Under these circumstances, we may fairly set the order aside without costs."

In the case of *Beni Madhab Christian v. Raj Chandra Pal*, 2 Ind. Cas. 202=14 C. W.N. 141, their Lordships Chitty and Carnduff, JJ., said: "A pure question of law may be urged for the first time in a second appeal, though the fact that the appellant had not previously pressed it may be considered in awarding or refusing costs." Their Lordships further observed in the course of the judgment:—"It appears to be the fact that Mohim Chandra Mandal was a *raiyat*, and that the sub-tenancy he purported to create in favour of the plaintiffs was a permanent one. It may be noticed that although these defendants raised this plea in their written statements, it was never referred to in the Court of first instance, nor in the lower appellate Court when the appeal was first before it. It is, however, a pure question of law, and, therefore, might, we think, be urged for the first time in second appeal, though the fact that defendants had not previously pressed it might be considered in awarding or refusing costs." *Beni Madhab Christian v. Raj Chandra Pal*, 2 Ind. Cas. 202=14 C.W.N. 141.

Costs may not be allowed where the plea of *res judicata* was not raised until after all the evidence had been taken. *Run Bahadoor Singh v. Lucho Koer*, 6 C. 406=7 C.L.R. 251. The Court said in the course of the judgment: "Upon the whole, therefore, though with regret, we feel we are bound to hold that the judgment in the rent-suit on the substantial issue of separation must be regarded as *res judicata* governing the present suit, and we must, therefore, affirm the decision of the Court below; though we differ from its judgment both on the merits and on the question of estoppel, but as the plea of *res judicata* was not raised until after all the evidence had been taken and great expense incurred, we think each party should bear his and her own costs both in this Court and in the Court below, and we direct accordingly." *Run Bahadoor Singh v. Lucho Koer*, 6 C. 406 (418)=7 C.L.R. 251.

There may be misconduct of many sorts; for instance, there may be misconduct in commencing the proceedings or some

(ix) Want of objection by respondent for inclusion of unnecessary matter in record by appellant.

In the recent case of *Bijoy Gopal Mukerji v. Srimati Krishna Mahishi*, 9 Bom. L. R. 602=11 C.W.N. 424=5 C.L.J. 334=2 M.L.T. 133=17 M.L.J. 154=4 A.L.J. 329=34 C. 329, the Privy Council did not deprive the successful appellant of any part of his costs, for the inclusion in the record of a bulk of papers absolutely irrelevant to the appeal, as the respondent did not object to their inclusion.

(x) Unnecessary costs of successful defendant.

The costs which a defeated plaintiff should be required to pay, should be only the costs necessarily incurred by the successful party in the defence of the suit. Costs cannot be deemed necessary, if by reasonable diligence on the part of the defendant or his pleader the expenditure of them could have been avoided. *Seeta Patta Mahadevi v. Suryudama*, 18 M. 128. (*Per Shephard, J.*)

(xa) Unnecessary costs—Expense of witness—Service of summons on wrong person.

In a suit brought by the plaintiffs against A, the summons was by mistake served upon B, who thereupon filed a written statement denying his liability and alleging that he was erroneously described in the title to the plaint. On the day of the hearing of the case the plaintiffs' agent saw B for the first time, and ascertained that he was not the real defendant in the suit. *Held*, that B having done nothing to mislead the plaintiffs as to his identity, was entitled to his costs of suit. (*London, Bombay & Mediterranean Bank v. Mahomed Ibrahim Parkar*, 4 B. 619.)

(xb) Suit caused by conduct of defendant.

It is right that the plaintiff should recover the whole of the costs which she has incurred in the suit into which she was forced by the defendants for the recovery of her property, although the whole amount of the claim was not decreed to her. *Shib Pershad Chuckerbutty v. Gungamonee Debee*, 16 W.R. 291. His Lordship Jackson, J., said in the course of the judgment:—"Lastly, it is said that the Judge was wrong in giving the plaintiff a decree for her full costs when the whole amount of the claim was not decreed. Looking to the whole of the circumstances of the case, we think that the Judge was right to give the plaintiff her costs. There seems to be no doubt upon the evidence that the plaintiff, who, as a widow, is entitled to look to these defendants to support her and maintain her, has been turned out of her house and deprived of her share in the property by them; and even though she has not been able to satisfy the Judge as to each item of property for which she sued, it is right that she should recover the whole of the costs which she has incurred in a suit into which she was forced by the defendants for the recovery of her property." *Shib Pershad Chuckerbutty v. Gungamonee Debee*, 16 W.R. 291 (293). Where the amount under a decree was available for payment on the joint application of T, the decree-holder, and one R whose name had also been registered as a decree-holder, because a moiety of the amount belonged to him; and the latter sued the former owing to whose passive opposition, the decretal amount which was in Court's deposit could not be drawn, *held* that the claim must be decreed with costs. *Ajodhya Doss v. Muthoorra Doss*, 23 W.R. 14.

(xi) Where defendant's admission and conduct induced the supposition of his liability for a claim.

Where a party's admissions and conduct induced the supposition of his liability for a claim, the Court refused him his costs, although the suit against him founded on such claim was dismissed. *Sree Nath Roy v. Goluck Chunder Sein*, 15 W.R. 348. Their Lordships Jackson and Mookerjee said in the course of the judgment: "But we think that the Judge was right in refusing costs. Although Goluck was not satisfactorily proved to be a partner, still his admission that he had advanced a sum of money to one of the partners, and the willingness manifested by him to pay the liabilities of the firm, might have induced the plaintiff to bring him into the category of defendants. We would not interfere with the order of the Judge refusing to give him costs. We dismiss the appeal with costs." *Sree Nath Roy v. Goluck Chunder Sein*, 15 W.R. 348 (350).

miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will

In the course of the judgment in the case of *Gadidass Suryanarayana Row v. Gadidass Rajya Lakshmmamma* alias *Rajyam*, 8 M.L.T. 202, their Lordships Benson and Krishnaswami Iyer, JJ., in reversing the decree of the District Judge and remanding the case for disposal according to law said: "We must however direct the appellant to pay the costs of the respondent in this Court as much of the difficulty arose from the confusion in the plaint." *Gadidass Suryanarayana Row v. Gadidass Rajya Lakshmmamma*, 8 M.L.T. 202. (xii) Difficulty caused by confusion in the plaint.

It has been held that a party by the act of whose counsel a difficulty in the case arises must pay the costs. *Damul v. Shripat*, 6 Bom. L.R. 301. Their Lordships Jenkins, C. J. and Batty, J. said in the course of the judgment:—"It only remains to consider how far we can remedy the mischief that has been occasioned by throwing the costs on the defendants. Mr. Samarth has argued before us that it is not the defendants who are to blame but their advisers. But it is a sound principle for which there is the highest authority that the party by the act of whose counsel the difficulty has arisen must pay the costs: *Neale v. Gordon Lennox*, (1902, A.C. 471). We, therefore, order that the defendants pay the whole of the costs of the plaintiff up to the present time including costs of this appeal." *Damul v. Shripat*, 6 Bom. L.R. 301 (303). (xiii) Difficulty caused by act of counsel.

A defendant who, although he has a good defence, has by his conduct induced the plaintiff to sue him, may be made liable for the plaintiff's costs, though the suit be dismissed. *Lallah Bhagwan Doss v. Akbar*, 1 Ind. Jur. N.S. 390. (xiv) Defendant by his conduct inducing plaintiff to sue him.

Where in a suit the defendant is found to have been not to blame for the litigation, he is entitled to his costs. *W. Stalkart v. Guru Das Kundu Chowdhry*, 21 O. 680. The Court (Trevelyan and Beverley, JJ.) said in the course of the judgment:—"The ordinary rule is that the person who is to blame for the litigation should pay the costs. It is found that the defendant was not to blame, and there is no reason why he should not get his costs." *W. Stalkart v. Guru Das Kundu Chowdhry*, 21 O. 680 (683). (xv) Defendant not to blame for litigation.

Where the plaintiff brought a series of charges and claims, the bulk of which he abandoned at the hearing and was defeated on others, costs were, on account of the defendant's unscrupulous conduct, given to the plaintiff, though he only recovered judgment to a trifling amount. *Ram Gopal Chatterjee v. Bhobun Mohun Banerjee*, Oor. 128. (xvi) Unscrupulous conduct of defendant.

Where the defendant has in his written statement and throughout the subsequent proceedings imputed to the plaintiff an attention to overreach and defraud him, and the imputation of fraud which has been made and persisted in has not been proved, he will be deprived of his costs. *Lewin v. Morrison*, 2 Agra 351. (xvii) Defendant imputing fraud to plaintiff—Fraud not proved.

In a suit for recovery of the possession of land in which the plaintiff recovers a decree, it is no ground for exempting a defendant from costs that he did not himself occupy any part of the land, if he has denied the plaintiff's title in the suit, or was instrumental as the agent of others in dispossessing the plaintiff. *Mussamut Koome-roonissa Begum v. Hunooman Doss*, Marsh 122 (123). (xviii) Conduct of defendant sued for mesne profits.

The guardian *ad litem* of the minor defendants in this case was guilty of gross misconduct inasmuch as his opposition to the issue of probate was not *bona fide* and was commenced and carried on by him simply with a view of setting aside the will which he thought to be injurious to his own private interests. He was living in the same house with the testatrix and was present with her when she executed the Will in proper mental condition. Having put the executors to great expense by reason of his conduct (xix) Guardian *ad litem* being guilty of gross misconduct in conduct of suit.

induce the Court to refuse costs; but where there is nothing of the kind the rule is plain and well settled. It is, for instance, no

he was held liable to bear the costs of the suit. *Goolam Hossein Noor Mahomed v. Fatma Bai*, 8 B. 391.

(xx) Applicant for letters of administration concealing existence and claims of which he was aware.

An applicant for letters of administration to the estate of a widow, having concealed the existence and claims, of which he was aware, of the relatives of the deceased husband of the widow, on the application being dismissed was ordered to pay the costs of the application and of the caveats entered by some of the relatives of the deceased husband. *In the goods of Nathibai*, 2 B. 9=2 Ind. Jur. 19.

(xxi) Successful mortgagee entering into usurious bargain.

A mortgagee is, as a general rule, entitled to the costs of enforcing his security; but where the Court, in consideration of his usurious bargain, declines to award them wholly or in part, the High Court will not interfere. (*J. Carvalho v. Nurbibi*, 3 B. 202 (203)=4 Ind. Jur. 32). The Court (West, J.) said in the course of the judgment: "The District Court, while thus giving six per cent. interest, threw the costs of the appeal on the appellant, whose bargain it considered usurious. The general rule no doubt is that a mortgagee is entitled to the costs of enforcing his security against one who disputes it but this is not prescribed by any express regulation. The decision in *Desaji Lakhmaji v. Bhavanidas Narotamdas* (8 B.H.C.R.A.C. 100), which was followed in *Balkrishna Abaji v. Vishnu Raghunath* (see Printed Judgments for 1875, p. 56), seems to prevent our interfering, under these circumstances, with the decision of the District Judge, and we must confirm his decree. Each party to bear his own costs in this Court." (*J. Carvalho v. Nurbibi*, 3 B. 202 (204)=4 Ind. Jur. 32).

(xxii) Suit for partition filed solely for the purpose of inflicting injury upon his joint holders.

Where an ill-conditioned person files a plaint for partition, solely for the purpose of inflicting injury upon his joint-holders, the Court will, in the exercise of the power conferred by S. 187, Act VIII of 1859, mulct him in the entire costs. *Bhoobun Mohun Dey v. Deno Nath Dey*, 1 Hyde, 122. Mr. Justice Wells said in the course of the judgment that he was exceedingly glad to have an opportunity of stating his views upon the subject of costs in partition suits. He was satisfied that in many cases under Act VIII actions of this kind had been brought solely for costs. In many instances the whole family had been ruined from the fact of one member of it being an ill-conditioned man. He did not feel himself bound here by English precedents. He was sitting and adjudicating under Act VIII. He had had several partition-suits before him where the entire property at stake was not worth more than 800 rupees. The property in many cases consisted of a dwelling house, often the only residence of a Hindoo family; and he could not conceive anything much harder than that one individual member of a family should bring a suit for the partition of such a property. It often happened that the house was sold for the purpose of paying the costs incurred, and the result was that six or seven families were turned out without a place to go to. If he had been satisfied that the present was an application of that nature by an ill-conditioned man, and that the property was of the kind above mentioned, he would certainly have made the plaintiff pay not only his own costs, but all the costs incurred up to actual partition. S. 187, Act VIII, 1859, was in the following words: "The judgment shall direct, in all cases, by whom the costs of each party are to be paid, whether by himself or by another party, and whether in whole or in what part or proportion, and the Court shall have full power to award and apportion costs in any manner it may deem proper." This section gave him the very fullest discretionary power, and it was a power which, under the circumstances named, he should most certainly exercise. In the present case he saw no reason why the defendant should not pay his own costs. (*Bhoobun Mohun Dey v. Denonath Dey*, 1 Hyde, p. 122).

answer, where a plaintiff asserts a legal right for a defendant to allege his ignorance of such right and to say 'If I had known of

The plaintiff and defendants were jointly liable under a decree, and the plaintiff (xxiii) Unnecessarily making one a party to suit. having paid a far larger amount than was due as between herself and her co-defendants, this suit was brought for the recovery, from the defendants, of the amount so paid by the plaintiff in excess of her share of the liability. One of the defendants had paid into Court more than the full amount of his share. Thereupon the lower Court dismissed the claim as against this defendant, but awarded him no costs. *Held*, that, as the plaintiff had no claim against this defendant, it was not necessary to make him a party and that he was entitled to his costs. *Held* also that the scale upon which this defendant was entitled to his costs depended upon what the plaintiff claimed against him and that he was entitled to costs on the usual scale as on a suit for an amount for which the suit was brought. (*Kasheenath Sein v. Chunder Monnee Debee*, 9 W.R. 288.) The Court (Markby and Mitter, JJ.) said in the course of the judgment: "Now, in an ordinary case, where we saw that the lower Court had exercised its discretion as to granting or refusing costs, we should be very slow to interfere. But in this case costs have been withheld entirely upon a misconception. It was not necessary to make this defendant (appellant) a party to the suit: the plaintiff, as the result has shown, had no claim against him, and he could in no way be affected by the result of the proceedings. We think, therefore, that the decision of the lower Court, so far as it refuses costs to the present appellant, must be reversed, and this appeal be decreed with costs and interest." (*Kasheenath Sein v. Chunder Monnee Debee*, 9 W.R. 288 at p. 289).

Suits for foreclosure may be dismissed with costs against disclaiming defendants. (*Mackintosh v. Nobinmoney Dossee*, 2 Ind. Jur. N.S. 160).

If any difficulty arises from a party's omission to join a necessary party to the suit, (xxiv) Omission to join necessary parties. the party in wrong should forfeit his costs. *Muhammed v. Abdulla*, 24 M. 171 (175); Gour's Transfer of Property Act, Vol. II, p. 1396.

A defendant who colludes with the plaintiff, and induces him to bring a suit for his benefit, 'may be ordered to pay the costs of his co-defendants in the Court below. It seems that he may also be ordered to pay the costs of an appeal by the plaintiff. (xxv) Third party colluding with plaintiff. (*Byroo Raoot v. Baboo Anooroodab Deo Narain Singh*, Marsh 608).

The assignee of a decree who is made respondent in an appeal from it, and takes no steps actively to support it, ought not to be ordered to pay costs. (xxvi) Liability of assignee of decree for costs of hearing in lower Court. (*Ramji Morarji v. J. E. Ellis and the Standard Oil Company of New York*, 20 B. 167). The Court said in the course of the judgment: "In the present case the assignee company have taken an active part in the appeal, though they have been brought upon the record against their consent. It is admitted that they may properly be ordered to pay the appellant's costs of the appeal, but it is argued that they ought not to be ordered to pay the costs incurred in the Court below. There is this difference between this case before us and that of an executor or trustee coming in and supporting the decree, that here the original plaintiff is still retained upon the record, and that the assignee company are only added as an additional security for costs already incurred or for those to be incurred in the appeal. We have felt great doubt upon the subject, but, on the whole, we think the defendant is not entitled, by bringing the assignee company upon the record against their will, to obtain an additional security for the costs which have been already incurred in the Division Court. The decree will, therefore, be drawn up making the Standard Oil Company liable only for the appellant's costs of appeal and Ellis liable for the costs throughout. The costs of speaking to the minutes will be borne by the parties respectively." *Ramji Morarji v. J. E. Ellis and the Standard Oil Company of New York*, 20 B. 167 (172).

your right I should not have infringed it.' (page 507). I have often remarked that there is an idea prevalent that a defendant can escape

(xxvii) Losing party not making a successful party, party to appeal.

Same principles laid down in certain old decisions by the late Supreme and Sudder Courts.

In the first Court, the Government obtained their costs; the opposite party appealed, but did not make the Government a respondent. On appeal, the decree of the first Court was reversed. *Held*, that the Government, not having been made a party to the appeal, were entitled to recover their costs to the first Court. (*Government v. Lalji Sahi*, 1 B.L.R. S.N. 28).

There are several cases in the older reports, where the old Supreme and Sudder Courts originally established in the early days of the British Administration in the various Presidency towns and mofussil places considered that the conduct of the parties to the suit is a material particular to be taken into consideration in the matter of awarding or denying costs to a successful party. The following are some of the more important of such decisions, arranged in chronological order. Demand of a sum of money deposited with the defendant thirty years previous to the filing of the bill, but sworn by the answer to have been paid over according to the directions of persons whom the plaintiff represented, dismissed; but without costs. *Chintradry Petia Peeramah, Syrang v. T. Nineapah*, (1808) 1 Strange 245=5 Ind. Dec. Old Series, p. 130. Interest and costs refused to a Native with reference to claims in which he succeeded on the ground of his improper conduct. *Vencata Runga Pillay v. The Honorable East India Company*, (1803) 1 Strange 153=5 Ind. Dec. Old Series, p. 80. If a respondent appears upon a notice served of an intended application to have a petition of appeal received and merely does not object, his costs will not be given. (Cal. M. Journal for 1841, p. 717); *Prawnkissen Mitter v. Muttysoondery Dossee*, (1841) Fulton 400=1 Ind. Dec. Old Series, p. 882. Where the interest of one of the plaintiffs was acquired by a champertor's agreement for a share in the property in litigation, he must be non-suited and must be held liable for costs. Withdrawal at a late stage in appeal will not exonerate him from liability for costs. *Loofonissa v. Meheronissa Khanum*, (1846) 2 Sud. Dew. Adaw. Rep., Bengal (1846) 289=9 Ind. Dec. Old Series, p. 179. Where the Government sued the treasurers and their sureties to recover the deficit in the opium agency accounts and one of them threw the entire responsibility for the amount of the deficit on the others and completely failed and the others were exonerated, *held* that an order making him and his surety liable for all the costs of the others was just and legal. *Laloo Sahoo v. Sub-Deputy Opium Agent*, (1846) 2 Sud. Dew. Adaw. Rep., Bengal (1846) 182=9 Ind. Dec. Old Series, p. 105. A mortgagor, (after mortgaging certain property a second time) became insolvent: an order was issued from the Insolvent Court, requiring the second mortgagee to come in, and prove his claim:—This he declined or neglected to do, but subsequently instituted a suit in the Supreme Court:—*Held*, that under the circumstances, the 2nd mortgagee was not entitled to his costs of suit out of the insolvent's estate. *Llewellyn v. O'Dowda, Assignee of Stocqueler, an Insolvent*, (1847) G. Taylor 169=2 Ind. Dec. Old Series, p. 102. The following extract from the judgment of Sir L. Peel in the above case may also be noted:—"The question reserved by the Court for consideration in this case is, whether the complainant should have his costs of suit. The Court was inclined not to allow them, because it appeared to them that a resort to the Insolvent Debtor's Court, (where the estate of the Insolvent and the mortgagor was under distribution) would have given the complainant the full relief at no cost to himself, and at a trifling cost to the estate. He had notice to appear there. It was argued in opposition to this that the Insolvent Court had no jurisdiction over the case of a second mortgagee, which the complainant was. It is necessary therefore to explain the grounds and extent of the jurisdiction of that Court. The insolvent must insert in his schedule all debts that he owes, consequently mortgage debts, and he must state the securities in the hands of the creditors. There is so far no difference

costs by saying 'I never intended to do wrong.' That is no answer, for, as I have often said, some one must pay the costs and I do not

between a first and second mortgagee. Any creditor may impeach these debts, for it is obvious that a collusive and fraudulent transfer of the insolvent's property with a view to defraud his creditors, may be made under the disguise of a mortgage. The Court has jurisdiction to enquire into the validity and amount of the debts. It has also jurisdiction to enquire whether mortgaged personal property in the possession of the assignee, was or was not in the possession of the mortgagor, as reputed owner, with the consent of the true owner, with a view to order a restoration of it by the assignee, in case he should have seized it erroneously under that belief. The Court cannot, it is true, compel a mortgagor whose debt is undisputed, and who is not within the provisions of the section relative to reputed ownership, to realize his securities by a sale in that Court, under the order of the Court, though this may be done by consent. But if the mortgaged property is more than sufficient to cover all the incumbrances on it, it will be for the interest of the assignee to redeem, and as the mortgagor might have done so, so may the assignee. A redemption of course can take place out of Court; a suit is only necessary when the accounts are disputed or other difficulties are thrown in the way of redemption. A mortgage under ordinary circumstances is not an objection to the title, nor are mortgages, whether two or more. Therefore the mortgagor may sell, for he can, by redeeming, make a title, and the mortgagee will be forced to convey. And as the assignee cannot know what the property will actually fetch until he treats for a sale, this is a prudent step, and he may by his contract easily protect himself against being forced inconveniently to complete a contract. Therefore the sale, under the circumstances of this case, by arrangement between the first mortgagee and the assignee, was proper, and if the assignee had tendered to the second mortgagee his principal interest and costs, the latter would have been necessarily obliged to convey to the purchasers. Whatever the assignee legally does in the discharge of his duties, he of course does officially as assignee; for his sole right to interfere with the insolvent's estate is derived from his appointment, and the general authority of the Insolvent Court over him as its officer is sufficient to give jurisdiction to that Court, to order him to pay money in his hands to the parties entitled to it. We have no doubt therefore that the Court has power to direct payment to a second mortgagee after a sale, when the money is in the hands of the assignee. Until the second mortgagor is paid, or, which is the same thing, until the full money due to him is tendered, the equity of redemption, which is mortgaged to him exists in him in full force and effect. In our opinion, therefore, the complainant ought to bear the costs of this suit. He was summoned to a Court having competent jurisdiction to award what was due to him:—he chose not to appear;—had he appeared, the Commissioner would, in all probability, have overruled the objection stated by the assignee, if the objection had been insisted on. If that Court had forbore to decide it, this suit would have been necessary. But this was not the case. The complainant forbore to appear, and has stood on his asserted rights, and questioned the jurisdiction of the Insolvent Court, and we think he must suffer for his error, and that the estate cannot be visited with the costs occasioned by that error." *Per Sir L. Peel, in Llewellyn v. O'Dowda, &c.*, (1847) G. Taylor 169 at pp. 170, 171, 172=2 Ind. Dec. Old Series, pp. 103, 104. The fact that one of the appellants has withdrawn from the appeal is no ground for exonerating him from costs. *Chunder Dut Singh v. Howree M.sr.*, 4 Sud. Dew. Adaw. Rep., Bengal (1848) 625=10 Ind. Dec. Old Series, p. 439. The following extract from the judgment in the above case may also be noted:—"In this case the petitioners (appellants) with two other persons, Achumbit Singh, Sheo Lal Singh, were sued by the plaintiffs for possession of

see who else but the defendants who do wrong are to pay them." There can be no doubt that the discretion of the Court under the

certain lands with *wasilat*, and a decree was recorded against them. They all appealed ; but, afterwards, Achumbit Singh and Sheo Lal Singh withdrew. The decision of the lower Court was (with some alteration in regard to the quality of land sued for) affirmed ; but Achumbit Singh and Sheo Lal Singh were exonerated from costs and *wasilat*, because they had withdrawn from the appeal. ' On this point the co-defendants (appellants) apply for a special appeal ; and as there is no other reason assigned by the principal sudder ameen, for exonerating Achumbit Singh and Sheo Lal Singh, than that they withdrew from the appeal, I admit the same, as it was contrary to the practice of the Courts to exonerate parties on such grounds. As the appellants have not made Achumbit Singh and Sheo Lal Singh, respondents, and consequently no notice has been served on them to attend the Court, we cannot adjudicate the case in their absence ; but being of opinion that the reason assigned by the principal sudder ameen for exonerating the said Achumbit Singh and Sheo Lal Singh is insufficient, we remand the proceedings to him, with instructions to summon all parties before him again, and decide the case *de novo*. The respondents, who have appeared in this Court unnecessarily, are to pay their own costs in this Court. *Per* C. Tucker, J., in *Chundur Dut Singh v. Howree Misr*, 4 Sud. Dew. Adaw. Rep., Bengal (1848) 625=10 Ind. Dec. Old Series, p. 439. If a person institutes a suit improperly, and it is dismissed, he alone is liable for costs, and any extra judicial intimation as to costs inserted in a decision by the deciding officer, is a mere nullity. *Ram Gopal Mookerjee v. R. T. M. Dibbea*, 5 Sud. Dew. Adaw. Rep., Bengal (1849) 398=10 Ind. Dec. Old Series, p. 946. The appellant took in farm an estate belonging to the minor, whose guardian and mother (the Ranee) respondent is, from the Court of Wards, on a 10 years' lease. A *mahal*, or distinct portion of the estate, was possessed by one Budun Chundur Nundee ; a suit for it was instituted on the part of the proprietor, and a decree was eventually obtained for possession with mesne profits. In the meantime, the appellant, as farmer, sued Budun Chundur Nundee for the rents, and his suit was dismissed with costs, and he was referred for his claim to the proprietor, who had obtained a decree for the mesne profits. He therefore instituted the present suit, the subject of this appeal, for the arrears of rent with interest due to him, and for the costs of the suit against Nundee, making both the proprietor and Nundee defendants. The principal sudder ameen gave him a decree for the arrears, with interest, against the proprietor ; and dismissed the claim for costs on the reason, *first*, that he was liable for the costs himself, as he had preferred a wrong suit which was dismissed with costs ; and, *secondly*, that a third party could not be made answerable for costs incurred in a suit against another, which too was dismissed. The claim in appeal was urged, *first*, on the plea, that as the subject-matter of the suit dismissed, has now been decreed against the proprietor, so should the costs incurred in that suit ; and *secondly*, on the plea, that in awarding costs in that suit the principal sudder ameen inserted in his order the word ' now ', which evidently shewed his intention that they might be reclaimed subsequently. The judgment of the appellate Court was as follows :—"The pleas urged in this appeal cannot be admitted for a moment. If a person institute a suit improperly, and it be dismissed, he only is, of course, liable for the costs ; and any extra-judicial intimation inserted in a decision by the deciding officer, such as in the present instance, almost equivalent to dictating to another Court, is a mere nullity. Appeal dismissed with full costs. *Per* Aber Dick, J., in *Ram Gopal Mookerjee v. R. T. M. Dibbea*, 5 Sud. Dew. Adaw. Rep., Bengal (1849) 398 at p. 399=10 Ind. Dec. Old Series, p. 947. A, in execution of a decree against B, causes certain property to be

Code of Civil Procedure is one to be exercised with reference to general principles. The direction in that section that in the event of the Court not directing the costs to follow the event, it shall record its reasons in writing, is a clear confirmation of the said view. Here it is not suggested that the plaintiff in suing for the

sold. It is proved on a suit that the property did not belong to B. A, having defended the suit on the ground, that the property *did* belong to B, and having, from the first, done all in his power to dispute the claim of the rightful owner, is justly liable to a decree for costs and mesne profits in favour of that owner. It is not, under such circumstances, a valid plea on this point that, in appeal, he admits the right of the owner, seeking to shelter himself from the decree for costs and mesne profits, on the ground that they should be exacted from the purchaser at the sale, he, A, having only *sold the right and interest* of B, at the risk of purchasers. *Muharajah of Burdwan v. Huree Nurain Chowdhree*, 6 Sud. Dew. Adaw. Rep., Bengal (1850) 414=11 Ind. Dec., Old Series, p. 338. The costs of the co-defendants of Government in a suit charged to Government, by whose directions they had been associated in it. *The Collector of Sylhet v. M.K. Kishore Manik*, (1851) 7 Sud. Dew. Adaw. Rep. Bengal, 150=11 Ind. Dec. Old Series, p. 622. Decision of the lower appellate Court in regard to costs amended by awarding costs equally against two parties, the plaintiff and two of the defendants, who had *both* joined in pleas, ruled to have been false and fraudulent. *S. Nuzzer Allee v. Rugoobeer Thakoor*, (1851) 7 Sud. Dew. Adaw. Rep. Bengal, 99=11 Ind. Dec. Old Series, p. 583. The following observations of the Court in the course of the judgment may also be noted: "As it appears, on perusal of the plaint, and of the decision of the moonsiff confirmed by the principal sudder ameen, that the plaintiffs came into Court falsely stating themselves to be in possession of the property purchased, and on a deed which the moonsiff believed to have been antedated, they, plaintiffs, ought not to have been altogether released from the costs they had incurred in instituting so false and fraudulent a suit. On the other hand, the admission of plaintiff's purchase and possession by the sellers, defendants and special appellants, was equally false and fraudulent. Thus we are of opinion that both are justly liable for the costs in the suit; and we accordingly amend the decision of the lower Courts on this point of costs, and award the costs in equal proportions against both the plaintiffs and the sellers, defendants, including the costs of this special appeal. *Per C. Tucker, Aber. Dick & J.R. Colvin, Esqrs., JJ.* *S. Nuzzer Allee v. Rugoobeer Thakoor*, (1851) 7 Sud. Dew. Adaw. Rep., Bengal, 99 at p. 100=11 Ind. Dec. Old Series, p. 583. The appellants, although they defended an irregular sale in execution of a decree, were held liable only for their own costs. *Jugdeepnarain v. Mt. Hurris Koonwur*, (1852) 8 Sud. Dew. Adaw. Rep. Bengal, 907=12 Ind. Dec. Old Series, p. 704. Where a plaintiff withdraws from a suit after the completion of the pleadings and before judgment, he is liable only, under cl. 1, S. 31, Reg. XXVII of 1814, to the costs actually incurred previous to the withdrawal, and to half of the fees of the vakeel employed by him and by the defendants. This order accords with the principle of the decision in case *Radha Gobind Mitter*, of 27th April 1847, Rep. p. 114. *Bhugwan Lall Sahoo v. Sahib Perhlad Sein*, (1852) 8 Sud. Dew. Adaw. Rep. (Bengal) 521=12 Ind. Dec. Old Series, p. 404. In exercising its discretion in the matter of costs, the Court may consider the conduct of the party previously to, as well as during, the litigation. *Harnett v. Vyse*, 5 Ex. D. 307 at p. 311, C.A.; but not letters or conversations written or declared to be "without prejudice," *Walker v. Wilsher*, 23 Q.B.D. 395, C.A.; and a plaintiff partially successful may be ordered to pay costs; *Harris v. Petherick*, 4 Q.B.D. 611, C.A.

debt decreed to him was guilty of any misconduct, neglect or omission which would warrant the Court refusing him his costs. (184)

Vexatious or improper conduct on the part of a party would be good ground for refusing costs to him, which otherwise he might get. (185-186)

Where the plaintiff relies on several invalid and dishonest pleas, besides the plea on which he has succeeded, he may be deprived of his costs. (187) Where a suit is rendered necessary only because of plaintiff's negligence^(187-a) or misconduct, he may be required to pay costs, although successful; (188) and the same is the case when he has been guilty of great laches in bringing suit and shows no excuse for his delay. (189) "So where the plaintiff brings a suit to obtain relief, a part of which he knows he is not entitled to, the discretion of the Court will be properly exercised in decreeing costs against him. (190) And if plaintiff unreasonably enforces an equitable right depriving defendant of the opportunity to satisfy the claim made

(184) *Kuppuswami Chetty v. Zamindar of Kalahasti*, 27 M. 341 at 342 and 343. (Per Sir S. Subrahmanya Ayyar, Offg. C.J.) A successful defendant cannot be deprived of costs on the ground of improper conduct unconnected with the issue as between himself and the plaintiff, such as, for example, misrepresentation to the public. (*King & Co. v. Gillard & Co.*, (1905) 2 Ch. 7.) A party acting with malice and malevolence has no right to obtain costs. (*Kalee Parshad v. Ram Pershad*, 18 W.R. 14.) But, where the claim is an honest one, and mainly succeeds, full costs may be properly awarded. (*Sheo Dyal v. Bishonath*, 9 W.R. 61; *Ghanasham v. Moroba*, 18 B. 474.) Where the relief sought in the plaint was not clearly stated, though it could not be stated that the plaintiff was incapable of being viewed as seeking for any relief of the sort claimed, the High Court remanded the case to the Court of first instance, but subject to the plaintiff-appellant paying all costs incurred up to date, for which a month calculated from the date of the receipt of the record by the first Court was fixed, it being ordered that, in default of payment of such costs within the time allowed, the appeal should be dismissed. (*Forester v. Secretary of State*, L.R. 4 I.A. 137; *Dakhina v. Saroda Mohan*, 23 C. 357; *Tokhan Sing v. Girwan Singh*, 9 C.W.N. 372). Gour's Transfer of Property Act, 4th Ed., 1459.

(185-186) *Chithrayil v. Irumanon Vittel*, 3 M.H.C. 279 (282).

(187) *Sabapathi Pillai v. Van Mahalinga Pillai*, 15 M.L.T. 206 = (1914) M.W.N. 256 = 26 M.L.J. 331 = 23 Ind. Cas. 581.

(187-a) See *Lukshumanan Chetty v. Muthia Chetty*, 18 M.L.T. 247 = 2 L.W. 755 = 30 Ind. Cas. 785.

(188) *Andrews v. Hunt*, 7 Mackey (D.C.) 311. Voluntary ignorance on the part of trustees for debenture-holders.—Cf. *Turner v. Naval, etc., Co-operative Society of S.A., Limited and others*, reported in the Times Newspaper, January 21st, 1907, a motion to commit certain trustees to prison for contempt was dismissed, but without costs, on the ground that respondents had been guilty of great indiscretion in remaining in voluntary ignorance of the terms of an order which they knew had been made, and which they might reasonably have supposed to have affected their obligations.

(189) *Paulding v. Watson*, 21 Ala. 279; see also cases noted under Ref. (189), *supra*.

(190) *Howard v. Bennett*, 72 Ill. 297.

against him without suit, the relief may be granted without costs or plaintiff be compelled to pay defendant's costs." (191)

On the other hand defendant may be required to pay costs, although successful, when the plaintiff was misled in bringing suit by his misconduct. (192)

In exercising its discretion to deprive a successful party of his costs, the Court is not confined to the consideration of the conduct of the party in the course of the litigation, but may also consider his conduct previous to the commencement of the action. (193)

Matters leading up to litigation may also govern order as to costs. (193-a)

Even in cases where it is not absolutely necessary for a party to come into Court if he shows a proper and wise discretion in so doing, it follows that he is entitled to his costs. (194)

Litigation being proper, though not absolutely necessary.

In equitable actions or in any other actions in which the Court is by statute vested with a discretion in the allowance of costs, costs should not be given either party where doubtful or novel questions are involved. (195)

Novel and doubtful questions being involved in the case.

In an appeal for costs, the Court held that the lower Court had rightly refrained from charging the plaintiff with defendant's costs, the plaintiff's suit having been dismissed under a ruling not in full circulation when the suit was filed. (196)

Decision of the case depending upon a ruling not fully circulated.

(191) *Walland v. Huber*, 8 Nev. 203.

(192) *Pettit's Case*, 19 Fed. Cas. No. 11,047. See also *Cyclopædia of Law and Procedure*, Vol. XI, Heading "Costs," pp. 36, 37.

(193) *Harnett v. Vise*, 5 Ex. D. 307; 43 L.T. 645; see also *Estcourt v. Estcourt Hop Essence Co.*, L.R. 10 Ch. 276; *King & Co. v. Gillard & Co.*, (1905), 2 Ch. 7. See also Ref. (184), *supra*.

(193-a) *Naba Kumar v. Naba Kumar*, 13 C.L.J. 404=16 C.W.N. 805 (at p. 810)=10 Ind. Cas. 90.

(194) *Keshavray K. Joshi v. Bhavanji Babaji*, 8 B.H.C.R.A.C. 142 (148).

(195) *Myer v. Hart*, 40 Mich. 517; but see *Vembu Iyer alias Ramachandra v. Srinivasa Iyengar*, 23 M.L.J. 638=12 M.L.T. 547=17 Ind. Cas. 609.

(196) *Musst. Mesree Koonwur v. Musst. Imamun*, (1853) 9 Sud. Dew. Adaw. Rep. (Bengal) 832=13 Ind. Dec. Old Series, p. 632. This was an appeal laid on account of costs charged on the appellant. It was contended for the appellant that the general practice of the Court is to award costs when a plaint is dismissed and that the Judge has not adhered to it. It was contended on behalf of the respondent that the first decision of the Sudder Dewany Adawlut, under which it was ruled that a deed stamped after institution was inadmissible, was passed by the Full Bench on the 17th September 1850 only. The respondent has, upon the principle of the decision quoted by the Judge, lost her case, and that decision is founded upon the same principle. The decision of 1850 had no publicity in the mofussil, when my client's action was instituted in January

Decision of the case being involved in great doubt and difficulty.

Where there is great doubt in the decision of a question involved in the suit, costs may not follow the decree. (197) According to the modern English practice, the Court, though it retains a discretion, generally acts on the rule that *prima facie* the unsuccessful party is to be charged with the costs of the suit, and in one case it gave costs against an unsuccessful plaintiff, though the case was one of great difficulty, arising out of a will and dependent on foreign law. (198) It has also been recently decided by the Madras High Court that the fact that questions of law raised in the case are not easy of solution is not a good ground for disallowing the costs of a successful litigant. (198-a)

Decisions being conflicting in respect to the question involved.

The successful party will not be entitled to costs as of right where the decisions are conflicting with regard to the question involved. (199)

Parties being misled by new rule of Court.

On a fair question upon new orders on which there has been no decision, the parties, in point of costs, are entitled to indulgence. (200)

Reported case afterwards overruled.

If a suit is correctly laid on the authority of a reported case, there being no authorities in conflict with it, and the decision in the reported case is afterwards reversed, the plaintiff in the suit filed on its authority is entitled, on motion, to have the suit dismissed without costs. (201)

1851; by former practice she would not have been nonsuited, and I therefore contend that the Judge has exercised a sound discretion to the parties respectively. The Court held as follows: "We are of opinion that the Judge has acted rightly in this case. The rule laid down by the Court in 1850 had not full circulation when the plaintiff filed her suit. We dismiss the appeal with costs." *Musst. Mesree Koonwur v. Musst. Imamun*, (1853) 9 Sud. Dew. Adaw. Rep. (Bengal) 832=13 Ind. Dec. Old Series, p. 632. See also Note (200), *infra*.

(197) *Dearden v. Byron (Lord)*, 8 Price, 465; see *Vasonjee Morarji v. Chanda*, 37 A. 369 (P.C.)=19 C.W.N. 873=17 Bom. L.R. 536=18 M.L.T. 31=1915 M.W.N. 449=29 M.L.J. 130, which was a case of construction of deed involving difficult question and in which no costs were allowed to the successful party; see also *Chunilal v. Bai*, 26 M. L.J. 647=38 B. 399 (P.C.)=19 C.L.J. 563=23 Ind. Cas. 645.

(198) *Nelson (Earl) v. Bridport (Lord)*, 10 Beav. 305.

(198-a) *Vembu Iyer alias Ramachandra v. Srinivasa Iyengar*, 23 M.L.J. 638=12 M.L.T. 547=17 Ind. Cas. 609.

(199) *Tindal v. Jones*, 11 App. Pr. (N.Y.) 258; *Cyclopædia of Law & Procedure*, Vol. XI, Heading "Costs," p. 55.

(200) *Watts v. Penny*, 11 Beav. 435; 18 L.J. Ch. 150; 13 Jur. 578. See also Note (196), *supra*.

(201) *Robinson v. Rosher*, 1 Y. & C.C.C. 7; 5 Jur. 1006. A suit having been instituted on the authority of a reported case, which was afterwards reversed, the Court,

In an English case the plaintiff was held entitled to have his suit dismissed without costs, and without prejudice to a new suit, as he had been misled by the act of the Court.⁽²⁰²⁾ Extra costs occasioned by a mistake of the master was, in one case, allowed to a creditor proving his debt against a lunatic's estate.⁽²⁰³⁾ But in another case the Court held that the rule that costs are seldom, if ever, allowed where there has been a mistake of the master, is no longer applicable since the Judicature Act, 1873.⁽²⁰⁴⁾ Costs occasioned by mistake of Court.

Where both the parties to a suit, misapprehending its nature, go to trial as if the suit were maintainable and fight upon false issues, the party who ultimately succeeds will not be entitled to costs, as of right, as against the other.⁽²⁰⁵⁾ Costs occasioned by mistake of parties.

Where the case of both parties was false, the Court would not allow costs to either side.^(205-a) Costs where the case of both parties is false.

after looking simply into the record, dismissed it without costs. *Sutton Harbour Improvement Co. v. Hitchens*, 15 Beav. 161. A decision, on the authority of which a suit had been instituted, being overruled, the plaintiff offered to have his suit dismissed without costs: *Held*, that this was no answer to a motion to dismiss for want of prosecution, and that the plaintiff must either proceed or have his suit dismissed on the usual terms. *Lancashire and Yorkshire Ry. v. Evans*, 14 Beav. 529, though a suit has been filed on the authority of a reported case, which is afterwards reversed, it was held that the Court has not jurisdiction to order that the suit shall be dismissed without costs. *Cronin v. Murphy*, 1 Ir. Ch. R. 233.

(202) *Lister v. Leather*, 1 De G. & J. 361; 3 Jur. (N.S.) 433; 5 W.R. 666 (Eng.). But see also *Husaini Begum v. Collector*, 9 A. 11; on appeal 9 A. 665, where the Court seems to have been of opinion that the losing party must bear the costs of the successful party incurred through the error of the Court.

(203) *Buckle, In re*, 1 Russ. & M. 363; *Ajoodhya v. Daibee*, 3 Agra Rev. 5.

(204) *Sparrow v. Hill*, 7 Q.B.D. at p. 368.

(205) *Shah Muhammed v. Kashi Das*, 7 A. 199 = A.W.N. (1884) 338. The following remarks of Petheram, C.J., in the course of the judgment may also be noted: "If the suit had been properly framed, that issue should be tried. But the persons conducting the litigation mistook the powers which the Courts have; and instead of bringing a suit for trespass or asking for an injunction to prevent persons from trespassing, they brought a suit against persons who had never interfered with the steps at all, and prayed for an injunction against the whole world. Now, no Court in existence has or can have such powers, and therefore the suit must be dismissed. Then it is said that, this being so, the defendants should have their costs, and that would be proper if at the beginning the defendants had taken the point that the suit was not maintainable. But instead of doing so they fought the case all along as if the suit was maintainable, and upon a false issue. The litigation, owing to the mistake of both sides, has been wholly fruitless. I think therefore that both sides should pay their own costs." *Per Petheram, C.J., in Shah Muhammad v. Kashi Das*, 7 A. 199 = A.W.N. (1884) 338. See also cases noted under Ref. (252), *infra*.

(205-a) *Nihal Singh v. Mai Singh*, 160 P.W.R. 1915.

Costs of collusive suit.

A defendant who colludes with the plaintiff and induces him to bring a suit for his benefit may be ordered to pay the costs of the co-defendant. (205-b)

Costs when there is difference of opinion among Judges.

The question whether the existence of a difference of opinion among Judges is any reason why costs are not to be awarded to the successful party, arose in some of the early cases that came before the Supreme Court of Calcutta. A general reading of those old reports shows that there was a difference of opinion on the subject. In fact, as in the case of all other questions relating to the subject of "costs" the only safe rule is to leave the awarding of costs to the discretion of the particular tribunal by which the action is tried and not to fetter it by any hard and fast rules. In the case of *Bryce v. Smith* (206) which was decided as early as 1830, the opinion was generally expressed that "the Court will not generally give costs to either party, when there is a difference of opinion on the Bench." (207) The following observations of the Court in the course of the judgment may well be noted: "The 14th clause of the Charter of this Court, which is the passage that gives us the power to award costs, and without which we should not have had that power, says that we may award costs between party and party, such as we may think it just that one party should pay to another. It does not say that we are bound by the English Statutes on the subject, and it has never been thought that the statutes of England as to costs applied here. It is left to the Court to consider what is just, and it is only where we think it just that we are to give costs. There is an end therefore of the argument of the plaintiff's counsel derived from the statutes he has quoted. There is no inference that can be drawn from the practice of the English Courts under the statutes that can be binding upon us; though it may be very proper to see what has been done there. We must consider what it would be just to direct in this case. I can state from my own experience, having sat nine years in the Courts in this country, that I have never known any other rule or any other practice to prevail, where there has been a difference of opinion on the Bench, except that which I have acted on in this case, namely, that we would award costs,

(205-b) *Bhyroo v. Anoorodeh*, Marsh 608; see also *Muhammed Islam v. Hari*, 16 P.L.R. 1914 at p. 53=7 P.W.R. 1914.

(206) (1830) Bignell 54=1 Ind. Dec. Old Series, p. 425.

(207) *Bryce v. Smith*, (1830) Bignell 54=1 Ind. Dec. Old Series, p. 425. See also the same point fully discussed in the *Bank of Bengal v. The United Company*, reported in the Ind. Dec. Old Series, Vol. I, p. 439=Bignell, p. 87.

against neither party. I have known that principle acted upon over and over again at Madras, and I know at home, wherever there can be a difference of opinion in equity, or in decisions on interlocutory matters, where the costs rest in the discretion of the Court, that has been the practice observed. I think it a fair and proper rule to adopt as a general rule where the costs are left to the discretion of the Court. I do not say that there are not exceptions to this rule, but as a general rule it is a rule that has been recognized in other Courts, and it is one to which, as far as I can see at present, I imagine I shall always adhere.”⁽²⁰⁸⁾

This was the opinion expressed by the Supreme Court in 1830. In the same year the same Court had occasion to consider a similar question and their Lordships there laid down that “it is not an invariable rule that costs will not be given where there is a difference of opinion on the Bench.”⁽²⁰⁹⁾ The same Court had occasion to express their opinion on this point a third time in a case that came up for decision in the year 1847.

In that case the learned Judges observed that the established practice of the Court was that, where the Judges differed in opinion, each party should pay his own costs, although it certainly seemed fair that the winning party should be exempted from the payment of costs. As it had been the usual course, however, that where the puisne Judge differed no costs should be allowed to either side, their Lordships held that it must be pursued in the particular case before them.⁽²¹⁰⁾ When the same question arose for the fourth time, their Lordships held that “a verdict for the plaintiff, where the Judges differ, ought to carry costs, although the practice had usually been otherwise.”⁽²¹¹⁾

The following observations of Perry, C.J., as to the reasons for giving the successful party his costs, although the Judges may differ, are also worthy of being noted : “The awarding of costs in this Court is in the discretion of the Judges, but the rule which I have always endeavoured to follow since I have been on the Bench, is

(208) *Per* Grey, C.J., in *Bryce v. Smith*, (1830) Bignell 54 at pp. 61, 62 and 63=1 Ind. Dec. Old Series, pp. 428 (429).

(209) *Dookeram v. Becoollohl*, (1831) Morton 278=1 Ind. Dec. Old Series, p. 1054.

(210) *Per* Pollock, C.J., in *Ramlall Thakoor Seydass v. Soojamull Dhondmull*, (1847) 2 Morley Dig. 415 at p. 423=4 Ind. Dec. Old Series, p. 704.

(211) (*Dissentiente* Yardley, J.) *Ramlal Thakursidas v. Dulabdas Pitamber*, (1849) Perry O.C. 198=4 Ind. Dec. Old Series, p. 180;

derived from the analogy of the Statute of Gloucester. But, in cases where the two Judges are divided in their opinions, although the Charter directs that the judgment shall follow the opinion of the Chief Justice, the ordinary practice has been that in such cases no costs have been awarded. This practice has always appeared to me to be injurious to the interests of justice, and to have been adopted rather from a feeling of delicacy between colleagues, than from a sense of what rigorous logic demands. Where two Judges are sitting on the Bench it may be taken *a priori* that the opinions of one Judge are just as likely to be right as the opinions of the other, and the opinions of the Chief Justice are entitled to no preponderance, except such as may be due to his (in most cases) longer experience in India. But, if the interests of justice require a rule to be laid down that in such cases the opinion of the Chief Justice shall prevail, it appears to me that the judgment should be treated as an ordinary judgment of the Court; and, although, I am quite alive to the evils which ensue (especially in colonial Courts) where the Bench is equally divided, I do not think the evil will be increased, but, on the contrary, that it is likely to be diminished, by adding the responsibility which is thrown on the Chief Justice, when the costs of the cause, as well as the judgment, are made to follow his decision. As I have expressed opinions to the above effect more than once, both as a puisne Judge and as Chief Justice, and have never heard any argument against them, I thought the present case, which was going home on appeal, a fit opportunity for pronouncing what appeared to me to be the sound rule."⁽²¹²⁾ Where there is a difference of opinion among Judges on the question of costs, the opinion of the senior Judge would prevail under cl. 36 of the Letters Patent.^(212-a)

Plaintiff
instituting
suit without
previous
notice.

The fact that an action has been brought without a previous communication with defendant does not prevent plaintiff from getting his costs of the action if he succeeds.⁽²¹³⁾

(212) *Per Perry, C.J., in Ramlal Thakursidas and others v. Dulabdas Pitamber*, (1849) Perry O.C. 198 at 220 and 221=4 Ind. Dec. Old Series, pp. 201 (202).

(212 a) *Ram Das Hajra v. Secretary of State*, 18 C.W.N. 106=17 C.L.J. 75=16 Ind. Cas. 922.

(213) *Goodheart v. Hyett*, 25 Ch. D. 182; *Wittman v. Oppenheim*, 27 C.D. 260; but see the observations of Katy. J., in *Holt v. Smith*, 4 Times Rep. 329 and of North, J., in *Walter v. Steinkopff*, (1892) 3 Ch. 489; 61 L.J. Ch. 521. The absence of a previous demand before bringing an action for an injunction will not prevent the plaintiff from being given his costs (*Ruskin v. Robinson*, (1885) 2 T.L.R. 18; *Wittman v. Oppenheim*,

Though for a suit on a promissory note payable on demand no demand is necessary, and although the ordinary rule is that a debtor is to see the creditor and ascertain the amount of the debt and pay it, still in a suit without such demand, the plaintiff will be saddled with costs if the debtor was willing to pay.^(213-a)

Where plaintiffs in an action for infringement of copyright brought a suit without notice, and the defendant, as soon as he understood the circumstances, tried his best to undo the injury caused by the infringement: It was held, that the defendant must submit to the injunction and pay the costs.⁽²¹⁴⁾

Where an action is brought by the plaintiff to enforce a legal right, such as an action to restrain the infringement of a very small part of the plaintiff's copyright, the Court will not, as a matter of course, order the defendant to pay the costs of the action.⁽²¹⁵⁾ But when an action is brought to enforce a legal right, and the Court finds that there is some necessity for the action and that there is no misconduct on the part of the plaintiff, the Court has no discretion to refuse him costs.⁽²¹⁶⁾ In an English case, defendants bought from a certain person at a small cost a box of cigarettes bearing a label which was a very close imitation of the registered trade-mark used by the plaintiffs upon the boxes in which they sold the cigarettes made by them. The defendants bought the cigarettes under the belief that they were made by the plaintiffs. The plaintiffs sued

instituting
suit merely
to enforce a
legal right.

(1884) 27 Ch. D. 260, even though such demand might have been made without any risk of thereby causing the plaintiff's object to be defeated. [*Goodheart v. Hyett*, (1883) 25 Ch. D. 182.] But in a more recent case it was laid down by Kay, L.J., that "the Court always discouraged exceedingly the practice of one party commencing a suit and proceeding to litigate in a peremptory sort of way without first giving the opposite party the opportunity of submitting to his demands." And although it is not the law that a defendant should always have notice of the intention to bring an action before it is brought, yet, when the course of conduct complained of has notoriously been followed for years, the defendants should have notice given or protest made to them before proceedings are commenced. *Walter v. Steinkopff*, 1892, 3 Ch. 489; See also Reference (213-a), *infra*.

(213-a) *Meghraj v. Johnson*, 11 N.L.R. 189=31 Ind. Cas. 880 (following *Jearumissa v. Manikji*, 7 B.H.C. 36.)

(214) *Wittmann v. Oppenheim*, 54 L.J. Ch. 56; 27 Ch. D. 260; 50 L.T. 713; 32 W.R. 767 (Eng.).

(215) *Cooper v. Whittingham*, (15 Ch. D. 501), cited and followed in *Kuppuswami v. Zamindar of Kalahasti*, 27 M. 340 (342, 343), and *Upmann v. Forester*, (24 Ch. D. 231) observed on. *Walter v. Steinkopff*, 61 L.J. Ch. 521; (1892) 3 Ch. 489; 67 L.T. 184; 40 W.R. 599.

(216) *Cooper v. Whittingham*, 49 L.J. Ch. 752; 15 Ch. D. 501; 43 L.T. 16; 28 W.R. 720, cited and followed in *Kuppuswami v. Zamindar of Kalahasti*, 27 M. 341.

the defendants for an injunction to restrain them from infringing their trade-mark or selling the cigarettes. The defendants at once returned to their vendors the greater part of the cigarettes, and, by their affidavit, submitted to abide by any order the Court should make, but contended that they ought not to be made to pay the costs: It was held, that, under the circumstances, there ought to be no order as to costs.⁽²¹⁷⁾

Defendant
insisting
on his strict
legal rights—
Moral con-
siderations,

Similarly a defendant who insists upon his legal rights in a case in which the Court considers he should not morally do so, will not be allowed his costs.⁽²¹⁸⁾

Defendant
relying on
inconsistent
case.

Where the defendant's case is inconsistent, he may be deprived of costs though successful.^(218-a)

Defendant
relying on
statute of
limitation.

Reliance on the Statute of Limitations is not an admissible ground for depriving a defendant of his costs.⁽²¹⁹⁾

Defendant
succeeding
on a technical
objection (as)
Plea of
Statute of
Frauds.

The fact that the defendant raises what is called a technical objection, as for instance a plea of the Statute of Frauds, is no ground to disallow him his costs, where he succeeds on such objection.⁽²²⁰⁾ In the case of *Dyas v. Stafford* ⁽²²¹⁾ Lord Fitzgibbon said: "I disapprove of any suggestion that a defendant, who succeeds upon a plea of the Statute of Frauds, is to be regarded as an unmeritorious litigant, and that he is only reluctantly to be allowed his costs. If a plaintiff attempts to enforce a bargain which is either avoided or of which the enforcement is prohibited by the statute, I am not prepared in effect to put a penalty upon a successful defendant for insisting upon his statutory rights."⁽²²²⁾

Where the
Court
does not
adjudicate on
the merits of
the cause.

The Court enters into the question of costs only as incidental to its decision upon the merits of the cause.⁽²²³⁾ The Court does

(217) *Uppmann v. Forester*, (24 Ch. D. 231) discussed; *American Tobacco Co. v. Guest*, 61 L.J. Ch. 242; (1892) 1 Ch. 630; 66 L.T. 257; 40 W.R. 364 (Eng.).

(218) *Landed Estates Investment Co. v. Weeding*, 21 L.T. 384; 18 W.R. 35 (Eng.).

(218-a) *Umrao v. Lachhman*, 8 A.L.J. 465=15 C.W.N. 497=13 C.L.J. 519=23 A. 344=10 Ind. Cas. 285 (P.C.)=9 M.L.T. 501.

(219) *Elms v. Hedges*, (1906) W.N. 114 and see *Granville v. Firth*, (1903) 72 L.J. K.B. 152, C.A. As to the effect of success on other technical pleas, see cases noted under References (147) to (148-c), *supra*.

(220) See *Dyas v. Stafford*, 9 L.R. Ir. 530. See also References (147) and (148-c), *supra*.

(221) 9 L.R. Ir. 530.

(222) *Per Fitzgibbon*, L.J., *Dyas v. Stafford*, 9 L.R. Ir. 530. See also cases noted at References (147) to (148-c), *supra*.

(223) *Gibson v. Cranley* (Lo 6 Madd. 365 (Eng.).

not deal with the question of costs where it does not adjudicate upon the subject-matter of the suit.⁽²²⁴⁾ Therefore, where, upon a motion for an injunction to restrain a partner from dealing with the partnership assets, it was referred to arbitrators to take the accounts (that being the only question at issue), and the result was that a certain sum was due to the plaintiff: *Held*, that the Court, knowing nothing of the merits of the case, would make no order against the defendant in respect of the costs of the arbitration and award.⁽²²⁵⁾ Where a suit is dismissed on the ground that the suit does not lie, the Court ought not to look at the merits and disallow the costs of the defendant.^(225-a)

In one case, relief being granted on a ground not set out in the pleadings, the Court refused to give costs.⁽²²⁶⁾

Where Court grants relief on ground not set out in the pleadings.

The fact that the Judge disapproves of the policy of the legislature in enacting a Code on the provisions of which the successful party relies, is no ground to deprive such party of his costs ^(227-a)

Where Judge disapproves of the policy of Legislature.

Where judgment is passed in favour of the plaintiff on an issue conceded by the defendant, and the other issues are decided on defendant's favour, an order for costs may be made in favour of the defendant.⁽²²⁷⁾

Where judgment is on an issue conceded by defendant.

Defendants disclaiming all interest may be dismissed with costs on motion by plaintiff *ex parte*, without prejudice to the question how the costs shall ultimately be borne as between plaintiff and the other defendants.⁽²²⁸⁾

Where defendant disclaims all interest in the suit property.

Where the party's admissions and conduct induced the supposition of his liability for a claim, the Court refused him his costs, although the suit against him founded on such claim was dismissed.⁽²²⁹⁾

Where defendant's admissions and conduct induce supposition of his liability for the claim.

(224) *Andrews v. Morgan*, 3 W.R. 145 (Eng.).

(225) *Ibid*.

(225-a) *Ram Das Hazra v. Secretary of State*, 18 C.W.N. 106=17 C.L.J. 75=16 Ind. Cas. 922.

(226) *Leach v. Way*, 5 L.J. Ch. 100.

(227) *Howkins v. Stanford*, 138 Ind. 267; 37 N.E. 794. See *Cyclopædia of Law and Procedure*, Vol. XI—Heading "Costs," p. 29 Note. A deposit of costs accompanied by a prayer that they should be inquired into upon a particular principle does not imply an admission on the part of the depositor of his obligation to pay costs to the extent of the deposit. *Rajah Leelanund Singh v. Court of Wards*, 14 W.R. 387.

(227-a) *Secretary of State for India v. Venkatesh*, 2 Bom. L.R. 125.

(228) *Clements v. Oliford*, 14 W.R. 22 (Eng.); *Baily v. Lambert*, 5 Ha. 178.

(229) *Sreenath Roy v. Goluck Chunder Sein*, 15 W.R. 348 (Eng.).

So also, in American case, where one party made an application to the Court in consequence of the declarations of the other party, although the application be dismissed, such other party was ordered to pay the costs of the action.⁽²³⁰⁾

Where plaintiff has good reason to think defendant liable.

Where it appears that complainant had good reason to think defendant liable, the Court will not award costs against him, although unsuccessful, if defendant was in such a situation as to render it probable that he was liable on equitable principles.⁽²³¹⁾

Defendant's wrong committed in ignorance—and being slight in its nature.

Where the defendant has committed a wrong, but quite innocently and in ignorance of the wrongful nature of the act, and the wrong itself is of a trivial nature, the Court will not award plaintiff his costs of the action, though he succeeds in the action.⁽²³²⁾

Where an action is brought to restrain the infringement of a very small part of the plaintiff's copyright, the Court will not, as a matter of course, order the defendant to pay the costs of the action especially if the infringement by defendant was not deliberate, but committed in ignorance of the plaintiff's rights.^{(233) & (234)}

Defendant not confining his defence within proper limits.

A suit was instituted on a mortgage against A, the executrix under the will of the mortgagor and entitled to a life estate in the property. B, C and D, the reversioners under the Will, were also joined as defendants. They pleaded that they were not necessary parties, but joined A in disputing the claim in suit. The Court below decreed the claim in full with costs against A but dismissed the suit with costs as against B, C and D. *Held*—That if the reversioners had confined their defence to merely pleading that they were unnecessary parties, the decree of the lower Court could not be questioned; but they having disputed the plaintiff's claim in common with A, and having been unsuccessful therein, the proper order for costs would be to award them pleader's fees, not upon the full amount of the claim, but upon one half of that amount.⁽²³⁵⁾

In the case of *Lachmeswar Singh v. Manowar Hossein*⁽²³⁶⁾ costs were refused to a defendant on the ground that he set up as his defence, an exclusive title, in which he had failed.

(230) *Leonard v. Manard*, 1 Hall (N.Y.) 200.

(231) *Clark v. Reed*, 11 Pick (Mass.) 446.

(232) *American Tobacco Company v. Guest*, (1892) 1 Ch. 630.

(233 & 234) *Waller v. Steinkopf*, (1892) 3 Ch. 499; see also Reference (232), *supra*.

(235) *Tara Prosunno Mukherjee v. Satish Chandra Singh*, 4 C.W.N. 90.

(236) 19 C. 253 (P.C.) = 19 I.A. 48 = 6 Sar. P.C.J. 133.

Where, in a probate action, the defendant fails to establish his plea of undue influence, the Court may, in its discretion, order the costs to be paid out of the estate, if it finds that there are reasonable grounds for suspecting undue influence. (237)

Defendant making unsuccessful defence, but on reasonable grounds.

Costs are not to be charged against a defendant, upon a mere conjecture that he may have been concerned in an injury done to a plaintiff. (238)

Where plaintiff has sued the wrong party, it is not a ground for depriving the successful defendant of his costs that he could have informed the plaintiff who was the proper party to be sued. (239)

Defendant withholding information.

Where a plaintiff proceeds by too expensive a method to obtain a relief which he could have obtained by a less expensive method, the difference caused by the two modes has to be borne by the plaintiff himself though he succeeds. In an English case, where an application was by petition and not by summons (as it should have been) the respondents having failed, had to bear the costs, but the extra costs, *i.e.*, the difference between the costs of a petition and the costs of an adjourned summons, were ordered to be deducted. (240)

Plaintiff proceeding by an unnecessarily expensive method—Unnecessary costs not allowed.

(237) *Williams v. Coker*, 67 L.T. 626. See also *Orton v. Smith*, L.R. 3 P. & M. 23; *Davies v. Gregory*, L.R. 3 P. & M. 28; *Shortman v. Shortman*, 67 L.T. 717; *Brown v. Penn*, 12 Times, Ref. 46; *Browning v. Mostyn*, 66 L.J.P. 37; *Aylwin v. Aylwin*, (1902) p. 203; *Wilson v. Bassil*, (1903) p. 239. Also, in cases where there are no reasonable grounds for suspicion of undue influence, it is open to the Court to leave the costs to follow the event. *Black v. Cleland*, 12 Times Ref. 63. In the case of *Cummins v. Murray*, the judge, at the trial of the probate suit made a special order that the defendant who pleaded undue influence, but failed in his defence, should however get his costs out of the estate. Held, that, provided there were any grounds on which the judge could have made such special order, there was no jurisdiction to interfere with an order made by the judge in the exercise of his discretion. It was held that probate suits were on a special footing in this respect. See *Cummins v. Murray*, (1906) 2 I.R. 509. But see also *In re Proctor*, 103 Iowa 232, where it was held by the American Court that the fact "that the unsuccessful party defended the suit in good faith and on reasonable grounds is no reason to deprive the successful party of his costs," See *Cyclopædia of Law and Procedure*, Vol. XI, Heading "Costs", p. 27.

(238) *Elias Marcus v. Mukeroodeen Mohumed*, (1850) 6 Sud. Dew. Adaw. Rep. Bengal 70=11 Ind. Dec. Old Series, p. 54.

(239) *Westgate v. Crowe*, (1908) 1 K.B. 24.

(240) *Re Kellock* (1887), 35 W.R. 695 (Eng.); *Re Martin and Varlow*, (1895) 43 W.R. 247 (Eng.); *Olark v. Ward*, (1865) 14 W.R. 241 (Eng.); *Kelsey v. Larkin*, (1889) 3 Jur. 767; *Att.-Gen. v. St. John's Hospital*, (1893) 3 Ch. 151; *Re Lancashire and*

Although the plaintiff succeeds in a suit, it may be a good cause for refusing him costs that he adopted a more expensive remedy than was necessary; ⁽²⁴¹⁾ and under such circumstances he may even be charged with costs. ⁽²⁴²⁾

Thus the prevailing party may not be allowed costs where the papers on which the motion is based are unnecessarily voluminous and contain irrelevant matter. ⁽²⁴³⁾

"No person has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance to an action which he cannot defend." ^(244 & 245)

Yorkshire Ry. Co. (1895), 72 L. T. 627; and see *Curwen v. Milburn*, (1889) 42 Ch. D. 424. See also *London Steam Dyeing Co. v. Digby*, (1888) 57 L.J. Ch. 505; *Allen v. Oakley*, (1890) 62 L.T. 724 (proceeding by motion instead of by summons); *Johnson v. Evans*, (1889) 60 L.T. 29 (action for redemption; unsuccessful party only ordered to pay such costs as he would have been liable to pay on a contested originating summons attended by counsel); *Blackett v. Blackett*, (1884) 51 L.T. 427 (action brought in Ch. D. for relief obtainable on summary application in the P.D. No costs on either side). As to the liability of plaintiff to pay the costs of party unnecessarily added as defendant, see *Mehr Singh v. Devi Dyal*, 38 P.R. 1912=19 P.L.R. 1912=32 P.W.R. 1912=13 Ind. Cas. 50.

(241) *Outtriv v. Graves*, 1 Barb. Ch. (N.Y.) 49.

(242) *White v. Meday*, 2 Edw. Ch. (N.Y.) 486.

(243) *Buffalo v. Scranton*, 20 Wend. (N.Y.) 676. As has already been seen, the successful party is not entitled to more than the necessary costs. Thus costs may be disallowed in the following cases:—(i) Where the costs have been lavishly incurred; (ii) Where costs were incurred in proving points admitted by the other side; (iii) Where they were incurred in adducing overwhelming, or irrelevant evidence, (*Bishenmun Singh v. Land Mortgage Bank*, 11 C. 244 (P.C.)=12 I.A. 7=4 Sar. 589=9 Ind. Jur. 85, (iv) Where the defendant's pleader, who could have had the plaint rejected without trial, files a written statement raising a variety of defences, but not raising the very point which ultimately causes the shipwreck of the suit, it was held that the defendant ought to bear the loss which his pleader, by dint of care, might have avoided. "To hold otherwise would be to make the plaintiffs answerable for the mistake of their adversary's vakil." *Seeta Patta v. Suryadumma*, 18 M. 128 (130); *Run Bahadoor v. Lucho Koer*, 6 C. 406; *Hari Das v. Gamble*, 12 B.H.C.R. 23; (v) So also where the plaintiff joins unnecessary parties, they must be discharged with costs upon him. *Devarakonda v. Devarakonda*, 4 M. 184; *Shunt Buksh v. Lalla Nund Ram*, 11 W.R. 48; *Bishen Dayal v. The Bank of Upper India*, 13 A. 290 (295); see *Gour's Transfer of Property Act*, 4th Ed. Vol. II, 1439. A defendant, though unnecessarily joined, will forfeit his costs if he has resisted the claim on unsubstantial ground, and thus challenged issues. *Heera Nand v. Rure Khan*, 72 P.L.R. 1905; But see also *Mehr Singh v. Devi Dyal*, 38 P.R. 1912=19 P.L.R. 1912=32 P.W.R. 1912=13 Ind. Cas. 50, which was a case of the addition of unnecessary parties.

(244 & 245) *Short v. Kalloway*, 11 A. & E. 29; *Ronnberg v. Falkland Islands Co.*, 17 C.B.N.S. 1; 34 L.J.C.P. 34; *Godwin v. Francis*, L.R. 5 C.P. 295; *Pow v. Davis*, 1 B. & S. 220; 30 L.J.Q.B. 257; the *Wallsend*, (1907) p. 302, 76 L.J.P. 67; or, by an unsuccessful appeal, *Vogan v. Oulton*, 15 Times L.R. 33, *Mayne on Damages*, 8th Ed., 1909, p. 107. There are several cases to be found in the reports of the old

Where, however, the law gives the plaintiff the right to choose

Supreme and Sudder Courts, in which the principle of not allowing costs unnecessarily incurred had been adopted by the courts in this country. A reference to those cases will show how longstanding and universal the law on the subject has been. We collect hereunder some of the more important of those decisions in their chronological order :—One exception being allowed, the Court will not go on further with the argument. Second exceptions allowed with double costs. *Sumner v. Manick Bhowe*, 1777 Morton 260 = 1 Ind. Dec. Old Series, p. 1041. Where an answer had first been filed without counsel's signature and taken off the file for irregularity, and a regular answer afterwards filed, and the fees of Court paid for both, the Court refused to order the fees of former answer to be refunded ; *Rajah Beeje Govind Singh v. C. Reed*, (1939) Morton 297 = 1 Ind. Dec. Old Series, p. 1069. Revenue sale—Reversal of decree for arrears of revenue—Auction purchaser, relinquishment of land by—Sum due for Government revenue, deduction of—Unnecessary filing of separate replies to separate appeals—Costs. *Musst. Gourmunnee v. G. Lamb and others*, 4 Sud. Dew. Adaw. Rep. Bengal (1845) 148 = 10 Ind. Dec. Old Series, p. 105. Costs—Case compromised between plaintiff and some of the defendants—Party unnecessarily made defendant entitled to costs. *Radha Govind Mitter v. Bhyrube Chunder Singh*, 3 Sud. Dew. Adaw. Rep., Bengal (1847) 114 = 7 Sel. Rep. 345 = 9 Ind. Dec., Old Series, p. 359. Costs were allowed to a party unnecessarily made a defendant, in a case subsequently compromised between the plaintiff and the other defendants. *Radha Govind Mitter v. Bhyrube Chunder Singh*, (1847) 7 Sel. Rep. 345 = 8 Ind. Dec., Old Series, p. 262. This was an appeal from a decision of the Principal Sudder Ameen of East Burdwan. The appellant sued respondent, among other defendants, for a very large amount. Eventually the suit was amicably settled by arbitration, and a *razeenamah*, or deed of satisfaction, filed ; and the suit thus disposed of, half the costs were as usual returned. The respondent, however, had been unnecessarily made a defendant, and had no concern in the settlement of the claim : he therefore demanded his costs, which not being awarded, he appealed to the Sudder Court. As it appeared that he had been forced into Court unnecessarily, the Sudder Court, (present Mr. Gordon) remanded the decision for amendment. The Principal Sudder Ameen decreed the full amount expended by the respondent in stamps and half of his pleader's fees, in fact all that the respondents had been obliged to expend. An appeal was preferred on the futile plea that, because there was no condition in the *razeenamah* injurious to respondents, therefore the appellant was not liable for the respondent's costs. The respondent, availing himself of the appeal, claimed a larger amount than that decreed to him, because he had paid to his pleader, according to agreement under Regulation XII, 1833, more than one-half of the prescribed amount of fees, which only had been awarded back to him. The respondent having been forced into Court unnecessarily by appellant became most certainly answerable to him for whatever costs he was thereby obliged to incur, but for no more, as is clearly stated in the proviso, concluding clause 5, section 2, Regulation XII, 1833. Consequently the appeal was dismissed with full costs, and the Principal Sudder Ameen's decision affirmed. *Radha Govind Mitter v. Bhyrube Chunder Singh*, (1847) 7 Sel. Rep. 345 = 8 Ind. Dec. Old Series, p. 262. Respondents unnecessarily filing separate replies to separate appeals, must pay their own expenses in regard to them, *Collector of Dacca v. G. Lamb, &c.*, (1848) 7 Sel. Rep. 524 = 8 Ind. Dec., Old Series, p. 398. The Court said in the course of the judgment in the above case :—The plaintiffs have replied separately to the appeals of the talookdars, and their pleaders have applied for full costs on each appeal. This cannot be admitted. The talookdars appealed in order to procure exemption from payment of the sums decreed against them : and it was perfectly immaterial to the plaintiffs whether they were exempted or not, as, in the event of their not paying, the Government was,

one among a number of methods, it is open to him to adopt any of such methods and get the costs occasioned by such method. (246)

by the Principal Sudder Ameen's decree, chargeable with the whole amount. It would have been quite sufficient for the plaintiffs to have stated, in their reply to the Collector's appeal, it was not necessary for them to reply separately to the other appeals. If they have gone beyond this, and incurred further expenses, it must be at their own risk, and they must pay their own expenses on the appeals of talookdars. See the judgment of the Principal Sudder Ameen in *Collector of Dacca v. G. Lamb*, (1848), 7 Sel. Rep. 524 at 542=8 Ind. Dec., Old Series, p. 411. In a suit for the possession of land, from which the plaintiff alleged he had been dispossessed by the defendant, as well as for damages on account of the plunder of personal property, the lower Court decreed in favour of the plaintiff on both heads, giving *wasilat* also on the land. The defendant did not contest the plaintiff's right of possession in the land, although he denied that he had dispossessed him from it. But, in laying his appeal against the decree of the lower Court, he calculated the value of the appeal so as to include the right in the land itself, as well as the *wasilat* awarded against him. *Held* that, as the only point, in the appeal connected with the land, was regarding the award of *wasilat*, the appellant, defendant, ought to have confined his appeal as to that part of the decree, to the amount of that award, and could not recover from the plaintiff, respondent, the costs of the excess valuation of the appeal, arising from the calculation having included also the right to the land. *Sheebnath Ghose v. Degumbur Ghose*, 6 Sud. Dew. Adaw. Rep. Bengal (1850) 310=11 Ind. Dec., Old Series, p. 251. Where a party, laying his appeal at a certain value, includes in such value an amount having reference to a portion of the decree of the lower Court which he does not contest, he must bear, although successful in his appeal, the proportion of costs arising from such amount which was in excess of the necessary charge of the appeal, having been brought into the valuation. *Edward Garstin v. L. Nurain Mundul*, 6 Sud. Dew. Adaw. Rep., Bengal (1850) 564=11 Ind. Dec., Old Series, p. 458. A party, to whom possession of an estate had been given up by another, notwithstanding some previous disputes as to the execution of a compromise, sued for registration of his name as proprietor of the estate. The defence was that the action was unnecessary, as the plaintiff had only to apply, which he had omitted to do, to the Collector as the proper officer for making registration. The lower Court decided in favour of the plaintiff, awarding to him at the same time the costs of the action. *Held*, that the award of costs in such a suit was improper, as it was incumbent on the plaintiff to apply for registration in the first instance to the collector, and a suit in court would only have been necessary had the other party raised objections before the collector. *Hunooman Pursaud v. Kaleepersaud*, 6 Sud. Dew. Adaw. Rep. Bengal, (1850) 260=11 Ind. Dec. Old Series, p. 209. Appellants, drawing petitions of appeal at an excess over the legal stamp, or appealing at a value in excess of the sum actually sought to be recovered by the appeal, cannot recover costs arising out of such excess stamp, or valuation. *Baboo Gunesch Dutt v. Rajah Ramnuran Singh*, (1850) 6 Sud. Dew. Adaw. Rep. Bengal 1=11 Ind. Dec. Old Series, p. 1. The plaintiffs charged with the due costs of the appellant, who had been made a defendant by them without sufficient grounds. The appellant, however, to bear the extra costs in appeal, caused by his having laid it at an amount greatly in excess of the value of the lands in reference to which alone the suit had been brought against him. *Pearee Lall Mundul v. Loknath Haldar*, (1852), 8 Sud. Dew. Adaw. Rep. (Ben.) 19=12 Ind. Dec. Old Series, p. 15. Special appeal to reduce costs on account of excess value of the stamp used in appeal. The respondent having yielded the point, decree accordingly. *Gopaulkishen Soor v. Kaderbuksh* (1854), 10 Sud. Dew. Adaw. Rep. (Ben.) 212=13 Ind. Dec., Old Series, p. 916.

(246) See *Frasch v. Loe*, 26 W.R.; 188 (Eng.); *Cook v. Heynes*, W.N. (84) 75.

A plaintiff bringing two or more actions where one would suffice would be held liable to pay the extra costs.⁽²⁴⁷⁾

Plaintiff unnecessarily multiplying actions.

The plaintiffs being guilty of oppressive conduct in bringing several actions for small amounts, the Court deprived them of their costs, although judgment was signed in default of defence.⁽²⁴⁸⁾

Plaintiff bringing several actions for small amounts against same defendant—Oppressive conduct.

Where each of two co-sharers in a *talook* sued separately for his share of the rent due from a tenant under a *kaboolcut*, it was held that no more costs were to be awarded to the plaintiffs than if they had sued jointly.^(248-a)

In an action for breaches of agreement to keep demise premises in repair, damages as claimed was 30*l*, as estimated by plaintiff at trial it was 5*l*, or 6*l*, and as assessed by Judge, 1*l*.—It was held that the triviality of the action, the exaggeration of the damage, and the bringing of the action in the superior Courts instead of in the inferior Court, in which it ought to have been brought, afforded sufficient ground for the exercise of the Judge's discretion in ordering the plaintiff to pay to the defendant all the extra costs occasioned by bringing the action in a superior Court.⁽²⁴⁹⁾

Plaintiff bringing action in superior Court—Exaggeration of claim.

Where the defendant knowing that plaintiff was greatly enhancing the costs by incurring unnecessary expenditure, does not object to such enhancement of costs or bring the same to the knowledge of the Court, such conduct on the part of the defendant may sometimes influence the Court to make him liable for such enhanced costs. Thus, although as a general rule the respondent would not be made liable for costs occasioned by the inclusion of unnecessary papers in the record, yet, in one case the Privy Council did not deprive the successful appellant of any part of his costs, for the inclusion in the record of a bulk of papers absolutely irrelevant to the appeal, as the respondent did not in that case object to their inclusion.⁽²⁵⁰⁾

Want of objection by defendant to plaintiff incurring unnecessary expenditure.

(247) See *Muddock v. Blackwood*, (1898) 1 Ch. p. 61.

(248) *Young v. Thomas*, (1892) 2 Ch., 134 C. A.

(248-a) *Pyari Mohan v. Gazi*, 2 B L.R. A.C. 337=11 W.R. 270.

(249) *Whitmore v. O'Reilly*, (1906) 2 I.R. 357.

(250) *Bijoy Gopal Mukerji v. Srimati Krishna Mahishi*, 9 Bom. L.R. 602=34 C. 329=4 A.L.J. 329=5 C.L.J. 334, P.C. So also where the objection regarding the insufficient stamp had not been raised in the lower Court, it was ordered that parties should each pay their own costs. *Mohunt Honooman Dass v. Mohunt Bhikun Dass*, (1852) 8 Sud. Dew. Adaw. Rep. (Ben.) 49=12 Ind. Dec. Old Series, p. 39.

Expenses
caused by the
trial of wrong
and
unnecessary
issues.

In the case of *Badische Anilin v. Levinstein* ⁽²⁵¹⁾ Bowen, L.J. said:—"It seems to me that, without laying down any hard and fast line, or trying to fetter our jurisdiction at a future period in any other case, we are acting on a sensible and sound principle, namely, the principle that parties ought not, even if right in the action, to add to the expenses of an action by fighting issues in which they are in the wrong."⁽²⁵²⁾

Successful
party refusing
to submit to
arbitration.

The fact that the successful party elects to stand upon his legal rights, and refuses to leave the subject-matter of the litigation to the arbitration of the Court, does not justify the Court in making an order depriving such party of his costs.⁽²⁵³⁾

Where both
parties are
at fault.

In a suit in equity where both parties are at fault, the Court will ordinarily require each party to pay his own costs, ⁽²⁵⁴⁾ or make each pay an equal share of the whole amount of costs taxed.⁽²⁵⁵⁾ Sometimes, costs will not be allowed to either party as against the other where there has been a mis-trial resulting from a submission of the case in accordance with their own stipulations.⁽²⁵⁶⁾

Scandalous
matter in
pleading.

Scandalous matter in an answer has been told to be a ground for withholding costs from a defendant, although he was successful in the suit.⁽²⁵⁷⁾

Negligence
of party.

Where an appeal is remanded to the lower Courts because the appellant did not set out his case properly in the first Court and

(251) 29 Ch. D. at p. 419.

(252) *Per* Bowen, L.J., *Badische Anilin, etc. v. Levinstein* (1895), 29 Ch. D. at p. 419, C.A. In a recent case plaintiffs being substantially successful, they were allowed the general costs of the action, excepting the costs of those issues in which the defendants had succeeded (*Leckhampton Quarries Co. v. Cheltenham Rural District Council*, (1905) 49 Sol. J. 618, C.A.). See also *Shah Muhammad v. Kashi Das*, 7 A. 199 = A.W.N. (1884) 338, noted as Ref. (205), *supra*.

(253) *Civil Service Co-operative Society v. General Steam Navigation Co.*, (1903) 2 K.B. 756.

(254) *Wilson v. Lyon*, 51 Ill. 530. See also *Nihal Singh v. Mal Singh*, 160 P.W. R. 1915 in which a case where the case of both parties was found to be false and no costs were awarded. See also Ref. (205-a), *supra*.

(255) *Waller v. Jones*, 107 Ala. 331.

(256) *Watts v. Tittabawassee Boot Co.*, 47 Mich. 540. See *Cyclopædia of Law and Procedure*, Vol. XI, Heading "Costs," p. 37.

(257) *Mayhew v. Phoenix Ins. Co.*, 23 Mich. 105. But see also *Seth Sam v. Simon Ayyes*, (1813) 2 Strange 45 = 5 Ind. Dec. Old Series, p. 256. Matter in an answer held scandalous and impertinent; but on account of the undue length of the bill, not with costs. *Seth Sam v. Simon Ayyes*, (1813) 2 Strange 45 = 5 Ind. Dec. Old Series, p. 256. See also chapter on "Amount and Allowance of Costs," *infra*.

support it by proper evidence, the respondent would be paid his costs of appeal.^(257-a)

The nature of the business in respect of which the litigation arises, as also the publication of misleading advertisements calculated to injure the opposite party, may be a ground for depriving a successful party of his costs.⁽²⁵⁸⁾ Misleading advertisement.

The fact that a losing party was not allowed to cross-examine witnesses does not seem to be any ground to disallow the successful party his costs.⁽²⁵⁹⁾ Losing party not allowed to cross-examine witnesses.

In the absence of misconduct, a successful plaintiff in the action will not, subject to the large discretion of the Court, be deprived of costs, simply because some of his witnesses have been guilty of exaggeration.⁽²⁶⁰⁾ The case would be different if the plaintiff himself were guilty of gross exaggeration.^(260-a) Witness guilty of exaggeration.

Where a bond is set aside as against public policy, at a suit of the *particeps criminis*, no costs are given.⁽²⁶¹⁾ Thus, it has been held that a person who is *particeps criminis* is not entitled to the costs of setting aside bonds given for an illegal consideration.⁽²⁶²⁾ Similarly, the Court held that no costs should be given where both parties were engaged in manufacturing an article intended to be used to deceive and mislead the public.⁽²⁶³⁾ In an English case, it was held that a third party assisting a person, in contemplation of bankruptcy, to withdraw property from his creditors, and who afterwards sets up a title in himself to the property against the assignees in a suit instituted by them, which defence fails, cannot claim to be reimbursed his costs out of a surplus of the bankrupt's estate arising from the sale of that property. Public policy requires that he should not derive any benefit from such a transaction.⁽²⁶⁴⁾ Costs refused on ground of public policy — *Particeps criminis*.

In some cases, although the Court gives the plaintiff a decree, still it may refuse him costs in consideration of the fact that the Where plaintiff has entered into an usurious bargain.

(257-a) *Lakshumanan Chetti v. Muthiah Chetty*, 18 M.L.T. 247 = 2 L.W. 755 = 30 Ind. Cas. 785.

(258) *Estcourt v. Estcourt Hop Essence Co.*, (1875), L.R. 10 Ch. 276; Cf. *King and Co. v. Gillard & Co.*, (1905) 2 Ch. 7.

(259) *Cone v. Montgomery*, 25 Ch. 277.

(260) *Per Kekenrick, J., in Lipman v. Pulman*, (1904) 91 L.T. 182.

(260 a) See *Whitmore v. O'Reilly*, (1906) 2 I.R. 357.

(261) *Debenham v. Oz*, 1 Ves. Sen. 277.

(262) *Morgan v. Bruen*, Ll. & Gt. Sugd. 180.

(263) *Estcourt v. Estcourt Hop Essence Co.*, 44 L.J. Ch. 223; L.R. 10 Ch. 276; 32 L.T. 80; 23 W.R. 313 (Eng.).

(264) *Tratt, Ex parte*, 1 W.R. 116 (Eng.).

bargain into which he had entered with the defendant was usurious in its nature.⁽²⁶⁵⁾ Thus in many of the American States, there are express statutory provisions to the effect that if usury be proved in an action on contract the Court may disallow costs either wholly or in part to the plaintiff though he may be successful.⁽²⁶⁶⁾

Hearing for
costs alone.

It has been held that "it is inappropriate and contrary to the practice of the Court to investigate the merits of a case merely to determine the incidence of costs."⁽²⁶⁷⁾ As a general rule a cause will not be heard for costs alone.⁽²⁶⁸⁾ As a matter of practice the Court will not hear a suit for settlement of costs only even on mutual consent.⁽²⁶⁹⁾ In an early English case where it was found that the defendant had satisfied the plaintiff's demand, the Court

(265) See *J. Carvalho v. Nurbibi*, 3 B. 202=4 Ind. Jur. 32. See Cases under Ref. (183), *supra*.

(266) *Garth v. Cooper*, 12 Iowa 364; But in one of those States the rule is limited at least to the extent that the amount recoverable must be reduced by proof of usury made by the defendant, and a voluntary indorsement of the amount of usurious interest taken or retained by the plaintiff before trial will not bring the case within the rule so as to entitle defendant to costs or deprive plaintiff of costs. *Whitten v. Palmer*, 50 Me. 125. In another state defendant recovers full costs if it be made to appear that usurious interest has been taken or reserved. *Neel v. Clay*, 48 Ala. 252). These statutes intend costs of the action and not merely costs incurred on the issue of usury. *Cattle v. Haddock*, 17 Nebr. 307. See Cyclopædia of Law and Procedure, Vol. XI, Heading "Costs," p. 45.

(267) *Mithalal alias Chunilal v. Chunilal Nagindas*, 4 Bom. L.R. 816. The following facts of the case extracted from the judgment may also be noted: "The plaintiff firm in this case claims to recover a sum of Rs. 7,985 from the defendant firm, the members of which are Shet Maneklal, an adult and Mithalal a minor. The defence of Mithalal is, that, though he is a sharer in the firm with Maneklal, the debt on which the suit is based was not one for which he could properly be made liable, as it was incurred for the purpose of Maneklal's separate and individual affairs. This defence did not succeed in the lower Court and ordinarily it would have been necessary for us to determine whether the lower Court had rightly fastened the liability on the minor. Defendant 1, however, has since satisfied the decree, so there is now no question before us which we can properly try on its merits, for the satisfaction of the decree has absolved the minor defendant from all liability under it. The only course under these circumstances open to us is to confirm the decree, because it would be inappropriate and contrary to the practice of the Court to investigate the merits of a case merely to determine the incidence of costs. We, however, wish it clearly to be understood that in affirming the decree of the lower Court, we in no way express an opinion that the conclusion of that Court was right. We accordingly confirm the decree of the lower Court, and order that each party do bear its own costs of this appeal. The cross-objection calls for no comment; the matter to which it relates was one within the discretion of the Judge and if that discretion was wrongly exercised through oversight the proper course would have been to apply to that Court for review."

(268) *Blackwood v. Gregg*, 1 Hay. & J. 310.

(269) *Roberts v. Roberts*, 1 Sim. & S. 39.

refused to allow the action to be proceeded with for costs. (270) In a later case it was suggested that after, action brought, the plaintiff after receiving payment of his demands, may go on to trial, if the costs then incurred are not tendered. (271) An action must proceed till it is brought to its proper termination, or is stopped upon payment of costs. (272) When the demand of the plaintiff is submitted to, and the only question between the parties is the costs of the suit, the cause ought not to be proceeded with, but the proper course is to make an application to the Court to prevent the expense of further proceeding. (273)

In a case where the parties compromised the subject-matter of the suit, without providing for the costs, it was held, that the cause could not be afterwards heard, for the purpose of determining the costs alone, and it was struck out of the paper. (274) Where parties

Re opening of
question of
costs after
compromise
of suit.

(270) *Tapp v. Tanner*, 20 L.J., Ch. 559.

(271) *Lill v. Robinson*, Beav. 84.

(272) *Goodwin v. Cremer*, 18 Q.B. 760. In a still later case it was laid down that though the substantial object of a suit be attained previously to the hearing, yet either party has the right to prosecute the suit to a hearing, in order to determine the question of costs. *Morgan v. G. E. Ry.*, 2 N.R. 60. Thus in one case a suit was filed in consequence of a claim to a fund made by a defendant. The defendant, in his answer, disclaimed all right to the fund, but stated certain facts, as the ground for his not being ordered to pay the costs of the suit. The plaintiffs entered into evidence by which they falsified those statements. The Court held that they were justified in so doing, and ordered the defendant to pay the costs of the suit. *Deacon v. Deacon*, 7 Sim. 378. So, also, where a debt is paid by a defendant without any knowledge of an action commenced, this is no defence to the action at the trial. *Toms v. Powell*, 7 East, 536; 3 Smith, 554; 6 Esp. 40. Again where the plaintiff commenced a suit and the defendant produced a receipt dated the same day, the receipt is no defence to the action without proof that the payment was made before the plaintiff was filed. *Godard v. Benjamin*, 3 Camp. 331.

(273) *Sivell v. Abraham*, 8 Beav. 598. The following appears to be the practice of the English Courts:—Where upon an interlocutory motion in an action the plaintiff obtains the relief which he seeks, he is bound to make an application to the defendant to have the costs disposed of on motion, and unless he does so is precluded from having the extra costs occasioned by going on to trial. But if the defendant refuses to allow the matter to be disposed of on motion, or if there is any question remaining open between the parties to be decided, the case cannot be so dealt with. *Sonnenschein v. Barnard*, 57 L.T. 712. Where the right of a party to an order for which he has given notice of motion is intercepted by a step taken by his adversary, he is entitled to his costs; but he should not bring on the motion, if the costs then incurred are tendered. *Newton v. Ricketts*, 11 Beav. 164. The plaintiff served a defendant with a notice of motion, but, before the motion was made, the defendant put in his answer: *Held*, that the plaintiff had a right to bring on the motion for the purpose of obtaining the costs of it. *Spooner v. Payne*, 17 L.J. Ch. 180; 12 Jur. 642. See *Moody v. Hebbard*, 17 L.J., Ch. 24; 11 Jur. 911.

(274) *Whalley v. Suffield (Lord)*, 12 Beav. 402.

to a suit have compromised all matters in difference between them, the Court will not entertain the suit for the mere purpose of determining the question of costs.⁽²⁷⁵⁾ The rule that a Court will not entertain a suit merely for determining the question of costs applies only where there has been an actual settlement of the subject-matter of the suit before the commencement of litigation.⁽²⁷⁶⁾

An order made on a party to a suit for payment of costs after taxation, with liberty to apply at the hearing for reimbursement, is intended to conclude all questions. He will not, therefore, having omitted to make any such application at the hearing, be allowed afterwards to open the question of costs, although, at the time of the hearing no taxation had been made of the costs to which he was liable under the order.⁽²⁷⁷⁾ In an English case it was doubted as to whether it was regular to present a petition to come on with the cause on further directions, for the purpose of stating circumstances occurring since the filing of the suit, with a view only to the adjudication of the costs of suit.⁽²⁷⁸⁾

Determina-
tion of the
amount for
the purpose
of fixing right
to costs.

While the amount claimed determines what Court has jurisdiction⁽²⁷⁹⁾ the amount recovered is the basis for determining the question of costs.⁽²⁸⁰⁾

(275) *Nicholls v. Elford*, 5 Jur. (N.S.) 264. A suit was filed for an account. In his answer the defendant, throwing on the plaintiff part of the blame of the circumstances which led to the institution of the suit, paid the amount due from him as agreed by the parties, and the plaintiff accepted the amount without prejudice to his right to the costs of the suit. Afterwards the plaintiff moved to stay all proceedings, and that the defendant might be ordered to pay the costs. The Vice Chancellor (10 W.R. 368; (Eng.) 6 L.T. 195) made the order as prayed; but, on appeal, *held*, that the question of costs would depend upon the merits of the case, the time for deciding which had not arrived, when the proceedings were ordered to be stayed; and the Court, therefore, discharged the order of the Vice-Chancellor, but expressed a doubt whether the plaintiff's right to costs was wholly gone by reason of his agreement to settle the dispute. *Wilde v. Wilde*, 31 L.J., Ch. 558; 6 L.T. 275; 10 W.R. 503 (Eng.).

(276) *Griffin v. Brady*, 39 L.J., Ch. 136; 18 W.R. 130 (Eng.). In a suit to compel the defendant to deliver up certain deeds and execute certain conveyances, he having at last done what was required, and having been paid on the other hand a small part of his counter-demand: *Held* (notwithstanding the general rule as to suits which have been compromised), that the plaintiffs were entitled to bring the suit to a hearing for the purpose of getting their costs, and decree against the defendant accordingly. (*Ib.*) On this subject see Yearly Practice, 1914, p. 1043; Mew's Digest, Vol. IV, Cols. 707—708; Daniell's Chancery Practice, 7th Ed., p. 959. Where an application is made for a new trial, and the application is opposed and a new trial is granted, the question of costs must not be left to abide the result of the new trial. *Hamilton v. Seal*, (1904) 2 K.B. 262.

(277) *Whalley v. Ramage*, 8 L.T. 499.

(278) *Tanner v. Dancey*, 9 Beav. 339.

(279) *Hastings v. Mills*, 50 Nabr. 842.

(280) *Cyclopædia of Law and Procedure*, Vol. XI, pp. 45, 46.

"Where there are several counts the recoveries on the different counts may be added to make up the sum necessary to entitle plaintiff to costs ⁽²⁸¹⁾; and where separate verdicts are rendered against defendants sued jointly, the separate sums awarded may be added to make up such amount, ⁽²⁸²⁾ unless the action is one in which the defendants, could not properly be joined."⁽²⁸³⁾

A Court has no jurisdiction to make persons not parties to suit Who liable
liable for costs.⁽²⁸⁴⁾ for costs.

The general principle cannot be denied that Courts of Justice have only power to deal with persons brought before them by regular process of law, and they have not power otherwise than by such process to summon before them any persons they may choose, to answer for their misconduct.⁽²⁸⁵⁾

There are, no doubt, exceptions to this principle such as the power to punish what is called "Contempt of Court" and it has been considered that the High Court on its Original Side has very wide powers in this respect.⁽²⁸⁶⁾

The costs of an abandoned motion⁽²⁸⁷⁾ are not costs in the Cause.⁽²⁸⁸⁾ As a general rule a party cannot abandon one suit or
Costs of
abandoned
suit or
proceeding.

(281) *Hillman v. Whitney*, 2 Allen (Mass) 268.

(282) *Huff v. Jewett*, 20 Misc. (N.Y.) 35.

(283) *Richards v. Scott*, Ida (1901) 65, Pac. 433. See Cyclopaedia of Law and Procedure, Vol. XI, Heading "Costs," p. 46. Interest accruing after the judgment cannot be added to determine the amount for the purpose of fixing right to costs. *Harvey v. Bangs*, 53 Me. 514.

(284) See *Ram Coomar v. Chunder Canto*, 2 App. Cas. 186; cited in 20 B. 167 (169) See this subject fully discussed in Chapter II on "Who are liable for Costs," *infra*.

(285) *Ramnidhy Koondoo v. Rajah Ojoodhyaram Khan*, 11 B.L.R. App. 37 (38).

(286) *Ramnidhy Koondoo v. Rajah Ojoodhyaram Khan*, 11 B.L.R. App. 37 (38, 39).

(287) As to what is an abandoned motion, see Dan. Ch. Practice, 7th Ed., 1901, Vol. I, Chap. xxii, s. 2.

(288) *Lewis v. Armstrong*, 3 M. & K. 69; see also *Farquharson v. Pitcher*, 4 Russ. 510; *Warner v. Armstrong*, 4 Sims, 140. Under the practice of the Court of Chancery it was provided that, where a party gave a notice of motion, and did not move accordingly, he should pay to the other side costs to be taxed by the taxing master, unless the Court itself should direct, upon production of the notice of motion, what sum should be paid for costs: R.S.O., O. XL, r. 23. This rule is repealed by Rule of the Supreme Court, 1883, but it is believed that the practice is still followed: see *Berry v. Exchange Trading Co.*, 1 Q.B.D. 77; Morg. Chy. Acts, &c. 478; Seton, 395. In taxing the costs of an abandoned motion, the costs of all work down to the time of any notice which stops the work are allowed, if reasonable: *Harrison v. Leutner*, 16 C.D. 559.

course of proceeding and adopt another, without previously paying the costs occasioned by the abandoned suit or proceedings.⁽²⁸⁹⁾

Costs of
ex parte
applications.

Where a suit is not decided on the merits after contest, but is withdrawn, the Court would act rightly in awarding the defendant only half his pleader's fee as costs.^(289 a)

No one can be ordered to pay the costs of an *ex parte* application.⁽²⁹⁰⁾ An absent party cannot be ordered to pay costs upon an *ex parte* application.⁽²⁹¹⁾ But an order made on notice and continuing an injunction with costs will, in the absence of special directions to the contrary, include the costs an interim injunction previously obtained on an *ex parte* application.⁽²⁹²⁾

Costs of
interlocutory
applications.

The Judge at the trial has power to deal with costs of interlocutory applications⁽²⁹³⁾ according to his discretion.

In the Court of Chancery, as is well known, costs of such applications have always been in the discretion of the Court, and as a general rule costs will follow the result.⁽²⁹⁴⁾

(289) *Davey v. Durrant*, 2 De G. & J. 506. If the costs have not been taxed, the party must pay sufficient sum into Court. *Burdell v. Hay*, 33 Beav. 189; and see *Bellchamber v. Giant*, 3 Mad. 550 (Eng.). See the provisions of O. XXIII, r. (1) of the Code of Civil Procedure (1908) and the cases under that rule collected in Sarkar's Commentaries on the same, pp. 1031-2.

(289-a) *Collector of Muthra v. Ahmadi Begam*, 5 Ind. Cas. 121.

(290) *Nokes v. Gibbon*, 26 L.J. Ch. 208; 3 Jur. (N.S.) 282; 5 W.R. 216 (Eng.).

(291) *Cast v. Poyser*, 26 L.J. Ch. 93, 353; 3 Jur. (N.S.) 38.

(292) *Blakey v. Hall*, 56 L.J. Ch. 568; 56 L.T. 400; 95 W.R. 592 (Eng.).

(293) *Arthur Napoleon Templeton v. Surgeon Lieut. Col. Edward Laurie*, 2 Bom. L.R. 244 (253).

(294) *Bartley v. Wood*, 13 L.J. Ch. 614 and *Feruguson v. Wilson*, L.R. 2 Ch. 92, cited in *Arthur Napoleon Templeton v. Surgeon, Lieut. Col. Edward Laurie*, 2 Bom. L.R. 244 (252). In *Hodges v. Hodges*, Jessel, M.R. said:—"The dismissal of an action with costs ought to include all costs reserved. I will give instructions to the Registrar always to insert, without any special directions, in all orders made in this branch of the Court the words including costs of all applications ordered to stand over until trial and all costs reserved to be disposed of at the trial, so that it will be for the other side to show why they should not be put in." *Hodges v. Hodges*, 25 W.R. 162 (Eng.); cited in *Templeton v. Laurie*, 2 Bom. L.R. 244 (252). But in *British N.P.P.A. v. Bywater*, (1897) Ch. 532, Byrne, J., says:—"Where interlocutory applications have been ordered to stand to the trial and are not then mentioned to the judge, the costs of such applications are to be treated as costs in the action and taxed accordingly, and need not be mentioned in the judgment. Where interlocutory applications have been disposed of, but the costs have been reserved, such costs are not to be mentioned in the judgment or order or allowed on taxation, without the special direction of the Judge." *British N.P.P.A. v. Bywater*, (1897) Ch. 532; cited in *Arthur Napoleon Templeton v. Laurie*, 2 Bom. L.R. 244 (252). In *Koosen v. Rose*, 45 W.R. 337 (Eng.), it was held that where, on an application under O. XIV, the Judge in Chambers has made an order as to costs, the Judge at the trial has no jurisdiction to interfere with these costs. *Koosen v. Rose*, 45 W.R. 337 (Eng.), cited in *Templeton v. Laurie*, 2 Bom. L.R. 244 (252).

CHAPTER II.

WHO ARE LIABLE FOR COSTS.

Duty of Court to make order as to costs when finally determining case.

Persons who are parties to suit, generally liable for costs.

Hidden parties, when may be made liable for costs.

(i) Jurisdiction of High Court.

(ii) Jurisdiction of Mofussil Courts.

(iii) No jurisdiction to make such order when suit no longer pending.

Person setting Court in motion for improper purpose—ChamPERTY and maintenance—Liability of.

Persons interested on behalf of whom suit is brought but not joining or joined as parties—Liability of.

Substituted parties—Liability of.

Several plaintiffs—Liability of.

Several defendants—Liability of.

Co-defendants—Liability of.

Personal representatives, trustees and heir-at-law—Liability of.

Assignee of decree pending appeal—Liability of.

Party allowed to withdraw from appeal—Liability of, for costs of lower Court.

Party compromising suit—Liability of.

Appellant partly succeeding in appeal—Costs of.

Joint Hindu family—Father and son—Liability for costs.

Sometimes neither party is liable—Costs ordered to be given out of the fund or estate.

Probate proceedings—Costs of.

Guardian ad litem or next friend of minor—Liability for costs.

Considerations in making *guardian ad litem* personally liable for costs.

Unreasonable or improper suit instituted by next friend—Costs of.

Intervenors—Liability of.

Surety—Liability of.

Attorney—Liability of.

Application for costs should be made at the hearing.

WHEN an original or appellate Court finally determines a suit, it must decide that the costs should be borne by one or other of the parties before it.⁽¹⁾ Thus it would not be at liberty to declare

Duty of Court to make order as to costs when finally determining case.

(1) *Kashee Chunder Dey v. Bungshee Buddun Dey*, 23 W.R. 89; Civ. Pro. Code (1908), O. XX, r. 6. See, also, *Raghunandan Lal v. Rajendra Prosad Narain Singh*, 14 C.W.N. 556 (557, 558) = 11 C.L.J. 207 = 5 Ind. Cas. 342. See, also, Ch. III "who are entitled to costs." On the subject-matter of this Chapter see Daniell's Chancery Practice, 7th Ed., 1901, Chapter XVIII, Sections II and III; Encyclopædia of the Laws of England, 2nd Ed., Vol. IV, pp. 44-49; Halsbury's Laws of England, Vol. XXIII,

that the costs of the suit should be borne by the unsuccessful party in a suit to be thereafter brought, because it might be that the suit would not be brought at all, and in that case there would be no execution, or the plaintiff and the defendant might be left to bear their own costs. (1-a)

Persons who are parties to suit, generally liable for costs.

Just as the general rule as to the person entitled to costs is that he must be a party to the suit, so, the general rule is that the person who would be liable for costs must also be a party to the suit. (2) It has been said that "Courts have no power except over parties to the record." (3) An exception has however been made in the case where the party before the Court is a mere puppet in the hands of a stranger to the suit. (4)

Ss. 324, 325, pp. 178—180; Mews, Digest, Vol. IV, Cols. 710—725; Yearly Practice, 1914, pp. 1045—1051.

(1-a) (*Ibid*). The following observations of Jackson, J., in the course of the judgment in the above case of *Kashee Chunder Dey v. Bungshee Budden Dey*, may also be noted:—"To the judgment was attached an order that the plaintiff was to be at liberty to institute a fresh suit in the proper Court within three months, and that the costs of that first suit and the appeal were to be paid by the party who should be unsuccessful in the suit so to be brought. The suit was afterwards brought and the result is that the plaintiff has got a decree, which decree has been in some respect modified by the final decision of this Court on special appeal delivered on the 7th July last. It is unnecessary to consider, therefore, the effect of the final decision of this Court upon the order in the first suit and the appeal, for this simple reason that we are of opinion that the order made by Mr. Wright, the Subordinate Judge, was made entirely without authority. It was his business as the appellate Court on the occasion to determine that the costs should be borne by one or other of the parties before him, as he was then finally determining the suit. He was not at liberty to declare that the costs of that suit should be borne by the unsuccessful party in a suit to be thereafter brought, because it might be that the suit would not be brought at all, and in that case there would be no execution, or the plaintiff and the defendant might be left to bear their own costs." *Per* Jackson, J., in *Kashee Chunder Dey v. Bungshee Budden Dey*, 23 W.R. 89 at p. 90. See, also, Civ. Pro. Code (1908), O.XX, r. 6; *Raghu Nandan Lal v. Rajendra Prosad Nairain Singh*, 14 C.W.N. 556 (557) = 11 C.L.J. 207.

(2) See on this point *Bevis v. Turner*, 7 B. 484 at p. 486.

(3) *Bevis v. Turner*, 7 B. 484 at p. 486.

(4) See *Bevis v. Turner*, 7 B. 484 at p. 486; Amir Ali's Civil Procedure Code, 1st Ed., p. 201. By O. XVI, r. 54 of the English Supreme Court Rules "the Court or a Judge may decide all questions of costs as between a third party and the other parties to the action, and may order any one or more to pay the costs of any other or others, and give such direction as to costs as the justice of the case may require." Under this rule, third parties, who had in reality fought the plaintiffs and failed, were ordered together with defendants, to pay costs both of successful appeal and in Court below: (*Edison and Swan United Electric Light Co. v. Holland*, 41 Ch. D. 28, C.A.) In *Hornby v. Cornewell*, 8 Q.B.D. 329, C.A., a third party was ordered to pay all the costs of the action, including the costs of the proceedings between plaintiff and defendant. Where a third party was ordered to pay the costs of the proceedings taken to bring him before the Court, the order could not be varied on appeal, though by the subsequent

Persons who without their consent are made parties to a suit in the appellate stage, are not liable for costs simply because they encouraged the plaintiff to bring the suit and provided him with the necessary funds.⁽⁵⁾

The cases in which a person who is not a party to the suit can be made subject to the order of the Civil Court are very rare, and unless such powers have been specially conferred upon the Civil Court by the Legislature, caution must be exercised before assuming them.⁽⁶⁾

As an ordinary rule, only the parties to a litigation can be made liable for costs, but, in exceptional cases, a Court may make a stranger to a suit liable for costs.⁽⁷⁾

The question whether the Court has power to make certain hidden plaintiffs responsible for the costs of an unsuccessful litigation in which they put forth certain others as nominal plaintiffs on the record, arose in a case which came before their Lordships Peacock, Norman, and Phear, JJ., of the Calcutta High Court as early as

Hidden parties, when may be made liable for costs (i) Jurisdiction of High Court.

judgment the action had been dismissed against him with costs: *Beynon v. Godden*, 4 Ex. D. 246, C.A.; but, *semble*, the costs of the interlocutory proceedings should have been reserved. For cases in which defendant has been ordered to pay costs to third party, see *Dawson v. Shepherd*, 49 L.J. Exch. 529; 28 W.R. 805; 42 L.T. 611; *Yorkshire Wagon Co. v. Newport Coal Co.*, 5 Q.B.D. 268. (Seton's Judgments and Orders, 6th Ed., Vol. I, p. 256.)..... Whatever may be the respective rights and liabilities of each party to the other with respect to costs, yet, as far the Court and its officers are concerned, it has been held that in contemplation of law each party to a suit should pay the costs made by him as they accrue in the progress of the suit (*People v. Harlow*, 29 Ill. 43; see Court Fees Act (VII of 1870), Ss. 4 and 6). "Each party is primarily liable for costs made by himself to the officers or other persons rendering the services for which the costs were incurred (*Exp. Ashley*, 3 Ark. 63). In any event if costs cannot be made out of the party cast, the successful party may be compelled to pay costs made by himself." (*Superior Ct. Office v. Lockman*, 12 N.C. 146) (*Cleveland v. Henderson*, 4 Tex. 182), *Cyclopædia of Law and Procedure*, Vol. XI, Heading "Costs", p. 90. The Court has no jurisdiction to make persons not parties pay costs—*Ram Coomar v. Chunder Canto*, 2 App. Cas. 186 (212); referred to in argument in *Ramji v. Ellis*, 20 B. 167 (169). An assignee by operation of law is liable to costs *ab initio*. A person who voluntarily makes himself assignee is a *fortiori* similarly liable (*Watson v. Holliday*, 20 Ch. D. 780 (785); *Borneman v. Wilson*, 28 Ch. D. 53 (55); *Harland v. Garbutt*, *Weekly Notes* (1881), p. 8; *Boynton v. Boynton*, 4 App. Cas. 733-5; referred to in *Ramji v. Ellis*, 20 B. 167 (169)). Except possibly in a very extreme and exceptional case a person assisting the plaintiff is not liable in respect of, and cannot be ordered to pay, costs unless he is made a party to the suit (*Hayward v. Giffard*, 4 M. and W. 194; *Ram Coomar v. Chunder Canto*, 2 App. Cas. 186 (212); referred to in *Ramji v. Ellis*, 20 B. 167 (170).

(5) *Robert Watson and Co. v. Hurgobind Sookul*, 22 W.R. 35.

(6) (*Ibid.*)

(7) *Balabhadra v. Radhashyam*, 16 Ind. Cas. 381. (*James Bevis v. Turner*, 7 B. 484, and *Jointee Chunder Sein v. Anundo Lall Doss*, 14 W.R.O.C. 1, *Rel. on.*)

1865.⁽⁸⁾ In that case, it was held, that, where a person is put forward as plaintiff, who has no interest of any sort in the subject-matter of the suit, and who is a mere name, the party using the name as plaintiff is guilty of contempt and abuse of the process of the Court.⁽⁹⁾ It was held in that case that the High Courts (but not ordinary Courts)⁽¹⁰⁾ have jurisdiction to compel the party who is really the plaintiff to pay costs (in case the suit is dismissed) although he was not named as party in the original proceedings. In this case, a suit for possession of land was dismissed with costs; and the defendant moved the Court to order two persons T and S, strangers to the suit, to pay the costs due to him alleging that they were the real, though hidden, plaintiffs, and had executed a *sham* lease in favour of the nominal plaintiff who, on the strength thereof, brought the suit; it was held that it was not competent to the Court under the provisions of the Code of Civil Procedure⁽¹¹⁾ to pass such an order. It was not the intention of the Legislature to empower the Court to deal by its judgment in any suit directly with persons not before it in that suit. But the High Court, having the equitable jurisdiction which the Supreme Court possessed, were competent to pass the order, it having been proved that the lease by them in favour of the nominal plaintiff was only a colorable transaction.⁽¹²⁾ It was further held that T and S, by reason of their having put forward a false plaintiff and a deed which they knew to have no real foundation, were guilty of contempt and abuse of the process of the Court, and that, therefore, the Court had jurisdiction to order them, as real plaintiffs, to pay the costs of the suit to the defendant.⁽¹³⁾

The following observations of Phear, J., in the course of the judgment may well be noted. His Lordship said:—"The present application is by way of motion calling upon Juggut Chunder Sein and Jointee Chunder Sein, strangers to the record, to show cause why they should not pay the several defendants their costs of the suit. Mr. Bell, in showing cause against the motion, made the preliminary objection that the Court had no jurisdiction to entertain the application.

(8) *Jointee Chunder Sein v. Anundo Lal Das*, 14 W.R.O.C. 1.

(9) (*Ibid*).

(10) *Ram Nidhee Koonāoo v. Ajoodhya Ram*, 20 W.R. 123 = 11 B.L.R. App. 37.

(11) Act VIII of 1859.

(12) *Jointee Chunder Sein v. Anundo Lal Das*, 14 W.R.O.C. 1; see, also, *Balabhadra Singh v. Radhashyam Singh*, 16 Ind. Cas. 381.

(13) (*Ibid*).

It is obvious that the question thus raised is a most important one, considering how great are the facilities for vicarious litigation of a vexatious and harassing nature which exists in this country, and therefore how desirable it is that this Court should have in its hands all reasonable means of visiting the real party, and not the ostensible party only, to the suit, with the consequence of failure. It is true that the Court probably has in all cases the power to stay proceedings at the instance of a defendant, until the third person other than the plaintiffs give security for payment of the defendant's costs; but this does not avail to give a relief to the plaintiff or to the defendant when, in the course of the trial itself, it for the first time turns out that the other party is a man of straw and merely the representative of a third person who is actually pulling the strings of the litigation.

It is said in opposition to the rule that the power of the High Court to deal with the matter must be sought in the provisions in this behalf of Act VIII of 1859, and that these do not enable it after judgment to saddle any one with the burden of the costs who is not a party in the cause. Section 187 of that Act appears to be the only one which bears directly on the point. By this it is enacted that the judgment shall in all cases direct by whom the costs of each party are to be paid, whether by himself or by another party, and whether in whole or in what part or proportion; and the Court shall have full power to award and apportion costs in any manner it may deem proper. It seemed at first doubtful whether the Legislature used the words "another party" as equivalent to "another person," in which case the power contended for by Mr. Evans would undoubtedly be given to the Court by the express words of the section, or whether it intended they should be read as if identical with "another party" to the suit. I think, however, that I must attach the latter signification to the words, otherwise I should be attributing two meanings to "party" in the same sentence; for it is clear that "costs of each party" must have reference to the technical sense only of the word. The last sentence in the section does not say anything to extend the area of the Court's action as regards the persons to be affected. The first portion of the section directs that the judgment shall always contain an order for the payment of the costs of each party to the suit, either by himself or by some other party or parties to the suit, and that either wholly or in part. The latter portion of

the section only adds that the Court, in coming to that judgment, shall have the fullest discretion in regard to which it may treat the subject of these costs, and in determining the amounts to be borne by the respective parties. It never could have been the intention of the Legislature to empower the Court to deal by its judgment in any given suit directly with persons not before it in that suit:

On the whole, then, I conclude that Act VIII of 1859 does not confer on this Court the power which is invoked in this application. Am I obliged, therefore, to say that this Court does not possess the power? I think not. The proceedings between party and party are, no doubt, regulated solely by Act VIII of 1859, but the remedy here sought is neither a step in the proceedings of any particular suit, nor one which can be made the subject of a separate plaint: it is rather of the nature of a substantive proceeding *in personam*, and it may well be that our equitable jurisdiction is sufficiently large to afford it. Now, by section 9 of the High Court Act, this Court has and can exercise all jurisdiction and every power and authority whatsoever which was vested in the Supreme Court, unless Her Majesty's Letters Patent constituting the Court otherwise direct; and certainly if the jurisdiction to entertain an application of this kind was vested in the Supreme Court, there is nothing in the Letters Patent, as far as I can discover, to prevent its devolving upon us. As to this, I should probably be bound, even if there was an absence of authority, to assume from the general words of the original Charter that the jurisdiction of the Supreme Court was co-extensive with that of Her Majesty's Superior Courts at Westminster; but an unreported case, *Doe, &c. v. Surroop Chunder Ghose*, was cited in argument before me, which clearly showed that the Supreme Court did, in fact, exercise the peculiar jurisdiction of the English Superior Courts in regard to dealing with the subject of costs in ejectment suits. It is true that the ejectment-suit no longer exists in its old form, but is in all respects assimilated to any other civil suit; and it might be argued that, as the jurisdiction in question originated in the specialities of the old form of proceeding, it must be considered as, in some sense, identical to it, and not self-existent; but on this point, I think, I must follow the example of the Superior Courts in England, who have decided that, notwithstanding the alteration of the nature of the action of ejectment there effected by the Common Law Procedure Act, the jurisdiction remained to them on the ground that that Act reserved all power.

which the Courts previously enjoyed. Similarly here, all previously existing powers of the Supreme Court are given to us ; and I am, therefore, of opinion that this Court has the same power of directing that the costs of any party to a suit for the recovery of land shall be paid by a person who is not on the record, as the late Supreme Court had and as the Courts at Westminster still possess and exercise. In coming to this decision, I do not disregard or infringe upon the precedents afforded by *Evans v. Rees*, and the cases there cited." Then his Lordship went on to examine whether the facts of the case before him justified him in making the order asked for. On this question his Lordship said :—" I think I am bound on the authorities to do so, if I arrive at the conclusion that Juggut Chunder Sein and his son are the real plaintiffs in this suit ; and on this point I feel no hesitation. I look upon the conveyance-transaction as entirely fictitious. I do not go the length of saying that there is no such person as Bamasoondery Dossee ; but I am convinced that, if there is, she took no real part in the making of the conveyance. I should in all cases look with grave suspicion upon the circumstance of a suit in ejectment being immediately preceded by a conveyance to a purdah woman for the purpose of her being made the plaintiff, it being remembered how great is the difficulty of identification, and how impossible to enforce a process against her personally if such a course becomes necessary. But here, in addition, there has been long antecedent litigation followed by a sleeping on his rights, supposing he had any, on the part of Juggut Chunder, until the end of this suit when he once more stirs himself to assert his title. Then suddenly comes the conveyance to this purdah woman, of whom all the description vouchsafed us is that she is an inmate of Juggut Chunder's house. He can't say why or when she came to his house, what her means are, or from whence she got the alleged consideration-money for the purchase. The making such a purchase at all with her eyes wide open, as Juggut Chunder is careful to say, to all the facts of the case, is so extraordinary an act for a woman, that I could not help remarking to her Counsel on his opening that his client must possess a very adventurous and speculative turn of mind. I could understand an attorney of a certain class or some species of reversionary societies buying up or making bargains with regard to the prosecution of rights like those involved in this suit ; and I dare say transactions of this kind take place in Calcutta as well as in England. But it is simply unintelligible to me that an ignorant and purdah woman should voluntarily, and even against advice

as Juggut Chunder says, insist upon purchasing a Chancery suit, she herself having previously been entirely uninterested in the matter ; and the only motive which can be suggested for this pertinacity being the circumstance that a small portion of the premises sought to be recovered would aptly serve for carrying out a religious purpose said to be entertained by her. I will add that the identification of Bamasoondery Dossee, which forms a link in the chain of evidence offered to the Court, was most unsatisfactory to me. In short, I feel no doubt but that Bamasoondery Dossee, if such a person is connected with the suit at all, is entirely a sham plaintiff—a mere puppet in the hands of others. As far as I can judge, Juggut Chunder and Jointee Chunder are both directly interested in this suit, and are active promoters of it—certainly the latter is so. It may be that the vexation is brought about by some one not disclosed to the Court; and if so, I regret that I cannot reach him to make him in some degree responsible for this vexatious and harassing litigation which he has contributed to set on foot. However, as to Juggut Chunder and Jointee Chunder, I am clear that they ought, within the spirit of the decisions to which I have referred, to be made liable for the defendant's costs, and therefore this rule will be made absolute with costs.⁽¹⁴⁾

(14) *Jointee Chunder Sein v. Anundo Lall Dass*, 14 W.R.O.C.J. 1 (2). There was an appeal from the above judgment, on the grounds substantially that, as the appellant was not a party to the suit, the Court had no power to make him liable for the costs ; that, if the Court had such power, the order should have been passed at the time judgment in the suit was declared ; and that, after the decree had once passed, it could not be afterwards altered. The following are extracts from the judgments of the Appellate Bench :—PEACOCK, C. J., said :—" We do not think it necessary to call upon the respondent in this case. We think that the order of the learned Judge was a very proper one, and is fully borne out by the evidence. If it were necessary to consider whether the late Supreme Court was bound by the decision in *Hayward v. Giffard*, 4 Meeson and Welsby, page 194, we might take further time to consider or look more minutely into the Charter of the Supreme Court. But whether the Supreme Court would have been bound by that decision or not, we think that the present case is very different from the case which has been cited. In that case the judgment of the Court was delivered by Lord Abinger as follows :—" If we were at liberty to consult equity and justice, we should probably make this rule absolute. But the authority of the Courts at Westminster is derived from the Queen's writ, directing them to take cognizance of the suits mentioned in the writs respectively, and thus bring the parties before them. This being so, they had no power to order any particular individual to come before them at their pleasure. In the present case, if it could have been shown that Spencer had committed any contempt of Court, or been guilty in respect of this suit of anything in the nature of champerty or maintenance, it would have been another matter; but we cannot make any order against an individual who is not party to any suit before us, nor has been guilty of any contempt, but merely because he has an interest in the event of the suit." That case, therefore, was determined on

In the later case of *Robert Watson and Co. v. Hurgobind Sookul* (22 W.R. 35) it was held that where the plaintiff died after

the ground that Spencer had an interest in the event of that suit. In 2 Adolphus and Ellis, page 334, it was ruled that the Court would not order a person not a party to the record to pay costs in any action but ejectment; and there, I think, they followed the rule laid down by Lord Abinger in the case referred to above. The learned Judge in that case having stated that the case would be different if the party had been guilty of any contempt of Court, let us see whether the parties who have been ordered to pay costs in this case have not been guilty of a contempt of Court, or at any rate guilty of an abuse of the process of the Court. This suit, although not an action of ejectment, is a suit to recover possession of land; and I say it is a great abuse of process of a Court of Justice for a man to lease out land to another by a fictitious deed, for the purpose of imposing upon a Court of Justice, and making them believe that it was an actual conveyance whereon to commence a suit in his own name—more especially so if that conveyance is made to a woman from whom it is almost impossible to recover the costs of the suit if she should fail. Let us see if the parties in this suit have not been guilty of abusing a process of the Court, by putting forward a deed which they knew to have no real foundation, in order to avoid paying costs of suit in case that suit failed. The learned Judge says “that the deed was a wholly fictitious one; and from the affidavits before the Judge, there can be no doubt that the Judge came to a right conclusion upon that point. It is said that the son (Jointee Chunder) ought not to have been made to pay the costs as well as the father (Jugget Chunder). But the question is whether both father and son were not colluding together by endeavouring to recover property in the name of the plaintiff in such a manner as to avoid being liable in the costs of the suit in case the plaintiff failed. Now, here is a fictitious deed prepared, which no one who reads the evidence can doubt; and both the father and son were present at the attorney’s office where the deed was concocted, and where the son admits he gave full instructions to the attorney. He was, therefore, a party knowing full well that that deed was executed for the purpose of protecting a person (whoever he may be) from the payment of costs in the event of failure. I say that that is a gross abuse of the process of a Court, and that the Court had the power to call the persons before it, and tell them that they had been guilty of a contempt of Court, and that the Court exercised a sound and wise discretion in compelling them to pay costs. I therefore think that this appeal must be dismissed with costs, to be paid by both these parties.” His Lordship Norman, J., said:—“I am entirely of the same opinion.” In *Marshall on Costs*, page 445, it is said: “The rule in all other actions than ejectment is not to call upon a person for costs who is no party to the record.” This is stated in *Hayward v. Gifford* to be the general rule. But the judgment in that case shows that there are several exceptions to it; and as regards ejectment, the Chief Baron points out that in ejectment the Courts take notice of the real parties litigant. There is no such limitation of the rule to the cases of defendants in ejectment as was suggested by counsel for appellant. The case itself shows that, if a suit is brought by a person having a real interest, however small, in the event of the suit, the Court cannot enforce payment of costs as against a person who, being largely interested in the result, supplies the plaintiff with money, and otherwise assists him in carrying on the suit. *Evans v. Rees*, A. and E., p. 167, where the plaintiff was a tenant from year to year, was a similar case. But in the case of the *Queen v. Green* (4 Queen’s Bench Reports, page 652) the Court made an attorney pay all the costs of an information. Sir William Follett in his argument put the case thus: “Where it is clear that a man of straw is purposely put forward, the real party ought to pay costs, and he cannot shelter himself by alleging that he meant only to act as attorney. Though he acted in that capacity, the application is not the less his own.” Lord Denman said:

the filing of an appeal by him, the appellate Court cannot appoint another person as a party to the appeal in the place of the original plaintiff without such person's consent, and cannot make such person, when so added, liable for costs, on the ground that the suit was financed and encouraged by him. An appellate Court cannot put on record a person, without his consent, as party to an appeal in the place of a deceased plaintiff appellant, and all that the Court can do in such a case, is to dismiss the suit for want of parties. (15 & 16)

"The question is whether a person who, on a motion for *quovarranto* information, acts as an attorney, is on that account to avoid payment of costs when he has, in fact, been the relator, but has put forward another person in that capacity who is unable to pay costs. I have no doubt that he is liable, where it appears that he is actually and virtually the relator." The Court, therefore, made the party in that case pay costs, not because he was attorney, but *although* he was attorney. Where a person is put forward by the plaintiff—who has no interest of any sort—who is a mere name—whose very existence is more than doubtful—the party using the name as plaintiff is guilty of a contempt and abuse of the process of the Court. The Court can and will compel the party who is really the plaintiff to pay costs, although he was not named as party in the original proceedings. *Jointee Chunder Sein v. Anundo Lall Doss*, 14 W.R.O.C. 1 (3, 4, 5). *N.B.*—In the case of *James Bevis v. C. A. Turner*, 7 B. 484 (486), Justice Scott delivering the judgment of the Bombay High Court said:—"This (case) involves the question of principle whether persons, not parties to the record, can be made subject to such an order (*i.e.*) an order for the payment of the costs of a party to the suit. Under the Old Procedure Code of 1859 that perhaps was possible. But in S. 21E of the new Code, the addition of the words 'to the suit' to the word 'party' seems to show that the Court no longer possesses this power. In England the general rule is that the Court has no power except over parties to the record. The only cases of exception are where the party before the Court was a mere puppet in the hands of a stranger to the suit." But see also *Balabhadra v. Radhashyam*, 16 Ind. Cas. 381, where the case of *Jointee Chunder v. Anundo Lall Doss*, 14 W.R.O.C. 1, was followed and relied on. As to the circumstances under which a Court will order costs of the suit to be paid by third persons who are not parties to the suit. See also *Srimati Bama Sundari Dasi v. Ramnarayan Mitter*, 8 B.L.R. App. 65.

(15 & 16) *Robert Watson and Co. v. Hurgobind Sookul*, 22 W.R. 35. In another case, A.L.D. and others having got a decree in a suit in which S.B.D. a *pardahnashin*, was plaintiff, a rule *nisi* was obtained by them against J.C.S. and another, on the ground that he was the real plaintiff and S.B.D. only a nominal one. It appeared that S.B.D. had no means of her own, but lived in the house of J.C.S., who could explain nothing of her circumstances or why she was residing in his house; but he stated that she had purchased the former plaintiff's right in the suit against a decree, she having been previously uninterested in the matter, and the only reason suggested for her doing so was that a small portion of the premises in question would serve for carrying out a religious purpose said to be entertained by her. The Court found that S.B.D. was only a sham plaintiff, and that J.C.S. was the real one, and the rule was made absolute. It was held that the words "another party" in S. 187 of Act VIII of 1859 should be read as if identical with "another party to the suit." Held, also, that the Court cannot, by its judgment in any given suit, deal directly with persons not before it in that suit; that the Court has the same power of directing that the costs of any party to a suit for the recovery of land shall be paid by a person who is not on the record, as the late

A person not on the record will not be ordered to pay the costs decreed against the defendant, when the defendant is a real and not a sham defendant, and himself did the wrongful act which constituted the cause of action, and has an interest in the subject-matter of the suit, and when the plaintiff was aware, before trial, of the circumstances whereunder he afterwards sought to make such stranger responsible for the costs and might have added him as a defendant on the record. (17-19)

In this case a District Judge having dismissed a suit with costs, and an appeal having been preferred against his decree, it was brought to his notice that one of the plaintiffs was an indigent person who had been put forward in the suit, two others being the parties really interested. Finding this to be the fact, the Judge ordered that the name of these two parties should be added to the decree for costs. It was held that the Judge had no power to make such an order, because the suit was no longer pending in his Court. (20) Justice Markby said in the course of the judgment:—"In this case it has been established to the satisfaction of the District Judge upon an inquiry instituted by him that one Ram Nidhee Koondoo and Bykunt Nath Koondoo, being desirous of entering into a transaction for the purpose of assisting certain persons called the "Bhooyas" in establishing their claim to certain landed property in Midnapore, agreed that they should receive, as a consideration for so doing, the half of any property that might be recovered in the suit; and in order to carry out this arrangement, purchased from the Bhooyas at a nominal sum one-half of their interest in this property; but the Koondos, instead of taking a conveyance in their own names, and joining with the Bhooyas as plaintiffs in the suit, took a conveyance in the name of one Shama Soonduree, an indigent member of the

(ii) Jurisdiction of Mofussal Courts.

(iii) No jurisdiction to make such order when suit no longer pending.

Supreme Court had, and as the Courts at Westminster still possess and exercise; that the recovery of costs from the real plaintiff in a suit in which the plaintiff on the record is only a sham one is not a step in the proceedings in any particular suit, nor can it be made the subject of a separate plaint, but it is of the nature of a substantive proceeding *in personam* and is within the equitable jurisdiction of the Court; that if the plaintiff on the record in a suit be only a sham one, the defendant may proceed against the real plaintiff for costs; that the real plaintiff, in a suit in which the one on the record is a sham plaintiff is liable for the costs. *Bama Sundery Dossee v. Anundololl Doss*, Bourke O.C. 44, affirmed on appeal, Bourke A.O.C. 96.

(17-19) *S. N. Prankumari Dasi v. Abinash Chandra Mookerjee*, 9 B.L.R. 210 (distinguishing *Bama Sundery Dossee v. Anundololl Doss*, Bourke O. C. 44 and referred to in *James Bevis v. C. A. Turner*, 7 B. 484).

(20) *Ram Nidhee Koondoo v. Ajoodhya Ram*, 20 W.R. 123=11 B.L.R. App. 37.

family and dependent upon them for support; and they caused the suit to be brought in her name and that of the Bhooyas jointly.

"The District Judge has found that Shama Soonduree was thus put forward by the Koondos in order to save themselves from having to pay the costs of the suits which were to be brought to establish the claim, in case they should be unsuccessful. The District Judge is further of opinion that Ram Nidhee Koondoo and Bykant Nath Koondoo are the real plaintiffs in the suit, though acting in the name of Shama Soonduree.

"Upon these facts being established, the District Judge directed that the names of Ram Nidhee Koondoo and Bykant Nath Koondoo should be added to the decree for costs, which the defendants had obtained in the two suits brought in the name of the Bhooyas and Shama Soonduree Dossee under the above arrangement, and which the District Judge had dismissed.

"Having had the depositions taken by the Judge read to us, and having heard the arguments thereon, we have no reason whatever to doubt that his conclusions of fact are fully justified by the evidence.

"The question for consideration is whether the District Judge had power to make such an order as was made by him upon these facts being brought to his notice.

"Whether or no, if the application had been made whilst the suit was still pending in the District Judge's Court, the Koondos could have been made liable in the decree for costs, we need not now determine.

"No doubt the District Judge had facts before him which showed that Shama Soonduree's ownership was a mere fiction; that, in fact, she was no more a reality than the John Doe or Richard Roe in the old fashioned English action of ejectment, and possibly it might have been considered that, in making the Koondos by name liable for costs, he was, in reality, only drawing up the decree in accordance with the real facts of the case.

"But, however desirous we may be to support the District Judge in checking an undoubted fraud, we feel unable to say that he had power to make such an order in the present case, because, when that order was made, the suit was no longer pending in his Court. The record had left his Court, and had been brought up to this Court upon appeal against the decree dismissing the suit. Even, therefore, if the District Judge had power to draw up a decree

making the Koondoos liable for costs whilst the suit was still pending in his Court, it was clearly impossible for him to do so after it had been carried out of his Court into the Court of appeal.

“ It was, however, contended that this was not really what the Judge intended to do ; that this order should be looked upon, not as a decree or as part of a decree against parties to a suit, but as an order made *in pœnam* against the Koondoos, similar to the orders which have been sometimes made in the High Court on the original side against persons not parties to the suit to pay the costs of a suit which they have promoted or instigated.

“ It is not necessary for us on this occasion to examine accurately upon what ground such orders are made by this Court. The general principle cannot be denied that Courts of Justice have only power to deal with persons brought before them by regular process of law, and they have not power, otherwise than by such process, to summon before them any persons they may choose to answer for their misconduct. There are, no doubt, exceptions to this principle ; such as the power to punish what is called “ contempt of Court ; ” and it has been considered that this Court, on its original side, has very wide powers in this respect. But we do not feel justified in saying that the Civil Courts of the mofussil have these wide and general powers. If one such Court has them, all must have them ; and we think it must not be too hastily assumed that Courts of such various grades have all precisely the same wide and general powers as are possessed by this Court. No authority has been produced before us for holding that the mofussil Courts possess power to make an order *in pœnam* against persons who are not parties to a suit, such as the Judge has made in this case ; and no instance has been shown in which such powers have been exercised. Special powers to punish, by fine not exceeding Rs. 200, any person guilty of contempt *in open Court*, or of undue arrogation of the authority of the Court, or of illegal execution of judicial authority in his own cause, were conferred upon these Courts at their foundation ^(20-a) and these powers have been since slightly extended by the Legislature. But no attempt was made to bring this case within any legislative provision.

“ It was also contended for the respondent that no appeal lies to this Court against such an order ; or that, if it lies at all, it can

(20-a) Reg. IV of 1793, S. 21.

only be heard as part of the general appeal which has been preferred to this Court against the decision of the suit by the District Judge. But, whether an appeal lies or no, the matter having been fully discussed, and the order complained of having been made in a suit of which the record is now in this Court, we have no doubt that we ought to set it aside. But we do not think we ought to allow any costs; for, though Ram Nidhee Koondoo and Bykunt Nath Koondoo have succeeded in setting the order aside, we cannot too strongly express our disapprobation of their conduct.”(21)

On the grounds stated above, it was held in this case, that mofussil Courts have no power to make an order *in panam* against persons who are not parties to a suit, such as the District Judge made in this case.(22)

Person
setting Court
in motion for
improper
purpose—
Champerty
and main-
tenance—
Liability of.

Where the Court finds any person, though not a party to the suit, guilty of champerty or maintenance, and setting in motion the process of the Court for improper purposes, such person will be made to pay the costs of such proceeding.(23)

Persons
interested on
behalf of
whom suit is
brought but
not joining
or joined as
parties—
Liability of.

In the case of *Sajedur Raj v. Baidya Nath Deb and others*,(24) which came before the Calcutta High Court in 1896, it was laid down that persons on whose behalf a suit is instituted, but who did not themselves join as plaintiffs in the suit could not be made liable for costs.

In that case the plaintiffs respondents on behalf of themselves and of 42 others, 36 of whom had intimated their willingness that the suit should be carried on by the plaintiffs, sued for the dismissal of a Mohunt and to set aside an alienation of property by him and obtained a decree. The purchaser of the alienated property appealed to the High Court and the decree was set aside on the ground that the suit was misconceived and was not one under S. 30 of the Code of Civil Procedure,(24-a) and the judgment concluded by saying

(21) *Ram Nidhee Koondoo v. Ajoodhya Ram Khan*, 20 W.R. 123=11 B.L.R. App. 37 (*Per Markby, J.*).

(22) *Ram Nidhee Koondoo v. Ajoodhya Ram Khan*, 20 W.R. 123=11 B.L.R. App. 37.

(23) *Juggessur Cocwar v. Prossono Comar Ghose*, 1 Ind. Jur. N.S. 282.

(24) 1 C.W.N. 65.

(24-a) Of the Code of 1882 corresponding to O. I, r. 8 (1), of the present Code of Civil Procedure (Act V of 1908).

merely that the appeal is allowed with costs, without specifying any names by whom such costs are to be paid. The decree when drawn up and signed named the two plaintiffs and the 42 other persons as respondents and directed the costs to be paid by the plaintiffs-respondents.

It was *held*, that since the 42 persons did not themselves join as parties, nor were joined as provided for under S. 32 of the Code,^(24-b) were not parties to the suit in the sense that they had any voice or control in the conduct of it, they may fall under the category of persons interested under S. 30,^(24-c) but not of party respondents; that the decree must accordingly be amended limiting the order as to the payment of costs to the plaintiffs Nos. 1 and 2.⁽²⁵⁾

Upon the substitution of a new party in place of the original party to a suit, the substituted party may become responsible for all costs and the original party discharged.⁽²⁶⁾

Substituted
parties—
Liability of.

(24-b) Of the Code of 1882 corresponding to O. I, rr. 8, 10 and 11 of the present Code of Civil Procedure (Act V of 1908).

(24-c) Of the Code of 1882 corresponding to O. I, r. 8, of the present Code of Civil Procedure (Act V of 1908).

(25) *Sajedur Raj v. Baidya Nath Deb and others*, 1 C.W.N. 65. His Lordship Macpherson, J., said in the course of the judgment:—"Persons on whose behalf the suits were instituted, but who did not themselves join as plaintiffs in the suit, were not parties to the suit in the sense that they had any voice or control in the conduct of it or that they could be made liable for costs. Possibly the effect of S. 30 might be that they would be bound by the decision, but it would not follow from that they were parties to the suit and S. 32 of the Code distinctly provides that any person on whose behalf a suit is instituted under S. 30 may apply to the Court to be made a party. That indicates that until he is formally joined as a party, he is not a party simply because a suit may have been instituted by another person for their joint benefit. Nor does it appear that in the appeal which was preferred to this Court, these persons were treated as party respondents. The memorandum of appeal shows that the appeal was directed against plaintiffs 1 and 2 who had instituted the suit for themselves and on behalf of the persons whose names were given. It may safely be said that it was not the intention of this Court to make the persons other than the actual plaintiffs in the suit liable for the costs and the entry of the names of the 42 persons in the decree as plaintiffs respondents was clearly an error. Their names might properly be entered as persons interested under S. 30, but should not have been entered in the category of party respondents. We think, therefore, that this decree is not in conformity with the judgment and should be amended by limiting the order as to the payment of costs to plaintiffs 1 and 2 only, and not to all the persons entered in that decree as plaintiffs-respondents. As regards the objection that, if the petitioners were not parties to the suit, they had no right to come here and ask for amendment of the decree, we think that as the decree makes them liable jointly and severally for the amount of costs, they had a right to come here and ask that it should be amended." *Per* Macpherson, J., in *Sajedur Raj v. Baidya Nath Deb*, 1 C.W.N. 65 at p. 67.

(26) *Ex parte James*, 59 Mo. 280 (American); *Ramji Morarji v. J. E. Ellis*, 20 B. 167.

Several
plaintiffs—
Liability of.

Where several plaintiffs unite in bringing an action and are unsuccessful, the defendant is entitled to costs against all.⁽²⁷⁾ If two plaintiffs unite in an action (of ejectment) one count alleging title in one plaintiff and one in another, and the judgment is in favour of one plaintiff and against another, the defendant is entitled to costs against the unsuccessful plaintiff.⁽²⁸⁾

Several
defendants—
Liability of.

Where one of several joint defendants is successful the plaintiff is entitled to recover of the others the costs incurred in the joint defence or otherwise, except such as may be separated therefrom as having exclusive reference to the defendant who is discharged.⁽²⁹⁾ Under a statute requiring that all the obligors in a joint contract shall be sued together, including those who may have performed their part, in order that the latter may recover back what they have paid, in case it should be determined that they were not bound, the judgment for costs must be *in solido*, against those who have not performed their part.⁽³⁰⁾ It has been held that on judgment for plaintiff against several defendants who make the same defence,⁽³¹⁾ the costs will be decreed against them jointly and not apportioned among them.⁽³²⁾ If separate suits be brought against several defendants for a joint tort, the plaintiff may recover separately against each, but he can have but one satisfaction; and he may elect *de melioribus damnis*, and issue his execution therefor against one of them; and the other defendants will be obliged to pay the costs of the suits against them respectively.⁽³³⁾

Where two or more defendants are sued upon a joint liability and one of them defaults, all the defendants are equally liable for the whole costs, where those who make a defence are unsuccessful.⁽³⁴⁾ Where several defendants have a common defence and file separate answers, the Court will in its discretion charge them with the costs occasioned thereby.⁽³⁵⁾

(27) *Knowlton v. Pierce*, 41 How. Pr. (N.Y.) 361. See also *Sajedur Raj v. Baidya Nath*, 1 C.W.N. 65, noted *supra*.

(28) *Maybury v. Evans*, 19 Wend. (N.Y.) 625; *Cyclopædia of Law and Procedure*, Vol. XI, p. 94.

(29) *Sloan v. Parke*, 2 Swan. (Tenn.) 62.

(30) *Drew v. Atchison*, 3 Rob. (La.) 140.

(31) *James v. Stevens*, 26 N.H. 117.

(32) *Barrel v. Foley*, (N.J. Ch. 1889) 17 Atl. 687.

(33) *Livingston v. Bishop*, 1 Johns. (N.Y.) 290.

(34) *Warner v. Ford*, 17 How. Pr. (N.Y.) 54.

(35) *Ravenel v. Zyles*, Speers Eq. (S.C.) 281.

Where a person is brought in as defendant, he should not ordinarily be charged with costs adjudged by a previous decree against a co-defendant, ⁽³⁶⁾ or for costs incurred before he was brought into the case. ⁽³⁷⁾

Where a party is made a defendant without a cause of action being alleged, his co-defendant should not be made to pay his costs which should be paid by the plaintiff. ⁽³⁸⁾ Co-defendants, liability of.

A defendant who colludes with the plaintiff, and induces him to bring a suit for his benefit, may be ordered to pay the costs of his co-defendants in the Court below. It seems that he may also be ordered to pay the costs of an appeal by the plaintiff. ^(39 & 40)

(36) *Williams v. Washington*, 43 S.C. 355.

(37) *Kennedy v. Kennedy*, 66 Ill. 190.

(38) *Ram Chunder Mitter v. Kisto Kaminee Dossee*, 10 W.R. 194. The special appellant's last objection is that he ought not to have been made liable for the costs of a co-defendant whom the plaintiff terms a *pro forma* defendant, and against whom she has not alleged any cause of action in her plaint. We think this objection is good. If the plaintiff made a person a defendant without even going to the extent of alleging a cause of action, still less proving one against him, certainly it was most improper that the Court should make his co-defendant pay his costs. It seems to us that the proper course would have been to dismiss the plaintiff's suit as against the unnecessary defendant, and to make the plaintiff pay his costs; and accordingly we think it right to order that the present suit be dismissed as against Tara Chunder Mitter, and that the plaintiff do pay his costs in all the Courts.—*Ram Chunder Mitter v. Kisto Kaminee Dossee*, 10 W.R. 194 at 195 (N.B.). But the Court may in a proper case order one defendant to pay the costs of another defendant. See *Bhyroo Rao v. Baboo, Marsh*, 608; *Rudow v. Great Britain Assurance Society*, 17 C.D. 608; *Sanderson v. Blyth Theatre Co.*, (1903) 2 K.B. 533. See Chapter III, *infra*, under heading "Defendant's Costs."

(39 & 40) *Bhyroo Rao v. Baboo Anoorodeb Deo Narain Singh*, Marsh. 608. Sir B. Peacock, C. J. said in the course of the judgment:—"The facts pointed out by the lower Court amount to such clear evidence of collusion and fraud that it is unnecessary for us to go into details respecting them. The appeal is, therefore, dismissed with costs and interest at twelve per cent. With reference to the costs in the lower Court, the Judge was called upon to make the defendant Anoorodeb Deo Narain Singh, as well as the plaintiff, responsible for them to the other defendants. The Judge refused to do so, considering that he could not make a defendant liable for the costs of his co-defendants. But Anoorodeb Deo Narain Singh being a party to the suit, an express issue was raised as to whether the suit was not brought by the plaintiff in collusion with him, and that issue was found in the affirmative. S. 187, Act VIII of 1859 is very general, and we think we have the power under that section to order a defendant who colludes with the plaintiff, and induces him to bring a suit for his benefit, to pay the costs of his co-defendants; as he colluded with the plaintiff there is no reason why the plaintiff should pay him his costs. We, therefore, order the decree of the lower Court to be amended, by declaring that the plaintiff shall pay the costs (with interest thereon at twelve per cent.) of all the defendants except the defendant Anoorodeb Deo Narain Singh, and that defendant, as well as the plaintiff, shall pay the costs of the other defendants in the Court below with interest thereon at twelve per cent.

Where, in a suit to recover a sum of money on a *hathchitta* against several partners, some of them denied the partnership and the liability, others admitting both, and the Court found in favour of the plaintiff, those defendants that disputed the liability and the partnership were ordered to pay the costs of the other defendants.⁽⁴¹⁾

Personal re-
presentatives,
trustees and
heirs at law
—Liability
of.

The general rule which gives the costs of the action to the victorious party, and throws them upon the unsuccessful party, applies equally to cases in which the parties are suing or defending in *autre droit*, and to those in which they are *sui juris*. Therefore executors, administrators, trustees,⁽⁴²⁾ or trustees in bankruptcy,⁽⁴³⁾ instituting or defending in those capacities actions against strangers to their trusts, are subject to the same rules as to costs as they would be if they were suing or defending in their own right.⁽⁴⁴⁾ Thus an executor or administrator instituting an action against a debtor to his testator's or intestate's estate, as he will, if he succeeds, be entitled, under the general rule, to the costs of his action from the debtor, so, if he fails, he must pay the costs of his adversary.⁽⁴⁵⁾ Similarly a trustee for sale, instituting an action against a purchaser for the specific performance of his agreement, is liable to pay or receive costs from his adversary, in the same manner as a person instituting such an action in his own right.⁽⁴⁶⁾ So, also, where a trustee, by refusing to join in a conveyance, rendered

The defendant Anoorodeb Narain Singh was a respondent in this appeal. It is possible that, although the suit was brought in collusion with him, this appeal has not been brought in collusion with him. He might have been satisfied to let the decision rest as it was given in the Court below. We do not think it necessary in this case to order him to pay the costs of his co-respondents. But we wish to guard ourselves against any misunderstanding, and we think that a defendant who colludes with a plaintiff for the purpose of bringing a suit may be responsible for the costs incurred by the co-defendants in all stages of the suit, including those of an appeal, in which he is merely made a co-respondent." *Bhyroo Raoot v. Baboo Anoorodeb Deo Narain Singh*, Marsh 608.

(41) *Juggut Chunder Roy v. Roop Chand Shaw*, 6 C. 811.

(42) *Lewin on Trusts*, 10th Ed., 1200, 1201; and see *Coverdale v. Eastwood*, 15 Eq. 121 (183); *Seton* 1694, where executors and trustees, who defended under an order *were*, though unsuccessful, allowed their costs out of the fund the subject of the suit.

(43) *Morris v. Cannan*, 10 W.R. 589 (Eng.), but where the defendant became bankrupt during the suit, and the assignee continued the defence, the latter was only held liable for the costs to the bankruptcy; *Foxwell v. Greatorex*, 33 Beav. 345; but see *Eglin v. Dryden*, 16 W.R. 837 (Eng.); *Cook v. Hathway*, 8 Eq. 612; *Borneman v. Wilson*, 28 O.D. 53.

(44) See *Morg & Wurtz*, 396; *Jones v. J.*, 2 De. G. J. & S. 294.

(45) *Westley v. Williamson*, 2 Moll. 458.

(46) *Edwards v. Harvey*, G. Coop. 40.

a suit for the specific performance of an agreement necessary, he was ordered to pay the whole costs of the suit.⁽⁴⁷⁾ The question whether a party who sues, or defends, in *autre droit*, and is unsuccessful, shall be reimbursed his costs out of the estate which he represents, is altogether a different one the answer to which depends on quite different principles.⁽⁴⁸⁾ There are, however, certain cases, arising from the character sustained by the party, in which the Court generally gives the costs to that party whatever may be the result of the action. One of these cases is where, under the practice of Courts in England, an heir-at-law is made a party for the purpose of establishing a claim against real estate; it being the almost invariable rule of the Court to give the heir-at-law his costs of such a proceeding.⁽⁴⁹⁾ In this respect the heir is more favoured than "executors." "Executors" says Lord Hardwicke, "shall not have costs, because they may renounce; but it is the law which casts the descent upon the heir, and that differs his case from the executors'; and if he has accounted, justly, for such money as is come to his hands, it certainly entitles him to his costs."⁽⁵⁰⁾

A decree was passed against two defendants and both of them preferred an appeal. The first defendant died during the pendency of the appeal, and without his legal representatives being brought on the record, the appeal was heard and decided on behalf of the surviving appellant and the suit dismissed with costs, and it was expressly stated in the decree that the appeal was prosecuted only on behalf of the surviving defendant. *Held* that it would be unreasonable to construe the decree as being intended to enure for the benefit of the first defendant also, and to consider that the decree appealed against was reversed in favour of his representative; and that, therefore, the decree of the lower Court must be regarded as still in force as against the first defendant, and so his heir was not entitled to restitution of the costs levied from his father under that decree until he successfully prosecutes the appeal.⁽⁵¹⁾

(47) *Jones v. Lewis*, 1 Cox. 199.

(48) As to which see Daniell's Chancery Practice, 7th Ed., 1901, Chap. XVIII, S. 3, pp. 987—1009.

(49) See *Singleton v. Tomlinson*, 3 App. Ca. 404. And see as to the costs of heir-at-law, Morg. & Wurtz. 344—351. A disclaiming heir in a foreclosure suit is in the same position as to costs as any other disclaiming defendant; *Gray v. Adamson*, 35 Beav. 383.

(50) *Humphrey v. Morse*, 2 Atk. 408; *Popple v. Henson*, 5 De. G. & S. 318.

(51) *Natesa Ayyar v. Annasami Ayyar*, 25 M. 426 referred to in *Pasupati Nath Bose v. Nando Lal Bose*, 30 C. 718 (720). The following observations of their Lordships

Assignee of
decree
pending
appeal—
Liability of.

The Court has jurisdiction to make an assignee of a decree who has been made a party-respondent liable for the costs of the suit *ab initio*, if he is made a respondent at his own desire in lieu of the original plaintiff, or if, having been so made a respondent *ex parte*, he actively supports the decree.^(51 a)

Although the Court has such jurisdiction, the assignee of a decree, who is made a party-respondent in an appeal from it, and takes no step actively to support it, ought not to be ordered to pay costs. A person who takes an assignment of a decree already made takes a completely legitimate security, and ought not, as a rule, to be subjected thereby to liability for the costs of the litigation which led up to it, even though the defendant succeed in getting him made *in invitum* a party-respondent.⁽⁵²⁾

But where, as in the present case, the assignee, although he has been brought upon the record against his consent, has taken an active part in the appeal, he may properly be ordered to pay the

Davies and Bhashyam Ayyangar, JJ. may also be noted :—"It is contended by the petitioner, the appellant before us, who is the son and legal representative of the deceased first defendant, that in the appeal prosecuted by the second defendant alone, the whole decree was reversed and the suit as against both the defendants was dismissed and that consequently the petitioner, as the legal representative of the first defendant, is entitled to restitution of the amount of costs realized by the plaintiffs against the first defendant only in execution of the original decree that was reversed in appeal. We are unable to accept the construction placed by the petitioner's *vakil* on the decree of this Court. It is expressly recited in that decree that the appeal was prosecuted only on behalf of the surviving defendant and we must therefore construe the decree as limited to his interests only. It would be unreasonable to construe the decree as being intended to enure for the benefit of the 1st defendant also, and to consider that the decree appealed against was reversed in favour of his representatives. According to our construction of the appellate decree the decree of the Original Court must be regarded as still in force as against the 1st defendant and his heir, the petitioner, is therefore not entitled to restitution of the costs levied from his father under that decree until he successfully prosecutes the still pending appeal of his father. The petitioner being a minor, the law of limitation will be no bar to his taking the necessary steps towards that end. These appeals are therefore dismissed, but in the circumstances of the case we make no order as to the costs of the appeals. *Per* Davies and Bhashyam Aiyangar, JJ. *Natesa Iyer v. Annasawmi Ayyar*, 25 M. 426 (428).

(51-a) *Ramji Morarji v. J. E. Ellis*, 20 B. 167. The view that the Court has the power in appeal to bring on the record the assignee of the original respondent is supported by the decisions in *Raja Ram Bhagwat v. Jibai*, 9 B. 151; *Ramji Morarji v. J. E. Ellis*, 20 B. 167 and *In the matter of the petition of Durga Prasad*, 22 A. 231 (233) = A.W.N. (1900), 79.

(52) *Ramji Morarji v. J. E. Ellis*, 20 B. 167.

appellant's costs of the appeal, although he cannot be made liable for the costs in the lower Courts.⁽⁵³⁾

A person who was not a party to a suit in which a decree for costs and mesne profits has been pronounced but has subsequently acquired an interest in the disputed property by gift, cannot be

(53) *Ramji Morarji v. J. E. Ellis*, 20 B. 167. The Court said in the course of the judgment in the above case:—"Now, it is a well-settled rule that executors and trustees in bankruptcy and others suing in *autre droit* are liable for costs as though they were suing in their own right, and when, pending a suit, they come in as plaintiffs in lieu of original plaintiffs and adopt the proceedings, they become liable personally for the costs *ab initio*. See the earlier cases collected in *Cook v. Hathway*, L.R. 8 Eq. 612, and see *Watson v. Holliday*, 20 Ch. D. 780 (785), *Borneman v. Wilson*, 28 Ch. D. 53 (55), *Boynton v. Boynton*, 4 App. Cas. 733 (735) *Daniell's Chancery Practice*, p. 1175 (6th Ed.). It cannot, we think, be doubted that an assignee of a claim in suit, who in virtue of his assignment is made a party to the suit as plaintiff before decree, is liable to have the same rule as to costs applied to him. *Seear v. Lawson* (16 Ch. D. 121), is an instance of a person acquiring an interest in the subject-matter of the suit by assignment so being made a party. It shows that such parties are treated just as an executor coming in after the death of his testator or a trustee in bankruptcy coming in after adjudication would be treated, and we cannot doubt that the same rule as to costs would be applied to them. We have not been referred to, nor have we found a case in which the assignee of a decree has been made respondent, or in which his liability to costs has been dealt with. We think that, on principle, the Court has jurisdiction to make such an assignee liable for the costs of the suit *ab initio*, if he is made a respondent at his own desire in lieu of the original plaintiff, or if, having been so made a respondent *ex parte*, he actively supports the decree. In principle we can see no difference between his case and that of the trustee in bankruptcy who actively supports an erroneous decree in favour of the bankrupt. Admitting, however, the jurisdiction, we think that the assignee of a decree, who is made respondent in an appeal from it, and takes no step actively to support it, ought not be ordered to pay costs. A person who takes an assignment of a decree already made takes a completely legitimate security, and ought not, we think, as a rule, to be subjected thereby to liability for the costs of the litigation which led up to it, even though the defendant succeed in getting him made *in invitum* a party respondent. In the present case the assignee company have taken an active part in the appeal, though they have been brought up on the record against their consent. It is admitted that they may properly be ordered to pay the appellant's costs of the appeal, but it is argued that they ought not to be ordered to pay the costs incurred in the Court below. There is this difference between this case before us and that of an executor or trustee coming in and supporting the decree, that here the original plaintiff is still retained upon the record, and that the assignee company are only added as an additional security for costs already incurred or for those to be incurred in the appeal. We have felt great doubt upon the subject, but, on the whole, we think the defendant is not entitled, by bringing the assignee company upon the record against their will, to obtain an additional security for the costs which have been already incurred in the Division Court. The decree will, therefore, be drawn up making the Standard Oil Company liable only for the appellant's costs of appeal and Ellis liable for the costs throughout. The costs of speaking to the minutes will be borne by the parties respectively." *Ramji Morarji v. J. E. Ellis*, 20 B. 167.

made liable for the costs and mesne profits so decreed, and the decree so passed cannot be executed against him.⁽⁵⁴⁾

Where a decree of the High Court awarded costs to one party, and the decree as to costs was assigned to a third party who took out of Court in execution thereof the money paid in satisfaction of it by the judgment-debtors, and the decree of the High Court was afterwards reversed in appeal by the Privy Council with costs in all the Courts, it was *held* that the decree-holders had no cause of action for a suit against the assignee to recover from him the costs realized by him in the manner described above.⁽⁵⁵⁾

(54) *Mashook Ali Khan v. Jwala Buksh*, 3 Agra, 193. The Court (Morgan, C.J. and Spankie, J.) said in the course of the judgment:—"The present appellants became in 1862, by gift from Musst. Roota Koower, interested in a portion of the property in dispute to the extent of 4 annas. At that time the state of the litigation was this; a decree had been pronounced by the Sudder Court, which was appealed to the Privy Council. It may be that by virtue of this gift and the enjoyment under it, the appellants have come under certain obligations to the true owners. If so, those obligations must be duly enforced before effect can be given to them. The question now before us is, whether under the decree passed in the suit, to which they were not parties, and in execution of that decree the appellants can be made liable for the costs of suit and appeal, and for mesne profits. We think, they cannot, and we reverse the Principal Sudder Ameen's decree." See *Mashook Ali Khan v. Jwala Buksh*, 3 Agra, 193.

(55) *Latta Prasad v. Sadiq Husen*, 24 A 288=22 A.W.N. 47 ref. to *Sadiq v. Latta*, 20 A. 139. The following observations of Stanley, C.J., and Burkitt, J, in the course of the judgment may also be noted:—"The present appellants failed in their attempt to have execution of the decree of Her late Majesty in Council against Sadiq Husen, the respondent here. It was in that case held by a Bench of this Court, of which one of us was a member, that as Sadiq Husen was no party to the decree made by Her late Majesty in Council, that decree could not be executed against him. Being thus foiled in their attempt to proceed against the respondent by way of execution, the appellants have had recourse to this regular suit, by which they seek to recover from him Rs. 4,820-13, the amount of the costs in the Court of the Subordinate Judge in the suit of 1888, which they paid into Court in July, 1891, when the original decree of the first Court was reversed by this Court on March 16th, 1891, and they were ordered to pay that sum as their appellants' costs, and it was paid to the respondent Sadiq Husen pursuant to an assignment to him from the successful defendants-appellants Aziz-ud-din and Hafiz-ud-din. The plaintiffs here further ask for Rs. 4,068-11-6 interest by way of damages on the Rs. 4,820-13. In our opinion the decree of the lower Court dismissing the suit is right. The appellants appear to us to be on the horns of a dilemma. If they sue the plaintiff as a party to the litigation, which ended with Her late Majesty's Order in Council, the answer is complete and is two-fold, namely, firstly, that in that case their suit is barred by the provisions of S. 244 of the Code; and, secondly, that it is barred as a *res judicata* by the decree in the reported case mentioned above. If, on the other hand, they sue defendant as a stranger to that litigation, it is difficult to see what cause of action they have against him. The appellants seem to have perceived this difficulty, for all they say is that "they are entitled under the law and equity to recover." We fail to see what are the facts on which the appellants can found their cause of action. What happened is, that respondent Sadiq Husen purchased for a consideration (as found by the learned Subordinate Judge in this case) the right to receive from the Court a

A plaintiff settled the matters in dispute in a suit with all except one of the defendants, against whom a decree was made and he was made liable for costs; he appealed, and upon his application at the hearing he was allowed to withdraw from the appeal and was dismissed from the suit with liberty to bring a suit against the plaintiff, no order being made as to costs of the appeal: the plaintiff applied to execute the decree of the first Court for costs: the application was resisted on the ground that the order of the appellate Court relegated the defendant to the position of a stranger to the suit, and that, consequently, there was no decree against him capable of execution: it was *held*, that the plaintiff was entitled to execute the decree for costs of the original Court as the effect of the order of the appellate Court was not to absolve the defendant from his liability for costs under the decree of the first Court. (56 & 57)

sum of money, being the costs due from appellants to Aziz-ud-din and Hafiz-ud-din, and he received those costs in cash from the present appellants though the Court in due process of execution. Now if Aziz-ud-din and Hafiz-ud-din, instead of assigning to Sadiq Husen before execution, had themselves executed the decree for costs, and on receipt of the money had handed it over to respondent there and then, would the appellants here have had any cause of action against Sadiq Husen when the decree, in execution of which those costs had been paid, was subsequently reversed? We think not, and we cannot see what difference it makes that Sadiq Husen, acting under the assignment of those costs to him, asked the Court to pay them to him; for we must assume that Sadiq Husen did not thereby become a party to the suit or a representative of a party. As the learned Subordinate Judge finds that consideration passed for the assignment, it may well be that Hafiz-ud-din and Aziz-ud-din were in debt to Sadiq Husen, and discharged the debt by the payment made to Sadiq Husen through the Court, on the authority conveyed by their assignment. But how does that give any cause of action to the appellants against Sadiq Husain? The order of Her late Majesty in Council gave the appellants a decree against Hafiz-ud-din and Aziz-ud-din for the costs incurred by them in all three Courts. We cannot understand why, having that decree in their hands, the appellants prefer to proceed against Sadiq Husen for a considerable portion of those costs instead of against Hafiz-ud-din and Aziz-ud-din. The appellant's decree is against the latter and not against Sadiq Husen, and that decree gives them a right to recover from Hafiz-ud-din and Aziz-ud-din the very sum which they now seek to recover from Sadiq Husen. In our opinion the appellants have not shown any tangible cause of action against the respondent. We therefore dismiss this appeal with costs.) *Lalla Prasad v. Sadiq Husen*, 24 A. 288 (289, 290 & 291) = 22 A. W.N. 47.

(56 & 57) *Balabhadra Singh v. Radhashyam Singh*, 16 Ind. Cas. 381. The following observation of Mookerjee, J. in the course of the judgment may well be noted:—"This appeal is directed against an order of the Court below refusing execution of a decree for costs. The respondent was the 10th defendant, in a suit brought by the plaintiff. He contested the claim, but a decree was made against him and he was made liable for costs. The other defendants settled with the plaintiff and as between them, a decree was made by consent. The tenth defendant then appealed to this Court. At the hearing

Party allowed
to withdraw
from appeal—
Liability of,
for costs of
lower Court.

Party
compromi-
sing suit—
Liability of.

Plaintiff sued *in forma pauperis* for an account of her property received and unaccounted for by defendant. Defendant was guilty of failure to render a proper account. The parties had compromised the suit, the defendant paying a certain sum to plaintiff in consideration of plaintiff withdrawing the suit, but the costs of the suit had been left untouched by the adjustment between them. It was *held* that the Court had jurisdiction to make the party in the wrong, *viz.*, the defendant who failed to render an account,

upon his application, he was allowed to withdraw from the appeal; and he was also dismissed from the suit with liberty to bring, if so advised, a suit for possession of the property in dispute against the successful plaintiff. The Court further directed that no order be made as regards the cost of the appeal. The question in controversy between the parties now is, whether the plaintiff is entitled to execute the decree for costs of the original Court against the 10th defendant. On his behalf, it has been contended that as he was dismissed from the suit, the position is precisely the same as if he had never been a party to the suit, and, that consequently, there can be no decree for costs against him capable of execution. In our opinion, this contention is fallacious. It need not be disputed that, as an ordinary rule, only the parties to a litigation can be made liable for costs. *James Bevis v. Turner*, 7 B. 484. The case of *Jointee Chunder Sein v. Anundo Lall Das*, 14 W.R. O.C. 1, where Sir Barnes Peacock, C. J., followed the decision in *Hayward v. Gifford*, 4 M. & W. 194; 6 D.P.C. 699; 7 L.J. (N.S.) Ex. 256; 51 R.R. 529, shows that the Court may, in exceptional cases, make a stranger to a suit liable for costs of the litigation, for instance, where the party on the record is a mere puppet in the hands of the stranger. It is not necessary for the decree-holder, however, to rely on this exceptional doctrine in the present case, because in our opinion, the respondent is not in the position of a stranger to the suit. He was a party to the litigation in the Court of first instance; in fact, he was the sole contesting defendant. It was his opposition which protracted the litigation and threw the burden of costs upon the plaintiff. It is unquestionable, therefore, that in the Court of first instance, the decree for costs was properly made against him. The mere circumstance that upon an appeal preferred by him to this Court, he was dismissed from the suit, does not justify an inference that the Court intended to absolve him from the liability for costs under the decree of the original Court. The effect of the order of this Court plainly was to leave the question in controversy between him and the plaintiff open for consideration in a subsequent litigation; but there was no intention to set aside the decree for costs made against him. The Court expressly stated, on the other hand, that "except in so far as it is affected by this order, the decree of the lower Court will stand." There is obviously no inconsistency between the decree for costs against the tenth defendant and the order that he be dismissed from the suit in order that all questions in controversy between him and the plaintiff made be left open for consideration in a subsequent litigation. In fact, it is not, and it cannot be, disputed that if the course ultimately adopted by the tenth defendant on appeal to this Court had been followed by him at an earlier stage of the litigation in the Court of the first instance, that Court might have left all the matters in controversy between him and the plaintiff open and yet might have made him liable for all the costs. In our opinion, the order of the Court below cannot be supported and must be discharged. The result is that this appeal is allowed and execution directed to proceed. The appellant is entitled to the costs of this appeal." *Balabhadra Singh v. Radhashyam Singh*, 16 Ind. Cas. 381.

liable for the costs of the suit, that matter not being dealt with by the compromise.⁽⁵⁹⁾

Although an appellant only partly succeeded in his appeal, the whole of his claim having been opposed in the Courts below on an untenable ground, it was held that there was no reason for departing from the general rule that the defeated party should pay the costs.⁽⁵⁹⁾

Appellant partly succeeding in appeal—Costs of.

Pending an appeal, the plaintiff, who was the appellant, died leaving one adult and four minor sons. The adult son prosecuted the appeal, which was dismissed, as was the suit in the Court below, with costs. The decrees for costs were sold by the defendant to a third person, who caused certain property which belonged to the estate of the plaintiff to be sold in execution. *Held*, in a suit by the minor sons to recover possession of the shares in the property sold, that as all the sons were interested in the litigation all their shares were liable for the costs, and the suit was dismissed.⁽⁶⁰⁾

Joint Hindu family—Father and son—Liability for costs.

The sons cannot succeed in exempting their joint ancestral property from being taken in execution of a decree for costs against their father when the latter defended the suit representing his sons.⁽⁶¹⁾

(58) *Rampurshad Jemadar v. Mt. Jumona*, 4 Sud. Dew. Adaw. Rep. Bengal (1848) 408=10 Ind. Dec. Old Series, p. 277.

(59) *Radhapersad Singh v. Ram Parmeswar Singh*, 9 C. 797 (P.C.)=13 C.L.R. 22=10 I.A. 113=7 Ind. Jur. 216=4 Sar. P.C.J. 421. His Lordship Sir A. Hobhouse said in the course of the judgment:—"With regard to the costs of these latter proceedings, their Lordships have had considerable doubt, because the appellant does not wholly succeed; but having regard to the fact that the whole of the appellant's claim was opposed in the Court below upon a ground which their Lordships think entirely wrong, they do not see sufficient reason for departing from the sound general rule that the party who is defeated in the controversy that is raised shall pay the costs. They, therefore, think it right that the appellant should have the costs of this appeal, and also the costs in the High Court." *Radhapersad Singh v. Ram Parmeswar Singh*, 9 C. 797 at p. 802 (P.C.)=13 C.L.R. 22=10 I.A. 113=7 Ind. Jur. 216=4 Sar. P.C.J. 421.

(60) *Jutadhari Lal v. Rughoobeer Persad*, 9 C. 508=12 C.L.R. 255.

(61) *Lala Ram v. Narain Singh*, A.W.N. (1889) 201. One Khushali, the father of a joint undivided Hindu family, purchased on behalf of the family, out of family funds, the equity of redemption of a certain property. The mortgagee thereof brought a suit against Khushali for the sale of the property. Khushali defended the suit, and a decree was given against him with costs. As he failed to pay these costs, certain ancestral property belonging to the family was attached and sold. The sons of Khushali then brought this suit against him and the purchaser of the property, alleging that they were not bound by their father's acts, and were entitled to recover the property which had been alienated in consequence of those acts. The Court of first instance gave the plaintiffs a decree, which the lower appellate Court affirmed. The purchaser appealed to the High Court. Oldfield and Tyrrell, JJ., said in the course of the judgment: "This appeal must be decreed. The plaintiffs, sons of Khushali, sued to recover what

Certain persons who had applied for a succession certificate in respect of debts due to a deceased relative were successfully resisted in these proceedings by one L. They then sued L for a declaration of their right of heirship and the suit was decreed with costs against L. L who was living with his son and grandson as members of a joint Mitakshara family having died, the decree-holders sought to recover the amount of the decree from L's son and grandson: *held*, on a review of the authorities, that L's son and grandson were bound to satisfy this decree.⁽⁶²⁾

has been found to be joint ancestral property sold in execution of a decree for costs against Khushali. The costs were decreed in a suit brought for the sale of some mortgaged property, in which Khushali had bought the equity of redemption. It is found that the plaintiffs were equally with him owners of the said property, and it must be held that Khushali defended that suit representing the plaintiffs. Under such circumstances the plaintiffs cannot succeed in exempting their joint ancestral property from being taken in execution. We reverse the decrees of the lower Courts, decree the appeal, and dismiss the suit with all costs." *Lala Ram v. Narain Singh*, A.W.N. (1883) 201.

(62) *Paryag Sahu v. Kasi Sahu*, 14 C.W.N. 659=11 C.L.J. 549=6 Ind. Cas. 258. The following observations of Chatterjee, J., in the course of the judgment may well be noted:—"The main question of law raised in this case is whether a decree for costs passed against a Mitakshara father who has failed to substantiate a claim made to some property is binding on his sons who have succeeded by right of survivorship on his death. It is contended that the debt in this case comes within the word *danda* or fine in the text of Yajnavalkya quoted in the Mitakshara, Chap. VI, S. 3, verse 47, Tarkalankar's Edition, "nor is he bound to pay any unpaid fines or tolls or idle gifts," or within the meaning of "*not vyavaharika*" in the text of Ushanas which has been translated variously as "necessary (for life)" by Pundit Giris Chandra Tarkalankar, as "unusual or not sanctioned by law" by the learned Judges of the Bombay High Court, *Durbar Khachar v. Khachar Harsur*, 32 B. 348, as "improper" by Shyama Churn in *Vyabastha Darpan*, 3rd Ed., p. 129. Words used by Hindu Law-givers must be understood in the sense in which the authors may be supposed to have used them. Hindu Courts of Justice did not allow costs to successful litigants but imposed upon the party who took a false plea a fine payable to the king, equal to the claim, see Yajnavalkya, Chap. II, verse 11. "If the defendant denies the claim of the plaintiff and the latter prove his claim by witnesses then the defendant will pay the plaintiff's claim and an equal penalty to the king." Manu, Chap. VIII, verse 59. "In the double of that sum, which the defendant falsely denies, or on which the complainant falsely declares, shall those two men wilfully offending against justice, be fined by the king." So that costs awarded against a defeated litigant could not be *danda* or fine within the meaning of text. Interpreting the word *vyavaharika* in the same way the costs could not come within the exception as the venerable Rishi could not have meant to exclude a thing which had no existence in his time. There is some diversity of opinion as to what liabilities or debts are excepted from the pious duty of the son to pay the debts of his father. The Madras High Court has held that when the liability originates in a breach of civil duty and not in a criminal offence the son is liable, see *McDowell v. Ragava*, 27 M. 71; *Kanemar Venkayapa v. Krishnachariya*, 31 M. 161; *Erasala Gurunathan v. Addepally*, 31 M. 472. The Bombay High Court has in a recent case held that a decree for damages against the father for obstruction of

Costs awarded by Court against a defeated litigant is not "danda" ⁽⁶³⁾ within the meaning of the text of Yajnavalkya quoted in Mitakshara. ⁽⁶⁴⁾ Nor are they covered by the description "not vyavaharika" in the text of Ushanas referred to in *Durbar Khachar v. Khachar Harsur*. ⁽⁶⁵⁾

Very many actions in our Courts are instituted for the purpose of obtaining the administration of property; such litigation need not necessarily be caused by the fault of any of the parties to the suit. In such cases it would not be proper to make any of the parties before the Court liable for the costs incurred. In cases of that description the general practice of the Court is not to direct the costs of the proceedings to be paid by one party to another, but to order payment of them out of the estate. The Court will also, for the purpose of affording due protection to trustees or others concerned in the administration of trust property, order the costs they have been put to, to be paid out of the trust fund which is the subject of litigation, so long as they have not been guilty of misconduct. ⁽⁶⁶⁾

Sometimes neither party is liable—Costs ordered to be given out of a fund or estate.

water passage is not binding on the son as the verdict of the Court in decreeing damages shows that the act of obstruction was wrongful. See *Durbar Khachar v. Khachar Harsur*, 32 B. 348. In the case of *Mahabir Prasad v. Basdeo Singh*, 6 A. 234, the Allahabad High Court held that a decree against a father for money embezzled by him is not binding. In our own Court in the case of *Khalilul Rahman v. Gobind Pershad*, 20 C. 328, Pigot and Rampini, JJ., held that debts incurred for paying the costs of fruitless and imprudent litigation by the father were debts to which the pious duty of sons to pay their father's debts does attach, as such debts could not be said to be illegal or unusual in the sense in which the words had been used for a series of years. "The exception" say the learned Judges "has too long been limited to illegal and immoral purposes to justify us in introducing an extension of it, which would include transaction the character of which was no more than imprudent or unconscientiously imprudent or unreasonable." In the case of *Pareman v. Bhattu*, 24 C. 672, a decree against the father for damages for crops stolen by him was held to be not binding on the sons. In the present case the action of the father was successful in the certificate proceedings and was on the defensive in the civil suit. He may have been imprudent or ill-advised but it cannot be said that he was guilty of any criminal offence or even of a breach of civil duty. Even therefore if the Bombay case were rightly decided, it is distinguishable and there is no reason for following the same." Per Chatterjee, J. in *Paryag Sahu v. Kasi Sahu*, 14 C.W.N. 659 (at 661 and 662) = 11 C.L.J. 549 = 6 Ind. Cas. 258, referred to in *Chakouri v. Ganga*, 12 Ind. Cas. 609 (610) = 15 C.L.J. 228.

(63) *Paryag Sahu v. Kasi Sahu*, 14 C.W.N. 659. (Per Chatterjee, J.)

(64) Ch. VI, S. 3, verse 47.

(65) 32 B. 348.

(66) See Daniell's Chancery Practice, Vol. I, 7th Ed., p. 956. Order 65, rule 1 of the English rules of Supreme Court provides that nothing in it shall be held to deprive any of these persons who has not unreasonably instituted or carried on or resisted proceedings of any right to costs out of a particular estate or fund to which he would be entitled under the Chancery Practice. And this will be so here. Amir Ali's Civ. Pro. Code, p. 203.

"Where a party is entitled to his costs, but it has not been decided who ought ultimately to bear them, payment is often directed to be made out of a fund in Court, or by one of the parties to the proceedings, 'without prejudice to the question how the same are ultimately to be borne.' (66-a) The absence, however, of these words, or words of a like meaning, from an order directing payment of costs out of a fund in Court, does not necessarily imply that the Court has decided that the fund out of which the costs are paid is that which must ultimately bear them; and costs paid out of a fund under an order from which those words are omitted, may be directed to be recouped out of another fund which is primarily liable for that purpose. (66-b) If the party ordered to pay the costs without prejudice in the manner before described neglects at the proper time to apply with respect to such costs, he will not be allowed to re-open the question afterwards." (66-c)

Probate
proceedings—
Costs of,

The matter for determination in this appeal was as to the source or funds out of which the costs of obtaining probate and other expenses in the proceedings for the purpose had to be provided, and it was held that the fund primarily liable for such costs being ordinarily the residuary estate, the part of such estate, in this case, which was undivided between the appellant and respondent, who were brothers, should first be applied to the costs and expenses of applying for and obtaining probate of the Will including probate duty, and that, in the event of such undistributed residue being insufficient, the appellant and respondent should pay such deficiency in equal shares after the probate duty is ascertained and at the time it is payable by the respondent. (67)

Guardian ad
litem or next
friend of
minor—
Liability for
costs.

Where a *guardian ad litem* of an infant had been guilty of gross misconduct in putting executors to proof of a will which he

(66 a) See *Smith v. Hammond*, 6 Sim. 10, 15. For form of order see Seton, 248.

(66-b) *Sheppard v. S.*, 33 Beav. 129, 130; *Re Roper, Taylor v. Bland*, 45 C.D. 126.

(66-c) *Whalley v. Romadge*, 8 L. T. 499. Daniell's Chancery Practice, 7th Ed., 1901, p. 985.

(67) *Dayabhai Tapidas v. Damodardas Tapidas*, 21 B. 75. Farran, C.J., said in the course of the judgment :—"The only point, before us, is as to the source from which the costs of obtaining probate are to be provided. The fund primarily liable is ordinarily the residuary estate. Part of the residuary estate in this case, viz., the interest on a lakh of rupees, appears to be as yet undivided between the brothers. This sum, we think, should, in the first instance, be applied to the costs and expenses of obtaining probate. After that each brother must contribute in equal shares. The order of the Division Court will be varied accordingly."—*Per Farran, C.J., Dayabhai Tapidas v. Damodardas Tapidas*, 21 B. 75 at p. 76.

wished to upset for his own private purposes, and which, the evidence showed, was to his knowledge duly executed by the testatrix in a sound state of mind, it was held that he was liable for the costs of the suit.⁽⁶⁸⁾

The Court has power to mulct the guardian in costs on the ground that he, as such, has misconducted himself.⁽⁶⁹⁾ Bayley, J., said in the course of the judgment in the above case ⁽⁷⁰⁾ :—Having considered the authorities that have been cited by me I am of opinion that the *guardian ad litem* can, and in this case ought to, be ordered to pay the costs of the litigation for which he is responsible. As to the power of the Court to make this order, I think there can be little doubt. S. 220 of the Code of Civil Procedure ⁽⁷¹⁾ gives the Court large powers in the matter of costs and there are reported cases which, I think, justify me in exercising those powers in the present case by ordering the *guardian ad litem* to pay the costs.

In *Green v. Procter* ⁽⁷²⁾ the will of a testatrix was propounded by the executors, and was opposed in the name of Elizabeth Green, a minor, by her step-father Joseph Green as her guardian, on the ground of incapacity and undue influence. The opposition failed on all the grounds put forward, there being not merely failure of proof, but complete disproof of the incapacity and undue influence. In his judgment Sir John Nichol said that the guardian had set up “a most ungrounded case in point of fact. There is nothing that justifies him in this opposition. I hardly recollect a case so vexatiously and falsely offered to the consideration of the Court. The party setting it up would be liable to the full costs if they had been

(68) *Goolam v. Fatmabai*, 8 B. 391. In the case of *Kalidas Shamji* (Unreported) Green, J., ordered a person, not a party to the record, to pay costs where he had instigated the proceedings. In *Sreemutty Bamasundary Dossee v. Anundolal Doss*, Bouke Ref.O.C.J. 44 = *Ibid.*, Part II, 96, Phear, J., of the Calcutta High Court ordered the “real plaintiff” to pay the costs and his order was approved in appeal by Peacock, C.J. and Macpherson, J. That case is also referred to in *Ram Coomar v. Chunder*, L.R. 2 Ap. Cas. 212 heard before the Privy Council. See the same cited in argument in *Goolam v. Fatmabai*, 8 B. 391 (392).

(69) Daniell's Chancery Practice, 148; *Komul Chunder Sen v. Subbessur Doss Goopto*, 21 W.R. 298; *Omrao Singh v. Prem Narain Singh*, 24 W.R. 264; *Green v. Procter*, 1 Hagg. Eccl. Rep., 337 at p. 340, cited in argument in *Goolam v. Fatmabai*, 8 B. 391 (392). See, also, Brown on Probate, p. 441.

(70) *Goolam v. Fatmabai*, 8 B. 391.

(71) Act XIV of 1882.

(72) 1 Hagg. Eccl. Rep. 337.

pressed for." The learned Judge there made the guardian pay some of the costs, and only abstained from ordering him to pay the whole, from a consideration of some of the special circumstances of the case.⁽⁷³⁾

As has already been seen, in the Calcutta case of *Sreemutty Bammasundry Dossee v. Anundolal Doss*⁽⁷⁴⁾ Phear, J., held that certain persons who had improperly set the Court in motion, might be ordered to pay costs, although they were not parties to the suit. This discretion was affirmed, on appeal, by Sir Barnes Peacock, C.J., and was referred to by the Judicial Committee of the Privy Council in *Ram Coomar Coondoo v. Chander Canto Mookerjee*.⁽⁷⁵⁾

In the High Court of Bombay, in the case of the alleged will of Kalidas Shamji ⁽⁷⁶⁾ Green, J., 1873, ordered that one Nagjee Jaitha should be personally liable for the costs of the caveatatrix. Nagjee Jaitha was not a party to the matter; but the Court, being of opinion that he was the person really moving the applicant, made him bear the costs, and that decision was affirmed by the Court of appeal.⁽⁷⁷⁾

In England the practice has been to make the guardian of an infant defendant pay the costs where he has been guilty of gross misconduct in the case.⁽⁷⁸⁾

It has sometimes been said that a next friend may be ordered to pay costs; but a guardian of an infant cannot, except perhaps where he is guilty of gross misconduct in the actual conduct of suit: e.g., putting in a scandalous or impertinent answer or the like.⁽⁷⁹⁾

The plaintiffs, who were two of the executors and trustees appointed by a will, applied for probate of the will. Hussan Aloo was the guardian *ad litem* of one of the minor daughters of the testatrix. On behalf of the minor he filed an affidavit, stating that he "had reason to believe that the will alleged to be made by the testatrix was not made by her whilst in a sound and proper state

Considerations in making guardian *ad litem* personally liable for costs.

(73) See *Goolam v. Fatmabai*, 8 B. 391 (393).

(74) Bourke's Rep. O. J. 44; and on appeal *ibid*, Part II, p. 96.

(75) Referred to in L.R. 2 App. Cas. p. 212, cited in *Goolam v. Fatmabai*, 8 B. 391 (394).

(76) Unreported.

(77) See *Goolam v. Fatmabai*, 8 B. 391 (394).

(78) (*Ibid*).

(79) *Morgan v. Morgan*, 11 Jur. N.S. 233 cited in argument in *Goolam v. Fatmabai*, 8 B. 391 (392).

of mind and understanding," and praying that the petitioners should be required to prove it in solemn form.⁽⁸⁰⁾ The Court found in favour of the will.

The Court in ordering the guardian *ad litem* to pay the plaintiff's costs observed as follows:—"I am of opinion that in this case Hussan Aloo has been guilty of gross misconduct. I consider that his opposition to the issue of probate was not *bona fide*; that it was commenced and carried on by him simply with a view of setting aside a will which he thought to be injurious to his interests. He claimed to be a partner of the deceased, and this will contained a statement by the deceased which was wholly inconsistent with, and opposed to his case, and he, therefore, sought to get rid of it. He was present when the will was executed: he was living in the house with the testatrix. He knew her mental condition, and he yet never objected to her signing the will, or made any suggestion of her incompetency, until he instituted the proceedings in this case. He has put the parties to great expense in carrying on a case the hearing of which lasted seven days. Having regard to all the circumstances I think he has been guilty of such misconduct as brings this case within the authority of *Morgan v. Morgan*,⁽⁸¹⁾ and I order that the costs of the applicants be recovered from Hussan Aloo, such costs to be taxed as between party and party."⁽⁸²⁾

The Code of Civil Procedure⁽⁸³⁾ provides as follows:—"A minor Unreasonable or improper suit instituted by next friend—Costs of on attaining majority may, if a sole plaintiff, apply that a suit instituted in his name by a next friend be dismissed on the ground that it was unreasonable or improper. Notice of the application shall be served on all the parties concerned; and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit or make such other order as it thinks fit."⁽⁸⁴⁾ After the dismissal of an administration suit brought by the next friend of a minor plaintiff, the Court ordered the next friend of the minor to

(80) *Goolam v. Fatmabai*, 8 B. 391.

(81) 11 Jur. N.S. 233.

(82) *Goolam v. Fatmabai*, 8 B. 391 (394).

(83) Act V of 1908, O. XXXII, r. 14.

(84) C.P.C., O. XXXII, r. 14.

pay the costs of the suit, being of opinion that he was the real actor in the suit, and that the suit was unnecessary.⁽⁸⁵⁾

Interveners—
Liability of.

Where interveners come into a suit of their own accord, and no adjudication is made of their rights, the proper course would be not to allow them any costs.⁽⁸⁶⁾

Costs cannot be awarded against a third party, who interposes to defend his own right, when the party under whom he claims confesses judgment.⁽⁸⁷⁾

It has been held that an intervener may be charged with costs of the intervention in the following cases:—(i) where he withdraws his plea at the trial,⁽⁸⁸⁾ (ii) where he fails to show that he has an actual interest in the subject-matter of the suit,⁽⁸⁹⁾ (iii) where it appears that the intervention was not made in good faith,⁽⁹⁰⁾

(85) *Devkabal v. Jefferson*, 10 B. 248.

(86) *Rajah Rooddur Narain Roy v. Coomar Narain Patnaik*, 13 W.R. 320 (321). In a suit instituted for the purpose of effecting a mutation of names in the Collector's register of landed proprietors, on an apparent collusive understanding between the parties in order to defeat the rights of others, the Sudder Dewanny Adawlut gave judgment as *between the parties* agreeably to the admission of the defendant, but made all costs, including those of a claimant who intervened as third party, chargeable to the plaintiff. *Goluknath Ray Chowdhree v. Bhyronath Chowdhree*, (1842) 7 Sel. Rep. 91=8 Ind. Dec. Old Series, p. 70. A party appearing spontaneously as respondent, without notice issued, must bear his own costs. *In re Nujeeb Khan*, (1852) 8 Sud. Dew. Adaw. Rep. (Ben.) 792=12 Ind. Dec. Old Series, p. 616. A sues B for foreclosure of mortgage; C intervenes in the suit, and proves a complete sale of the property to him by B before its mortgage to A. In rejecting the claim of A to foreclosure upon proof of such previous sale, the costs of C in the suit held to have been justly awarded against A, though A might have a good ground of action for reimbursement of their amount to him against B. *Rasmonee Dasse v. Ilahee Buksh*, (1853) 9 Sud. Dew. Adaw. Rep. (Ben.) 574=13 Ind. Dec. Old Series, p. 435. The following observations of the Court in the course of the judgment may also be noted:—The plaintiff may have a good ground of action against the heirs of Mahomed Summee, for the costs on account of third parties which he has been made to pay in this case, in consequence of Mahomed Summee's sale to them, before his mortgage to her, having been substantiated; but it was plaintiff's suit which compelled the third parties to come into Court to protect their rights in the land, and the principal sudder ameen has justly made her answerable to them for the costs of such appearance. The decree on that point appears, therefore, to us to be right, and we dismiss the appeal with costs. *Rasmonee Dasse v. Ilahee Buksh*, (1853) 9 Sud. Dew. Adaw. Rep. (Ben.) 574=13 Ind. Dec. Old Series, p. 435.

(87) *Bhaigut Singh v. Khurugnarain Singh*, (1853) 9 Sud. Dew. Adaw. Rep. (Ben.) 905=13 Ind. Dec. Old Series, p. 685. See on this subject Chapter on "Costs in Special Cases," *infra*.

(88) *Askey v. Williams*, 74 Tex. 294.

(89) *Gifford v. Workman*, 15 Iowa. 34.

(90) (*Ibid*).

(iv) where the intervention was not necessary for the protection of the intervener's interests.⁽⁹¹⁾ Where parties voluntarily come into a suit as defendants without the issue of any notice, such parties must generally bear their own costs.⁽⁹²⁾ Where an intervener is successful he may be awarded costs caused by the contesting of his claim against the party making the contest.⁽⁹³⁾

Where an intervener files a joint answer with defendant and makes a joint defence with him, and they are unsuccessful, judgment should be against both for costs.⁽⁹⁴⁾

It has been held that where the judgment in favour of the intervener is reversed on appeal the intervener is liable for the costs of the trial of the issues raised by his intervention and also the costs of the appeal.⁽⁹⁵⁾

On a decree or half of it being enforced against the defendant, **Surety, Liability of.** such defendant could also be held liable for the costs of the enforcement. So also, any surety of the defendant will also be liable for such costs.⁽⁹⁶⁾

A bond given as security for costs can be enforced in summary way by proceedings in execution.⁽⁹⁷⁾

In the case of *Queen v. Green* ⁽⁹⁸⁾, the Court made the attorney **Attorney—Liability of.** pay all the costs of a certain litigation.⁽⁹⁹⁾ Where it is clear that a

(91) *Barnard v. Bruce*, 21 How. Pr. (N.Y.) 360.

(92) *Davis v. Sharron*, 15 B. Mon. (Ky.) 64. See also *In re Nujeeb Khan*, (1852) 8 S.D.A.R. (Ben.) 792=12 Ind. Dec., Old Series 616.

(93) *McGarry v. McDonnell*, 82 Iowa 732.

(94) *Spruill v. Arrington*, 109 N.C. 192.

(95) *Reay v. Builer*, 99 Cal. 477 (Amer). See also Cyc., of Law and Procedure, Vol. XI, p. 94, Heading "Costs."

(96) *Thakoor Deen Tewaree v. Boolokee Lal*, 6 W. R. (Mis.) 35.

(97) *Chutterdharee Lall v. Ram Belashee*, 3 C. 318=1 C.L.R. 347. The following cases may also be referred to on this point. *Kusaji v. Vinayak*, 23 B. 478; *Abdul Wahed v. Farooqoomissa*, 16 C. 323; and *Chunder Kant v. Ram Coomar*, 3 C.L.R. 505; *Balaji v. Ramasami*, 7 M. 284; *Narayanamma v. Ramayya*, 22 M. 268; *Behari Lal v. Jagnandan*, 19 A. 247. If a surety against whom a surety bond is sought to be enforced summarily in execution, applies for and obtains time to pay the money, he is estopped from raising the objection, that the surety-bond cannot be executed summarily, when the decree-holder again applies for execution against him. *Kamizuddi v. Fauzdar Khan*, 10 C.W.N. 830=4 C.L.J. 311. It is not open to a surety to re-open the question as to his liability, when in a prior execution proceeding he accepted the finding of the Court as to his liability. *Waman Hari v. Hari Vitthal*, 31 B. 128.

(98) 4 Q.B.R. 652.

(99) See the same cited by Norman, J., in *Jointee Chunder v. Anundo Lall Doss*, 14 W.R. O.C.J. 1 at p. 5. On the subject-matter of this chapter see Seton on Judgments and Orders, 6th Ed., 1901, Vol. I, pp. 246-267; Yearly Practice, 1914, pp. 1045-1046; Daniell's Chancery Practice, 7th Ed., 1901, Vol. I, pp. 953-1009; Halsbury's Laws of England, Vol. XXIII, Ss. 323-337, pp. 176-186.

man of straw is purposely put forward, the real party ought to pay costs, and he cannot shelter himself by alleging that he meant only to act as attorney. Though he acted as attorney the application is not the less his own ⁽¹⁰⁰⁾. Lord Denman said : "the question is whether a person who, on a motion for *quo warranto* information, acts as an attorney, is *on that account* to avoid payment of costs when he has, in fact, been the relator, but has put forward another person in that capacity who is unable to pay costs. I have no doubt that he is liable where it appears that he is actually and virtually the relator."⁽¹⁰¹⁾

Application
for costs
should be
made at the
hearing.

"Where a party is entitled to costs, he should take care to apply for them at the hearing, or at any rate before the order has been passed;" after an order has been passed the Court will not give the costs of the action to a party, although he would have been entitled to them as a matter of course, if asked for at the hearing ⁽¹⁰²⁾.

(100) See the argument of Sir William Follett in *Queen v. Green*, 4 Q.B.R. page 652, cited and followed by Norman, J., in *Jointee Chunder v. Anundo Lal Doss*, 14 W. R.O.C.J. 1 at p. 5.

(101) *Per* Lord Denman in the case of the *Queen v. Green*, 4 Queen's Bench Reports, page 652 cited in *Jointee Chunder Sein v. Anundo Lal Doss*, 14 W.R.O.C. J. 1 at p. 5.

(102) *Colman v. Sarell*, 2 Cox. 206 : see also *Norris v. N.*, 1 Cox. 183 ; *Kendall v. Marsters*, 2 De. G.F. & J. 200 ; but see *Viney v. Chaplin*, 3 De. G. & J. 282.

CHAPTER III.

WHO ARE ENTITLED TO COSTS.

General rule—Only parties to suit are entitled to costs.

Classification of the subject—

- (i) Plaintiff's costs.
- (ii) Defendant's Costs.

Section I—Plaintiff's Costs.

Plaintiff's right to costs when successful.

Plaintiff, though successful, may be deprived of his costs when there is some good cause for the same.

Such good cause must be found among matters relevant to the proceedings.

Matters which the Court can look into in determining the existence or not of "good cause" to deprive successful plaintiff of his costs,

What is or is not good cause to deprive a successful plaintiff of his costs :—

- (i) Plaintiff's misconduct in the course of the litigation.
- (ii) Plaintiff's misconduct before litigation.
- (iii) Plaintiff's conduct not being honourable.
- (iv) Plaintiff's conduct as well as defendant's conduct being reprehensible.
- (v) Plaintiff's conduct as well as defendant's conduct being equally foolish.
- (vi) Conduct of which plaintiff was ignorant.
- (vii) Plaintiff abusing his right to select place of trial.
- (viii) Plaintiff making groundless allegation of fraud in the pleadings.
- (ix) Plaintiff having a fair case for consideration.
- (x) Plaintiff obtaining only nominal damages.
- (xi) Plaintiff obtaining an unconscionable advantage.
- (xii) Plaintiff entering into an usurious bargain.
- (xiii) Plaintiff claiming too much.
- (xiv) Plaintiff sleeping over his rights Negligence.
- (xv) Plaintiff labouring under a misunderstanding.
- (xvi) Plaintiff's suit rendered necessary by Act of God.
- (xvii) Plaintiff's costs unnecessarily incurred.
- (xviii) Plaintiff succeeding on some of several issues.
- (xix) Plaintiff's case raising questions of doubt, and difficulty among the profession.
- (xx) Plaintiff's case being one of peculiar hardship.
- (xxi) Plaintiff's case being involved in doubt purely owing to his own conduct.
- (xxii) Plaintiff's case involving a point which was differently decided before.
- (xxii-a) Plaintiff's case being based on an Act the policy of which the Judge does not approve of.
- (xxiii) Plaintiff instituting suit purely for his own convenience—No misconduct on defendant's part.

- (xxiv) Plaintiff's claim being reduced by successful set-off proved by defendant.
- (xxv) Co-plaintiffs, costs of.
- (xxvi) Joint appeal—Costs of different plaintiffs—Moiety of joint costs.
- (xxvii) Same defendant being sued with respect to same subject-matter by another plaintiff, employing same solicitor.
- (xxviii) Plaintiff ordered to pay costs of certain defendants with a right of recoupment from the other defendants.
- (xxix) Plaintiff's costs in amicable actions.
- (xxx) Plaintiff's costs in interpleader suit.

General rule
—Only parties to suit are entitled to costs.

JUST as the general rule as to the persons who would be liable for costs is that they should be parties to the suit or other proceeding in which the costs were incurred, ⁽¹⁾ so, the general rule as to the persons who are entitled to costs is that they must also be parties to the suit. As we have already seen costs are awarded as a means by which a party who has been unnecessarily put to the expense of a litigation is recouped by the person by whose fault the litigation was rendered necessary. ⁽²⁾ The only persons who can possibly incur expenditure in a litigation being the parties, it follows that the persons who would be entitled to be recompensed should also be such parties. No doubt there are exceptional cases, as in the case of a witness applying to the Court for the amount of his travelling charges and maintenance ⁽³⁾, and the Court making an order for the payment of such expenses. But these are exceptional cases, and do not belong strictly speaking to the law of costs. In the case of a witness, costs properly so called are the amounts paid by the party summoning him for his travelling and maintenance charges, and it is the party that incurs such expenses and who would be entitled to such costs. The sums which the witness is ordered to be paid by the party at whose instance he had been summoned are not costs in the strict sense of the term. Hence the general rule holds good that the person or persons entitled to the costs of a suit or other proceeding are the parties to it. The two parties in every litigation are the plaintiff and the defendant. We shall divide this chapter into two sections, and first deal with the costs of the plaintiff and then consider the costs of the defendant.

Classification of the subject
(i) Plaintiff's costs.
(ii) Defendant's costs.

(1) See Chapter II, *supra*.

(2) See Chapter I, *supra*.

(3) See *London etc., Bank v. Mahomed Ibrahim*, 4 B. 619 (620-621). See also *Nemai Chandra v. Ajahar*, 8 C.W.N. 178.

Section (1)—Plaintiff's Costs.

First, with regard to the plaintiff's costs, it has been stated by a high authority (Jessel, M.R.) in the well-known case of *Cooper v. Whittingham* (4), that "where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part, the Court has no discretion, and cannot take away the plaintiff's right to costs; nor does the fact that the defendant has conceded the plaintiff's right before trial disentitle him thereto (5)".

This is only an application of the general rule which we have already noticed in some detail in the previous chapter that the losing party must pay the costs of the successful party (6). It has been a rule which the Courts have universally observed that costs "should follow the event, and that if any party substantially succeeds, he is entitled to his costs. (7)"

But there may be cases when the Court may find it necessary to disallow plaintiff his costs, although it gives him a decree; and, in certain extreme cases, the Court may even order the successful plaintiff pay the costs of the unsuccessful defendant. (8)

(4) (1880) 15 Ch. D. 501.

(5) (1880) *Cooper v. Whittingham*, 15 Ch. D. 501, cited with approval and followed in *Kyppuswami Chetty v. Zamindar of Kalahasti*, 27 M. 341 at pp. 342-343. This case has also been much discussed. Cf. *Ruskin v. Robinson*, (1885) 2 T.L.R. 18; *Upmann v. Forester*, (1883) 24 Ch. D. 231. *Wittman v. Oppenheim*, (1884) 27 Ch. D. 260, where its principle has been adopted; *Florence v. Mallinson*, (1891) 65 L.T. 354, C.A., where *Cooper v. Whittingham* was distinguished; and *Walter v. Steinkopf*, (1892) 3 Ch. at p. 500, where it is unfavourably commented on by North, J. See also *West v. Gwynne*, (1911) 2 Ch. 1 at p. 8 C.A. *American Tobacco Co. v. Guest*, (1892) 1 Ch. 630, infringement of trade mark—distinguishing *Upmann v. Forester*, *supra*; *Macgregor v. Clay*, (1888), 4 T.L.R. 715 C.A., action brought frivolously and carried on vexatiously; *Whitmore v. O'Reilly*, (1906) 2 I.R. 257; *Jones v. Curling*, (1884) 13 Q.B.D. 262, C.A. See Yearly Practices of the Supreme Court, 1914, Vol. I, p. 1045.

(6) As to which see *Yonosuke Mitsue v. Ookerda Khetsy*, 21 B. 779; *Numberumal Chettiar v. Krishnajeel*, 26 M.L.J. 356=1914 M.W.N. 310; *G. Nilkani Nadkarni v. M. Ramchandra Pai*, 18 B. 474; *Bamundoss Mookerjee v. Omeish Chunder Raee*, 6 M. I.A. 289=1 Sar. 536; *Cheynt Ram v. Chowdhree Novbut Ram*, 5 W.R. 3 P.C.=7 M.I.A. 207=1 Sar. 617=1 Suther. 319.

(7) *G. Nilkant Nadkarni v. M. Ramchandra Pai*, 18 B. 474; see Code of Civil Procedure (Act V of 1908), S. 35.

(8) See *Harris v. Fatherick*, 43 L.J.Q.B. 521; *Daulat Ram v. Durga Prasad*, 15 A. 333=13 A.W.N. (1893) 121. But it must also be noted that an order laying the whole of the costs of a suit on a winning plaintiff can be justified only as extreme measure in cases in which a suit may have been wholly unnecessary for the purpose of establishing the case of the plaintiff; see *Keshavrar K. Joshi v. Bhavanji Babaji*, 8 B.H.C.A.C. 142 (143). As to what is "good cause" for depriving a successful party of costs, see *Huxley v. West London Extension Ry. Co.*, 14 App. Ca. 26; *Forster v. Farquhar*, (1893) 1 Q.B. 564, C.A.; *Bostock v. Ramsey Urban District Council*, (1900) 2 Q.B. 616 C.A.; as to the necessity of such cause being shown, *Wight v. Shaw*, 19 Q.B.D. 397, C.A.; *Baines v. Bromley*, 6 Q.B.D. 691.

Such good cause must be found among matters relevant to the proceedings.

In considering whether the successful plaintiff is or is not to have his costs, the Judge must confine himself to materials that are relevant to the proceedings. He cannot "act upon irrelevant materials for the purpose of depriving the successful plaintiff of costs," and, where he does so, an appeal lies as of right.⁽⁹⁾ In order to deprive the successful plaintiff of his costs on the ground of his misconduct such misconduct must be directly connected with the subject-matter of the action.⁽¹⁰⁾

Materials which the Court can look into in determining the existence or not of "good cause" to deprive, successful plaintiff of his costs.

Unless he has the consent of both parties for doing so, a Judge is not entitled to look at letters written "without prejudice" in order to determine the question of costs.⁽¹¹⁾ But in some cases, certain matters which the Court would not be permitted to look into for the purpose of deciding the case may properly be looked into for the purpose of deciding the question of costs. Thus, an answer, though not evidence in cause, may be read as to costs.⁽¹²⁾ Although the amended plead is the pleading exclusively, and, so far as regards the rights of the parties, the allegations made in the original plead, and which were omitted in the amended plead, are as if they never existed, yet that does not extend to deprive the Court of the assistance to be derived from the matter expunged, in determining *quo animo* the suit was instituted; and in an English case the Court referred to the passages of the original plead, and finding therein much groundless imputation against the defendant; —*held*, that costs were properly given against the plaintiff, although he succeeded in getting a decree.⁽¹³⁾ A correspondence "without prejudice" relating to winding up a suit, may be read to assist the Court in deciding on the question of costs.⁽¹⁴⁾ Although no evidence extraneous to the deeds can be received in deciding on their effect; yet on the question of costs, such evidence may be taken into consideration.⁽¹⁵⁾ But letters purporting to have been written by C., the wife of B, to G, after B's death, but not proved to have been received by G, containing strong assurances that G, was father of E, who was born five months after B's death, are not

(9) See *Edmund v. Martell*, (1907) 24 T.L.R. 25 C.A. (Eng.).

(10) *Lipman v. Pulman*, (1904) 91 L.T. 132.

(11) *Walker v. Wilsher*, (1889) 37 W.R. 723, C.A. (Eng.).

(12) *Howell v. George*, 1 Madd. 13; 15 R.R. 203.

(13) *Fitzgerald v. O'Flaherty*, 1 Moll. 347.

(14) *Woodward v. Eastern Counties Ry.*, 1 Jur. (N.S.) 899, Op., *Walker v. Wilsher*, post, col. 693.

(15) *Stewart v. Stuart*, 1 L.J. (O.S.) Ch. 61.

admissible as evidence of adultery even with a view to the costs of the suit, upon which, if admissible, they would have had a material bearing.⁽¹⁶⁾

As has already been seen in detail, for such exceptional orders depriving the winning party of the full fruits of his success there must be some "good cause" shown. Thus, misconduct in commencing proceedings or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct, or making an exorbitant claim through carelessness or recklessness, or the fact that ordinary taxation of costs would produce injustice, have been considered by Courts to be good cause that would justify such exceptional orders.⁽¹⁷⁾

What is or is not good cause to deprive a successful plaintiff of his costs:—
(i) Plaintiff's misconduct in the course of the litigation.

Failure as to the substantial cause of action, a nominal sum only being recovered; ⁽¹⁸⁾ or bringing an action frivolously and carrying it on vexatiously; ⁽¹⁹⁾ or oppressive conduct in asserting a legal right for the mere purpose of harassing a political adversary, ⁽²⁰⁾ and attempts to inflame damages by untrue statements ⁽²¹⁾ may be good cause to refuse costs to a successful plaintiff.⁽²²⁾ In short, it may be laid down that "everything * * * * which places upon the defendant a burden which he ought to bear in the course of the litigation, is perfectly good cause for depriving the plaintiff of his costs."⁽²³⁾

(16) *Legge v. Edmonds*, 25 L.J. Ch. 125; 4 W.R. 71 (Eng). See these cases collected in Mew's Digest, 1911, Vol. IV, Heading—"Costs" Cols. 686—687.

(17) *Jones v. Curling*, (1884), 13 Q.B.D. 262, C.A.; *Pool v. Lewin, Crawcour & Co.*, (1884) 1 T.L.R. 165, C.A. Where the plaintiff relied upon several invalid and even dishonest pleas besides the pleas on which he succeeded, the High Court made no order as to costs in either Court. *Sabapathi Pillay v. Vanmahalinga Pillay*, 15 M.L.T. 206 at p. 214=1914 M.W.N. 256.

(18) *Harris v. Peiherick*, (1879) 4 Q.B.D. 611, C.A.; *Roberts v. Jones, and Willey v. G.N.Ry. Co.*, (1891) 2 Q.B. 194; *Mentors, Limited v. Evans*, (1912) 3 K.B. 174.

(19) *Macgregor v. Clay*, (1888) 4 T.L.R. 715, C.A.

(20) *O'Connor v. Star Newspaper Co.*, (1893), 68 L.T. 146, C.A.; and see *Barnes v. Malby*, (1889) 5 T.L.R. 207, C.A.

(21) See *Pearman v. Burdett Couttes*, (1887), 3 T.L.R. 719, C.A.

(22) *The Yearly Practice*, 1914, Vol. I, p. 1068.

(23) *Per Halsbury, L.C.*, in *Huxley v. West London Extension Ry. Co.*, (1889) 14 App. Cas. 26. Costs not allowed to the plaintiff under the circumstances of the case, as he made unfounded charges of misconduct, profligacy and debauchery against defendant (*Biswanath Chunder v. Khanlaman Dasi*, 9 B.L.R. 76). Held that in this case, as plaintiffs not only claimed reliefs to which they were not entitled, but also omitted to state all the material facts which would entitle them to any relief, no order for costs should be made. *Societa Coloniale Italiana v. Maung Shwe Le*, 14 Bur. L.R. 135. It has been held that a party by the act of whose counsel a difficulty in the case been caused must pay the costs. See *Damul Dharma v. Shripat Narayan*, 6 Bom. L.R.

As has been stated in the previous chapter the Court regards, in some respects, the granting of costs to a party somewhat in the light of a testimonial of good conduct, and it will generally withhold such testimonial from a party who has been guilty of any misconduct with reference to the subject of the action, even where, under other circumstances, he would have been considered entitled to such costs.⁽²⁴⁾

(ii) Plaintiff's
misconduct
before
litigation.

The question as to what would be a proper order as to costs between the parties is not to be decided merely on a consideration of the conduct of the successful litigant towards the other side in the course of the litigation⁽²⁵⁾. The conduct of the plaintiff even prior to action brought may also be taken into consideration; and his misconduct before the litigation may also be good cause to deprive him of his costs,⁽²⁶⁾ though he gets a decree for the other reliefs claimed.

301: Their Lordships Jenkins, C. J., and Batty, J., said in the course of the judgment: "It only remains to consider how far we can remedy the mischief that has been occasioned, by throwing the costs on the defendants. Mr. Samarth has argued before us that it is not the defendants who are to blame but their advisers. But it is a sound principle for which there is the highest authority that the party by the act of whose counsel the difficulty has arisen must pay the costs: *Neale v. Gordon Lennox*, 1902 A.C. 471. We, therefore, order that the defendants pay the whole of the costs of the plaintiff up to the present time including costs of this appeal." *Per Jenkins, C.J., and Batty, J., Damul Dharma v. Stripat Narayan*, 6 Bom. L.R. 301 at p. 303.

(24) *Lawes v. Gibson*, 1 Eq. 135, 138; *Jeffryes v. Agra Bk.*, 2 Eq. 674; *Hilton v. Woods*, 4 Eq. 432; *Vickers v. V.*, 4 Eq. 523, 537; *Lyon v. Holme*, 6 Eq. 655; *Turquand v. Marshall*, 4 Ch. 376, 387; *Landed Estates Investment Co. v. Weeding*, 18 W.R. 35, Eng; *Pike v. Nicholas*, 5 Ch. 261, 267; *Hood v. N.E. Ry. Co.*, 11 Eq. 116, 131; *Harrison v. Good*, 11 Eq. 338, 355; *Motion v. Moojen*, 14 Eq. 202; *Allsopp v. Wheatcroft*, 15 Eq. 59, 65; *Norris v. Fraser*, 15 Eq. 318; *Payne v. Evens*, 18 Eq. 356; *Pitts v. Kingsbridge Highway Bd.*, 19 W.R. 884 Eng.; *Estcourt v. Estcourt, &c. Co.*, 10 Ch. 276; *New Sombrero Phosphate Co. v. Erlanger*, 25 W.R. 18 (Eng.); *Re Love*, 29 C.D. 348; *Huxley v. West London, &c.*, 14 App. Ca. 32; *Forster v. Farquhar*, (1893) 1 Q.B. 564. *Daniell's Chancery Practice*, 1901, 7th Ed., Vol. I, p. 973. This position is strongly exemplified in the case of mortgagees or incumbrancers, whose *prima facie* right to costs may, as we have seen, be defeated by their conduct, and also in the case of Trustees (*Lewin on Trusts*, 10th Ed. 1206 *et seq.*). And so, although there is no rule more general with respect to costs than that where relief is claimed on the ground of fraud the dismissal of the action shall be with costs (*Scott v. Dunbar*, 1 Moll. 442), yet, where the party succeeding is *particeps criminis*, he will not be considered entitled to the costs of the litigation; as in the case of actions for the delivering up of securities given upon considerations which are contrary to the policy of the law (*Debenham v. Ox*, 1 Ves. S. 276; *Mare v. Warner*, 3 Giff. 100; *Mare v. Earle*, 3 Giff. 108, *contra. Jackman v. Mitchell*, 13 Ves. 581, 587; *Mare v. Sandford*, 1 Giff. 288; W.V.B. 32 Beav. 574; *Wood v. Barker*, 1 Eq. 139; *McKewan v. Sanderson*, 20 Eq. 65 (76); *Daniell's Chancery Practice*, 7th Ed., 1901, Vol. I, p. 973.

(25) *Foster v. Farquhar*, (1893) 1 Q.B. 564, C.A.

(26) *Harnett v. Vise*, (1880) 5 Ex. D. 307, C.A.

The Court expects that there should be an absence of fraud on the part of the party applying to it for relief; and even where there has been no positive fraud, but the conduct of the party has not been strictly honourable, it will in cases where the application is to the discretion of the Court visit him with costs.⁽²⁷⁾

Where the conduct of both the parties to the suit has been equally reprehensible the Court will also abstain from giving costs in favour of either party.⁽²⁸⁾

(iii) Plaintiff's conduct not being honourable.

(iv) Plaintiff's conduct as well as defendant's conduct being reprehensible.

Thus where a suit instituted to restrain the defendants from making and selling a certain substance was dismissed, and it appeared that the substances made by both plaintiffs and defendants were intended to be used to deceive the public, no costs were given to either party.⁽²⁹⁾

"Where both parties had been equally foolish, as for instance, the one in selling and the other in buying an estate, which was liable to be defeated upon a contingency, which contingency had actually happened before the contract was entered into, although the contract was set aside, each party was ordered to pay his own costs."⁽³⁰⁾

(v) Plaintiff's conduct as well as defendant's conduct being equally foolish.

Conduct of which the plaintiff was ignorant, or to which he did not consent, could not constitute "good cause" for depriving him of costs.⁽³¹⁾

(vi) Conduct of which plaintiff was ignorant.

It has been held in certain English cases that an abuse of the right to select the place of trial⁽³²⁾ may constitute good cause to deprive the successful plaintiff of his costs, even though the defendant took no steps to get the place of trial altered or has objected without success.⁽³³⁾

(vii) Plaintiff abusing his right to select place of trial.

As the Court will not tolerate fraud in any form, so will it discountenance a groundless allegation of fraud in any pleading; and upon this principle it is that the rule has been established that

(viii) Plaintiff making groundless allegation of fraud in the pleadings.

(27) *Davis v. Symonds*, 1 Cox. 402, 408.

(28) *Daniell's Chancery Practice*, 1901, 7th Ed., Vol. I, p. 975.

(29) *Estcourt v. Estcourt, & Co.*, 10 Ch. 276; and see also *Ragett v. Findlater*, 17 Eq. 29, 43, 44; *Post v. Marsh*, 16 C.D. 395.

(30) *Hitchcock v. Giddings*, Dan. 1; 4 Pri. 135.

(31) *Canning v. Turner*, (1887) 3 T.L.R. 684, C.A. See also *Wills, etc., Association v. Hammond*, (1889) 5 T.L.R. 196, C.A.; *Jones v. Curling*, (1884) 13 Q.B.D. 232, C.A.

(32) See Rules of the Supreme Court in England, O. XXXVI, r. 1 and notes thereunder in the Yearly Practice, 1914, p. 488. (This right is now abolished.)

(33) See *Roberts v. Jones, and Willey v. G.N.Ry. Co.*, (1891) 2 Q.B. 194, approved in *Hill v. Morris*, (1891) 8 T.L.R. 55 cited in the Yearly Practice, 1914, p. 1068.

where relief is claimed on the ground of fraud an order dismissing the suit shall be with costs.⁽³⁴⁾

A party introducing unfounded charges of fraud will be made to pay the costs occasioned thereby, though he may be successful in the action.⁽³⁵⁾

Mere exaggerations or overstatements will not, however, deprive a successful party of his right to costs.⁽³⁶⁾

Where the parties have acted in such a manner as to render the charges of fraud not unreasonable, no order will be made as to the costs occasioned thereby.⁽³⁷⁾

(ix) Plaintiff having a fair case for consideration.

Where there is a fair case for consideration it is not the proper course to visit the party who fails with costs.⁽³⁸⁾

Thus in actions for the specific performance of agreements for the sale or purchase of estates, the circumstance of the title being bad only makes a *prima facie* case for costs, which is capable of being rebutted by circumstances.⁽³⁹⁾ So, also, a suit was dismissed without costs where the question was a pure question of title which

(34) *Langley v. Fisher*, 9 Beav. 90, 104; *New Brunswick, &c., Ry. Co. v. Conybeare*, 9 H.L.C. 711; *Luff v. Lord*, 11 Jur. N.S. 50; *Ship v. Crosskill*, 10 Eq. 73, 87; *Tabor v. Cunningham*, 24 W.R. 153 (Eng.); *Craig v. Phillips*, 3 C.D. 722, 737; *Morg. & Wurtz*, 106, 107; and see *Forrester v. Read*, 6 Ch. 40, where the costs of the charges of fraud were ordered to be taxed as between solicitor and client; see also *Ambrose v. Dunmow Union*, 9 Beav. 508, 514; *Straker v. Ewing*, 34 Beav. 147, 156; and *Parker v. McKenna*, 10 Ch. 96, where plaintiff, though successful, was held to have disintitiled himself to the costs of the suit.

(35) *Wright v. Howard*, 1 S. & S. 190, 205; *Thomas v. Phillips*, 11 Jur. 80; *Staniland v. Willott*, 3 Mac. & G. 664, 666, 682; *West v. Jones*, 1 Sim N.S. 205, 218; *Pledge v. Buss*, Johns. 663; *Blest v. Brown*, 4 De. G.F. & G. 367; *Jones v. Ricketts*, 10 W.R. 576 (Eng.); *Douglass v. Culverwell*, 3 Giff. 251; *Standish v. Whitwell*, 14 W.R. 512 (Eng.); *Clinch v. Financial Corp.*, 5 Eq. 450; *Thomson v. Eastwood*, 2 App. Ca. 215; but see *Gardner v. Ennor*, 35 Beav. 549, where successful plaintiffs were merely held disintitiled to their costs. For mode of apportionment of the costs, see *Heming v. Leifchild*, 9 W.R. 174 (Eng.). For the application of this principle it is not necessary that the word "fraud" should be made use of; a substantial imputation of it is sufficient. (*Marshall v. Stadden*, 7 Ha. 428, 444).

(36) *Thomas v. Lloyd*, 3 Jur. N.S. 288; contra, *Rawlins v. Wickham*, 1 Giff. 355; 3 De G. & J. 304.

(37) *Griggs v. Staple*, 2 De. G. & S. 572, 590; and see *Thompson v. Webster*, 4 De G. & J. 600; *A. G. v. Edmunds*, 6 Eq. 881, 395; *Bagnall v. Carlton*, 6 C.D. 371; *Daniell's Chancery Practice*, 7th Ed., 1901, Vol. I, p. 975.

(38) *Staines v. Morris*, 1 V. & B. 8, 16; and see *Cruikshank v. Duffin* 13 Eq. 555, 563; *Daniell's Chancery Practice*, 7th Ed., 1901, Vol. I, p. 976.

(39) *Edwards v. Harvey*, G. Coop. 40; *Monro v. Taylor*, 8 Ha. 51; *Abbott v. Swarder*, 4 De. G. & S. 448, 460; *Sherwin v. Shakespeare*, 17 Beav. 267; *Freer v. Hesse*, 4 De G.M. & G. 495.

raised very considerable difficulties in the minds of those most capable of judging upon such a subject.^(39-a)

"The mere fact of the Court giving a farthing damages in an action of libel is not conclusive to show that 'good cause' to deprive a plaintiff of costs exists, but it is an element to be taken into account."⁽⁴⁰⁾ In such cases the further point should also be considered as to what was the view of the Court when awarding such small amount as damages,—whether it meant it to indicate its censure of the plaintiff's conduct or not.^(40-a) Thus, where the award of contemptuous damages in an action for libel indicates the opinion of the Court that the plaintiff had no character, and was therefore not entitled to bring the action, it was held that good cause exists for depriving him of costs.^(40-b) So also where the plaintiffs are a company, the damages may mean that the plaintiffs, in the opinion of the Court, had suffered no commercial damage, and this may be reason for depriving them of their costs.⁽⁴¹⁾

(x) Plaintiff obtaining only nominal damages.

In some cases a plaintiff getting a decree for damages may really get something less than what he would be obliged to pay the defendant against whom the decree is passed by way of costs.⁽⁴²⁻⁴⁴⁾

(39-a) *White v. Foljam*, 11 Ves. 337, 463; and see *Bond v. Bell*, 4 Drew. 157.

(40) *Per Esher, M.R.*, in *Moore v. Gill*, (1888) 4 T.L.R. 738; *Myers v. Financial News*, (1888) 5 T.L.R. 42.

(40-a) *Wootton v. Sievier*, (1913) 29 T.L.R. 724.

(40-b) *Wood v. Cox*, (1889) 5 T.L.R. 272, C.A.; and see *Williams v. Ward*, (1886) 55 L.J.Q.B. 566, C.A.; cf. *Tipping v. Jepson*, (1906) 22 T.L.R. 743, C.A.

(41) *The Red-Man's Syndicate, Limited v. Associated Newspapers, Limited*, (1910) 26 T.L.R. 394. See *Yearly Practice*, 1914, Vol. I, p. 1068.

(42-44) *Bryce v. Smith*, (1880) Bignell 54=1 Ind. Dec. Old Series, 425 (427). In this connection the following observations of Grey, C.J., in the course of the judgment in *Bryce v. Smith*, may well be noted:—"I must say that the counsel for the plaintiff is under a great mistake, if he supposes that there is no precedent in any other Court for a party obtaining a verdict, and yet having to pay more costs than the amount of the damages he may get. Where a man's character is attacked or his rights invaded, it may cost him much more to vindicate his character or gain possession of his rights, than he can get in the way of damages. I am not saying that this is as it should be in all cases, but it is a great mistake to assert that it is not incident to other Courts besides this. I further think that the plaintiff might have anticipated that this was likely to be a very troublesome action. I certainly should not have anticipated such pleas as were put in, but I should have expected it to be a troublesome action. When one proprietor of a newspaper brings an action against the proprietor of another newspaper; and when the matter of offence has evidently grown up out of the hostility produced by the situation of the parties as having rival interests, he ought not to be astonished if he finds it rather a difficult proceeding. The next point in which I think a mistaken view has been taken by the plaintiff of his own interest, is that his counsel did not insist on having this matter brought before the Court at an earlier stage of the

(xi) Plaintiff obtaining an unconscionable advantage.

Where a party obtains an unconscionable advantage over another, the Court, although it may not feel itself justified in depriving him of the advantage he has gained, will not give him his costs of enforcing it.⁽⁴⁵⁾

Thus where a purchaser has obtained a bargain at an inadequate price, but which the Court may be bound to enforce, it will not give him costs against the seller, whose estate he has obtained at an under value.⁽⁴⁶⁾

(xii) Plaintiff entering into an usurious bargain.

A mortgagee is, as a general rule, entitled to the costs of enforcing his security; but where the Court, in consideration of his usurious bargain, declines to award them wholly or in part the High Court will not interfere.⁽⁴⁷⁾

cause. In this Court I have no doubt that he might have done so; and if he had insisted on it, and asked the Court to decide, in the first instance, whether he should be obliged to take copies of the pleas, he would have had our decision on the subject. There is no ground to say the Court would not have entertained such a motion. It was his duty to make the motion, and if he did not make it, he has no right to complain of the costs that have accrued since. I say also that beyond that principal and main motion which it was his duty to make, he might have applied to the Court for assistance in alleviating the costs in many ways. I am sure that if I had been told my paper book was to cost what it appears it did cost, I would have waived the ceremony of having it sent to me. There were various applications that might have been made by the plaintiff, none of which were made; and it is rather too much after he has neglected that, to come now and complain when the costs fall upon him in the end. *Per* Grey, C.J., in *Bryce v. Smith*, (1830) Bignell 54=1 Ind. Dec. Old Series, p. 425 (427); in an English case a plaintiff who succeeded in recovering a very small part only of his claim on a second trial, was ordered to pay the costs of both trials. *Harris v. Petherick*, (1879) 4 Q.B.D. 611, C.A., and for further instances of successful plaintiffs ordered to pay costs, see *Fane v. Fane*, (1879) 13 Ch. D. 228 and see *American Tobacco Co. v. Guest*, (1892) 1 Ch. 630; *Upmann v. Forester*, (1883) 24 Ch.D. 231; *Roberts v. Jones*, and *Willey v. G. N. Ry. Co.*, (1891) 2 Q.B. 194; *Florence v. Mollinson*, (1891) 65 L.T. 354 (where the judgment as drawn up and entered is set out in full; *Re Knight's Will*, (1884) 26 Ch. D. 82, C.A.; *Walter v. Steinkopf*, (1892) 3 Ch. 489; *Whitmore v. O'Reilly*, (1906) 2 I.R. 357. Cf. *Dicks v. Yates*, (1881) 18 Ch. D. 76, C.A.; *Foster v. G.W.Ry. Co.*, (1882) 8 Q.B.D. 515, C.A.; *Andrew v. Grove*, (1902) 1 K.B. 625; *Mentors, Limited v. Evans*, (1912) 3 K.B. 174; Yearly Practice, 1914, p. 1050.

(45) Daniell's Chancery Practice, 1901, 7th Ed., Vol. I, p. 974.

(46) *Burrowes v. Lock*, 10 Ves. 470, 476; and see *Fugh v. Arton*, 8 Eq. 626, 630.

(47) *Carvalho v. Nurbibi*, 3 B. 202=4 Ind. Jur. 32 (Ref. to in *Ganesh Harbaji v. Sidhakaran*, 13 C.P.L.R. 74 and *Lala Onkardas v. Brijlal*, 17 C.P.L.R. 38 and distinguished in *Bandaru Swami Naidu v. Atchayamma*, 3 M. 125). West, J., said:—"The District Court, while thus giving six per cent. interest, threw the costs of the appeal on the appellant, whose bargain it considered usurious. The general rule no doubt is that a mortgagee is entitled to the costs of enforcing his security against one who disputes it, but this is not prescribed by any express regulation. The decision in *Desaji Lakhmaji v. Bhavanidas Narotamidas*, 8 B.H.C.R.A.C.J. 100, which was

A successful party may be refused his costs where he claims (xiii) Plaintiff too much, and had refused to accede to an inexpensive mode of settling the questions in issue.⁽⁴⁸⁾ claiming too much.

So also, the Court would disallow costs to the successful party, where he, in addition to claiming too much, has by his mode of pleading put the other parties to very considerable difficulties.⁽⁴⁹⁾

But where, though he claimed too much, his demand was resisted *in toto*, he was given his costs up to the hearing.⁽⁵⁰⁾

So also, where a plaintiff has slept upon his rights and has allowed the defendant to suppose that he would not enforce them, he may, although successful, be deprived of his costs.⁽⁵¹⁾ (xiv) Plaintiff sleeping over his rights—Negligence.

Similarly in a case, where plaintiff and defendant had been defrauded, but both were to a certain extent guilty of negligence, no order was made as to the costs.⁽⁵²⁾

In another case a purchaser, the successful plaintiff in a specific performance suit, was not allowed his costs on the ground that he had induced the vendor to sign the contract without giving him an opportunity of consulting a solicitor.⁽⁵³⁾

Sometimes, when there has been a misunderstanding between the parties, and the action is in consequence dismissed, the Court will not give costs to the defendant.⁽⁵⁴⁾ (xv) Plaintiff labouring under a misunderstanding.

Thus, a suit for specific performance, where it was held that there was no concluded agreement, and that all the correspondence together did not amount to more than a treaty, was dismissed without costs, in consideration that it appeared to have been a case

followed in *Balkishna Abaji v. Vishnu Raghunath*, (see Printed Judgments for 1875, page 56), seems to prevent our interfering, under these circumstances, with the decision of the District Judge, and we must confirm his decree." *Per West, J.*, in *Carvalho v. Nurbibi*, 3 B. 202=4 Ind. Jur. 32.

(48) *Lawes v. Gibson*, 1 Eq. 135; *Foster v. Farquhar*, (1893) 1 Q.B. 564; but see *Becket v. Styles*, 5 Times Rep. 88.

(49) *Evans v. Davis*, 10 C.D. 747; *Gent v. Harrison*, 69 L.T. 307.

(50) *Jeffryes v. Agra Bk.*, 2 Eq. 674; but see *National Provincial, &c. Insce. Co. v. Prudential Assee. Co.*, 6 C.D. 757; and see *Cory v. Thames Iron Works Co.*, 16 W.R. 475 (Eng.), where the costs of the excessive claim were disallowed.

(51) *Anon.*, 2 Atk. 14; see also *Clifton v. Orchard*, 1 Atk. 610; *Pearce v. Newlyn*, 3 Madd. 106, 189; *Guest v. Homfray*, 5 Ves. 818, 824; *Lee v. Brown*, 4 Ves. 362, 369.

(52) *Mumford v. Stohwasser*, 18 Eq. 556, 565.

(53) *Hardy v. Eckersley*, W.N. (1877) 199.

(54) *Daniell's Chancery Practice*, 1901, 7th Ed., Vol. I, p. 974.

of misunderstanding, arising from the want of clear unequivocal conduct and language.⁽⁵⁵⁾

(xvi) Plaintiff's suit rendered necessary by Act of God.

Where an action is rendered necessary by an Act of God the judgment is generally made without costs.^(55-a)

(xvii) Plaintiff's costs unnecessarily incurred.

As a general rule costs occasioned by the inclusion of unnecessary papers in the appeal to Privy Council will not be allowed, although the appellant succeeds in the appeal.⁽⁵⁶⁾

But in the recent case of *Bijoy Gopal Mukerji v. Srimati Krishna Mahishi*,⁽⁵⁷⁾ the Privy Council did not deprive the successful appellant of any part of his costs, for the inclusion in the record of a bulk of papers absolutely irrelevant to the appeal, as the respondent did not object to their inclusion.⁽⁵⁸⁾

(xviii) Plaintiff succeeding on some of several issues.

If there are separate issues—that is, different issues which are distinct on the pleadings, or can be distinguished on the evidence in Court—and the plaintiff fails on one, then he ought to be deprived of the costs of that issue, and generally be ordered even to pay the costs of it.⁽⁵⁹⁾

(xix) Plaintiff's case raising questions of doubt, and difficulties among the profession.

A suit may be dismissed without costs where the question involved is a pure question of law or mixed question of law and fact, which raises very considerable difficulties in the minds of those most capable of judging upon such a subject.⁽⁶⁰⁾

“Where the doubt consists in pure questions of legal principle, and not in ascertaining the true construction and legal operation of some ill-expressed and inartificial instrument, it is now considered to be incumbent on the Court to decide such questions and so

(55) *Stratforth v. Bosworth*, 2 V. & B. 341, 348; *Marg. Townshend v. Stangroom*, 6 Ves. 328, 341.

(55-a) *Cresswell v. Haines*, 8 Jur. N.S. 208; *Hanson v. Lake*, 2 Y. & C.C.C. 328; *Hinder v. Streeten*, 10 Ha. 18; *Purser v. Darby*, 4 K. & J. 44; *Scott v. S.*, 11 W.R. 766; see *Barker v. Venables*, 11 Jur. N.S. 480; *Hale v. Bushill*, 35 Beav. 343; *Longinatto v. Morss*, 26 L.T. 828; and see *Re Sparks*, 6 C.D. 361; *Morg. & Wurtz*. 261—263.

(56) *Tarakant Bannerjee v. Puadomoney Dossee*, 5 W.R. 63 (P.C.) = 10 M.I.A. 476 = 1 Suther. 631 = 2 Sar. 184; *Pittapur Raja v. Buchi Silayya*, 8 M. 219 = 12 I.A. 16 = 4 Sar. 598.

(57) 9 Bom. L.R. 602 = 11 C.W.N. 424 = 5 C.L.J. 334 = 2 M.L.T. 133 = 17 M.L.J. 154.

(58) *Bijoy Gopal Mukerji v. Srimati Krishna Mahishi*, 9 Bom. L.R. 602 = 11 C.W.N. 424 = 5 C.L.J. 334 = 2 M.L.T. 133 = 17 M.L.J. 154 = 4 A.L.J. 329 = 34 C. 329.

(59) *Lipman v. Pulman*, (1904) 91 L.T. 132; Yearly Practice, 1914, Vol. I, p. 1045. See also Chapter on “Proportionate Costs,” *infra*.

(60) *White v. Foljambe*, 11 Ves. 337, 463; and see *Bond v. Bell*, 4 Drew. 157.

determine the doubt"; (61) and it has been stated that in these as well as in other similar cases the present practice of the English Courts is to make the costs follow the result.⁽⁶²⁾

Where the conduct of the plaintiff throughout has been open, straightforward and honourable, and it is only an evidently *bona fide* mistake as to somewhat difficult point of law that has rendered his suit so imperfect in its construction as to be unsustainable, he should not be saddled with the costs of the other party, who has unnecessarily protracted the proceedings.⁽⁶³⁾

Where the plaintiff had raised an important general question, the decision of which might to a certain extent affect other cases, which depended on the special form of an Act of Parliament, the suit was dismissed without costs.⁽⁶⁴⁾

(xix-a) Plaintiff's case raising an important general question.

"In most of the cases before mentioned, the Court in withholding the costs of the action from the successful party has been influenced by his conduct with reference to the action or the subject-matter of it. There are, however, many cases in which the Court, without any reference to the good or bad conduct of any party, has refrained from awarding costs to be paid by the unsuccessful party solely from consideration of the peculiar hardship of the individual case; it is, however, useless to refer to them in detail since they involve no general principle."⁽⁶⁵⁾

(xx) Plaintiff's case being one of peculiar hardship.

Although the Court will not, in general, visit with costs a party who has resorted to the Court in a doubtful case, yet, if he has refused a fair offer of accommodation, and obstinately persisted in his action, it is an aggravation, and he will be ordered to pay costs.⁽⁶⁶⁾

(xxi) Plaintiff's case being involved in doubt purely owing to his own conduct.

Whenever the doubt in which a particular case is involved has been occasioned by the conduct of the plaintiff himself, the Court will deprive him of his costs, though he succeeds in the action.⁽⁶⁷⁾

(61) *Alexander v. Mills*, 6 Ch. 124, 131, 132; see *Osborne v. Rowlett*, 13 C.D. 774, 781; *Palmer v. Locke*, 18 C.D. 381, 388.

(62) See *Carver v. Richards*, 6 Jur. N.S. 667; see, however, *Malden v. Fyson*, 9 Beav. 347; *Daniell's Chancery Practice*, 7th Ed., 1901, Vol. I, p. 796.

(63) *Heimiger v. Drosz*, 3 Bom. L.R. 1.

(64) *Clark v. School Bd. for London*, 9 Ch. 120; see *Daniell's Chancery Practice*, 7th Ed., 1901, Vol. I, p. 979.

(65) See *Shales v. Barrington*, 1 P. Wms. 481; *Drybutter v. Bartholomew*, 2 P. Wms. 127; *Coppin v. C.*, 2 P. Wms. 291, 297; *Forbes v. Taylor*, 1 Ves. J. 99; *Brodie v. St. Paul*, 1 Ves. J. 326, 334; *Mosely v. Virgin*, 3 Ves. 184, 187; *Dickenson v. Lockyer*, 4 Ves. 36, 45; *Everett v. Backhouse*, 10 Ves. 94, 101.

(66) *Per Ld. Hardwicke in Biggleston v. Grubb*, 2 Atk. 48.

(67) *Blunt v. Cumyngs*, 2 Ves. 8, 381.

(xxii) Plaintiff's case involving a point which was differently decided before.

Where the Court comes to a decision upon a point of law which is contrary to a former decision either of the Court or of any other Court of competent jurisdiction, it will generally exonerate the party against whom it decides from the payment of costs to his adversary.⁽⁶⁸⁾

Generally speaking, where the difficulty arose entirely from conflicting decisions, no order may be made as to costs.⁽⁶⁹⁾

"It is, however, only where the case turns upon a question of law, upon which the opinion of the Court may be fairly taken, that the unsuccessful party will be excused the payment of costs; if there is a decided objection to the case set up, the party setting it up will be compelled to pay them."⁽⁷⁰⁾

If there is one substantial objection to the plaintiff's case which prevails, the circumstance that the defendant has taken others which have failed will not relieve the plaintiff from his costs.⁽⁷¹⁾

(xxii-a) Plaintiff's case being based on an Act the policy of which the Judge does not approve of.

The fact that the plaintiff's case is based on a statute the policy of the Legislature in passing which statute is not approved by the Judge trying the case is no ground to deprive the successful party of his costs. ^(71-a)

(xxiii) Plaintiff instituting suit purely for his own convenience—No misconduct on defendant's part.

Where the plaintiff's suit is instituted purely for his own convenience and there is no misconduct or default on the defendant's part, that necessitated the plaintiff's suit, costs would not be given to the plaintiff though he may be given the relief he asks for.⁽⁷²⁾ Thus, in a suit upon a decree of the Small Cause Court, brought by reason of there being no process of that Court whereby satisfaction of its decree could be obtained,⁽⁷³⁾ it was *held*, that though the High Court had power to award to the plaintiff his costs

(68) *Rose v. Calland*, 5 Ves. 186.

(69) *Osborne v. Rowlett*, 13 C.D. 774. See this question also discussed in Chapter I, *supra*.

(70) Daniell's Chancery Practice, 1901, 7th Ed., 3 Vol. I, p. 977. See also as illustrations of the rule *Playford v. Hoare*, 3 Y. & J. 175; *Bryant v. Busk*, 4 Russ. 1.

(71) Daniell's Chancery Practice, 1901, 7th Ed., Vol. I, p. 978.

(71-a) *Secretary of State v. Verkalesh Govind*, 2 Bom. L.R. 125.

(72) See *Madan Mohan Bose v. Lawrence*, 1 B.L.R. O.C.J. 66. *N.B.*:—This case though overruled by *Moonshi Golam Arab v. Curreembux*, 5 C. 294 = 4 C.L.R. 477, the principle regarding the subject of costs stated above is not affected by the subsequent case.

(73) This was the old practice. This case so far as it decides that a suit can be instituted in the High Court on a decree of the Small Cause Court is not now good law. See *Moonshi Golam v. Curreembux*, 5 C. 294 = 4 C.L.R. 477.

of suits, still where it appears that the suit was brought by the plaintiff purely for his own convenience, and there was no reason to suppose any obstacle was thrown in the way of realizing the judgment by the debtor the High Court, would, in its discretion refuse plaintiff his costs.⁽⁷⁴⁾

Where the amount claimed by the plaintiff, as damages for a (xxiv) Plaintiff's claim breach of contract, by the defendant, was reduced on the defendant being reduced having successfully pleaded a set-off, plaintiff was yet allowed his costs, the provisions of S. 9 of Act XXVI of 1864 not being applied by successful set off proved by defendant. cable to such a case.⁽⁷⁵⁾

An action in which there were two sets of plaintiffs, acting by (xxv) Co-plaintiffs, the same solicitor, on one set of plaintiffs succeeding and the other costs of. failing, it was ordered that the defendant should pay to the successful plaintiff one moiety of the general costs of the action, and

(74) See *Madan Mohan Bose v. Lawrence*, 1 B.L.R. O.C.J. 66. This was an action upon a judgment, for Rs. 659, obtained by the plaintiff against the defendant, in the Calcutta Court of Small Causes, and the costs of suit. The plaintiffs alleged in their plaint that "the defendant had no moveable property, so far as the plaintiffs can discover, upon which execution of the decree of the Small Cause Court can operate, but he is possessed of, or entitled as of right to, certain valuable property within the local limits of the jurisdiction of this Court, to wit, within the Presidency Jail, which is sufficient in value to satisfy the decree; but there is no process of execution by prohibitory order out of the Small Cause Court, by virtue of which the moveable property can be attached, and sold in execution in satisfaction of a decree of such Court."

The suit was undefended. The defendant was a prisoner in the Presidency Jail. It appeared in evidence that the defendant was quite willing to pay to the plaintiffs the amount of the judgment and costs, but that the jailer refused to allow him to do so without an order of the Court. Markby, J., said in the course of the judgment:—"I am of opinion that this case does not fall under S. 9 of Act XXVI of 1864. I do not think it can be said that when a plaintiff comes into this Court, for the express purpose of availing himself of a process of execution, which does not prevail in the Small Cause Court, the suit was one for which a summons might have been taken out from the Small Cause Court, under S. 9, and I doubt whether the words in S. 25 (2) of Act IX of 1850, include a suit upon a judgment of the Small Cause Court. I, therefore, think that the plaintiffs are not absolutely deprived of their costs by S. 9, but under all the circumstances of this case, the plaintiffs having come here purely for their own convenience, and there being no reason for supposing any obstacle was thrown in the way of realizing the judgment by the debtor, I think, I ought, in my discretion, to refuse costs. Decree for the plaintiffs for the sum of Rs. 659, and the costs of the suit in the Small Cause Court, and interest on the aggregate amount at 6 per cent. No order as to costs." But see *Moonshee Golam v. Curreebux*, 5 C. 294=4 C.L.R. 477, which lays down that no suit would lie in the High Court on a decree of the Small Cause Court.

(75) *Kishorechand Champalal v. Madhowji Visram*, 4 B. 407. See also *Blake v. Appleyard*, 3 Ex. D. 195; *Neale v. Clarke*, 4 Ex. D. 286; *Potter v. Chambers*, 4 C.P.D. 451; *Nyers v. Defries*, 5 Ex. D. 15, *Walesby v. Gculskyn*, L.R. 1 C.B. 576, cited by counsel in *Kishorechand v. Madhowji*, 4 B. 407 at p. 414.

should be entitled, as against the unsuccessful plaintiff, to all extra costs to which he had been put by such extra plaintiff being joined. (76)

(xxvi) Joint
appeal—
Costs of
different
plaintiffs—
Moiety of
joint costs.

The plaintiff in the first Court obtained a decree against A and B who preferred a joint appeal with the result that the plaintiff's suit was dismissed with all costs. The plaintiff preferred a second appeal making A sole respondent and obtained a decree against A. On an application by B to execute his decree for costs against the plaintiff it was held that he was only entitled to recover a moiety of the joint costs awarded in favour of A and B by the lower appellate Court. (77)

(76) *Gort v. Rowney*, (1886) 17 Q.B.D. 635, C.A.

(77) *Narayan Ganesh Ghatate v. R.B. Indrabhan Bansilal Abirchand*, 17 C.P.L.R. 53. Stanley Ismay, J., said in the course of the judgment:—"I am not aware that the question has ever been considered in any reported ruling in this country but there are several English decisions which throw some light upon the case. The wording of the latter part of S. 26 of the Code of Civil Procedure is identical with the wording in O. XVI, r. 1 of the Rules of the Supreme Court, 1883. The effect of this rule was considered in *Viscount Gort and others v. Rowney* (55 L.J.Q.B. 541). In that case two plaintiffs had brought a joint action. Judgment was entered in favour of one of the plaintiffs with costs and in favour of the defendant as against the other plaintiff with costs. It was held by the Court of appeal that the successful plaintiff was entitled to full general costs and not to a moiety only, and that the defendant was not entitled to any general costs but only to costs occasioned by the joinder of the unsuccessful plaintiff. But this principle has not been extended to cases outside the rule. Thus in *Cain v. Adams* (5 L.J.K.B. 252) it was held that one of two joint defendants who has a verdict in his favour is entitled to the separate costs which he has incurred and to half the costs of the joint defence. In the very recent case of *Beaumont v. Senior and Bull* (72 L.J.K.B. 141) the two defendants joined in defending an action brought against them. Judgment was given for the defendant Bull with costs and against the defendant Senior with costs. The Registrar on the authority of *Gort v. Rowney* allowed only the extra costs incurred owing to the defendant Bull having been added as a defendant. On an appeal by the defendant Bull it was held that he was entitled to recover from the plaintiff a moiety of the costs incurred in the joint defence. Lord Alverstone, C. J. said:—"A successful defendant is entitled to his costs of defending the action. If it should happen that he is one of several defendants, in the absence of any previous agreement between the defendants and their solicitor affecting the matter, the costs of defending the action are to be apportioned among the several co-defendants so that the successful defendant is not entitled to recover from the plaintiff that portion of the costs which is paid by his co-defendants. If he were he would be recovering more than his costs of defending the action..... In the absence of any special agreement we must take it, upon the authority of the cases cited for the defendant Bull, that each of the defendants was to pay half the costs of the defence in which case the defendant Bull would be entitled to recover his half of those costs from the plaintiff." I have not been able to find any English decision precisely on all fours with the present case but in *Graham v. Campbell* (47 L.J. Ch. 593) where two defendants appealed jointly and one succeeded, both were allowed their costs of appeal, the costs not having been increased by the joint appeal and a cross appeal against both defendants having failed. It seems to me upon

A successful plaintiff ought not to be deprived of his proper costs of the action because another plaintiff, employing the same solicitor, has another action pending relating to the same subject-matter; and *a fortiori* when that other action is dismissed with costs.⁽⁷⁸⁾

(xxvii) Same defendant being sued with respect to same subject-matter by another plaintiff who also employs the same solicitor.

Where damages for injuries were claimed against two sets of defendants and the Court gave judgment against the second set and in favour of the first, it was ordered that the costs to be paid by the plaintiff to the successful defendants be included in the costs recoverable by the plaintiff against the unsuccessful defendants.⁽⁷⁹⁾

(xxviii) Plaintiff ordered to pay the costs of certain defendants with a right of recoupment from the other defendants.

such authority as is available that except in cases to which the special provisions of S. 26 of the Code of Civil Procedure of 1882 are applicable a party to an action who is awarded his costs cannot claim anything beyond what on the face of the record appears to be the actual costs incurred by him. Where there are several defendants or several appellants or several respondents a successful party can only claim to recover his own separate costs together with an aliquot share of the general costs. The mere fact that the costs have not been increased by a joinder of parties appears to be immaterial. Had the Divisional Court made the direction required by Rules IX and X of the Rules framed under the Legal Practitioners Act there would have been no need for this appeal and it cannot seriously be contended that the omission to make a direction can prejudice the opposite party or can enable a joint party to claim anything beyond an aliquot share of the general costs. The orders of the Courts below are set aside and in lieu thereof it is declared that the respondent is entitled to recover a moiety only of the item of Rs. 286-15-0. Each party will bear his own costs both in this Court and in the lower appellate Court." *Per Stanley Ismay, J.—Narayan Ganesh Ghatate v. R. B. Indrabhan Bansilal Abirchand*, 17 C.P.L.R. 53 (54-56).

(78) *Walker v. Provincial Homes Investment Co. Ltd.* (1910), 101 L.T. 871, C.A. Yearly Practice, 1914, Vol. I, p. 1046.

(79) *Medley v. London United Tramways, Limited* (1910) 26 T.L.R. 315. "The original defendant to Sanderson's action was the Blythe Theatre Company. The Company was sued for £ 189 for work done and materials supplied by Sanderson as he alleged at the request of the Company, the request being made by the defendant Hope, the Agent and who was the architect in building the theatre. The company pleaded, *inter alia*, that neither they nor their agents had desired plaintiff's assistance or his materials. Such defence was followed by plaintiff taking out a summons for adding Hope as a defendant, and liberty was accorded to plaintiff to amend the Writ and have Hope as a defendant to the action by claiming alternatively against Hope that sum, or by way of damages for a breach of warranty of authority. Hope denied that he was the company's agent and the company denied his authority. The jury found for plaintiff but against the company alone. Mr. Justice Grantham thereupon ordered judgment for plaintiff against the company, entering judgment also for the defendant Hope, and also ordered that he should recover against the plaintiff costs to be ascertained and that the plaintiff should recover costs against the defendant Company to be taxed, and also the plaintiff's taxed costs occasioned by joining Hope, including the costs which the plaintiff was adjudged to

"Under the Judicature Acts it is no longer necessary or proper to order a plaintiff to pay the costs of a defendant and have them over against another defendant, so that if the second defendant is insolvent, the plaintiff loses them. The proper form of order now is to order the defendant who is liable to them as between himself and his co-defendant to pay them to his co-defendant." (79-a)

pay to the defendant Hope. The Company appealed but Hope was not made a party to it. Lord Justice Romer in delivering judgment in favour of the respondent said *inter alia* :—"This action, seeking relief in the alternative against the two defendants, was rightly brought under O. XVI, r. 4—See *Honduras Inter-Oceanic Railway Company v. Lefevre* (L.R. 2 Ex. Div. 301) and *Bennetts & Co. v. Mcllwraith & Co.* (1896, 2 Q.B. 464). The rule is a beneficial one, and a plaintiff who rightly brings such an action as the present ought not to be mulcted in costs by reason of his taking advantage of the rule in a proper case. Under the Judicature Act, 1890, S. 5, and O. LXV, 65, rule 1, the Court has full power over the costs of all parties of such action. And, in my opinion, it has jurisdiction to order the plaintiff to pay the costs of the defendant against whom the action fails, and to add those costs to his own to be paid by the defendant against whom the action has succeeded, and whose conduct has necessitated the action. This jurisdiction has been frequently exercised in Chancery in proper cases, and can, of course, be exercised in the King's Bench Division. The costs so recovered over by the plaintiff are in no true sense damages, but are ordered to be paid by the unsuccessful defendant on the ground that in such an action as I am considering those costs have been reasonably and properly incurred by the plaintiff as between him and the last-named defendant. See, by way of illustration, *Child v. Stenning*, (11 Ch. Div. 82), where it will be seen, on looking into the facts of that case, that Master of the Rolls, Sir George Jessel, at p. 87, made exactly such an order as I have been indicating. The modern practice, in order to avoid circuitry, has been in such cases where there has been no jury to order the unsuccessful defendant to pay directly to the successful defendant his costs—See, *Rudow v. Great Britain Mutual Life Assurance Society*, (17 Ch. Div. 600, 607, 608). But, of course, a judge has jurisdiction to follow the old practice if he thinks fit to do so, and ought to do so when necessary, as, for example, when, having regard to O. LXV, r. 1, difficulties would otherwise arise by reason of the trial being with a jury. I think, therefore, that in the present case Mr. Justice Grantham had jurisdiction to make the order he did." Lord Justice Vaughan Williams in reluctantly agreeing said :—"This jurisdiction under the Judicature Acts should only be exercised in exceptional cases." *Sanderson v. The Blythe Theatre Company and Hope*, 8 C.W.N. (Journal portion) cccviii.

(79-a) *Per* Jessel, M.R., *Rudow v. Great Britain, etc., Assurance Society*, (1881) 17 Ch. D. at p. 608, C.A.; *Child v. Stenning*, (1879) 11 Ch. D. 82; *Besterman v. British Motor Cab. Co., Ltd.*, (1913) 29 T.L.R. 324; *Vine v. National Motor Cab & Co. Ltd.*, and *another*, (1918) 29 T.L.R. 311; and see *Bullock v. London and General Omnibus Co.*, (1907) 1 K.B. 264 C.A.; *Cf. Sanderson v. Blythe Theatre Co.*, (1903) 2 K. B. 533, C.A.; *Beaumont v. Senior*, (1903) 1 K.B. 282; *Cf. The Milwall*, (1905) p. 155, C.A. The usual and modern course is for the unsuccessful defendant to pay the costs incurred by plaintiff and by successful defendant to them direct. The "Esrom" and the Hopper "Wills No. 66," (1914) W.N. 81; See, further, *Poultton v. Moore*, (1914) 83 L.J. K.B. 875; *reversed*, (1915) 1 K.B. 400, C.A. The Laws of England, Supplement No. 6, pp. 1102, 1103.

In amicable actions costs will ordinarily be refused to both parties,⁽⁸⁰⁾ or divided equally between them.⁽⁸¹⁾

(xxix) Plaintiff's costs in amicable actions.

As a general rule the plaintiff in a properly instituted interpleader suit is entitled to his costs. In such case he would be entitled to a lien for his costs on the fund, and is not forced to take his chance of getting them from the defendant against whom the Court decides.⁽⁸²⁾

(xxx) Plaintiff's costs in interpleader suit.

An interpleader suit is not improperly constituted merely because one of the defendants does not claim the whole of the subject-matter.⁽⁸³⁾

(80) *Rotch v. Livingston*, 91 Me. 461.

(81) *Frazer v. Miller*, 12 Kan. 459; *Cyclopædia of Law and Procedure*, Vol. XI, p. 53.

(82) *The Secretary of State v. Mir Muhammad*, 1 M.H.C.R. 360 at 361. See also, *Campbell v. Salomons*, 1 Sim. & S. 462, *Per* Sir John Leach, V.C. The plaintiff to an interpleader suit has no right to his costs if the suit be not properly instituted: *Crawford v. Fisher*, 1 Hare 436; *Cook v. Earl of Rosslyn*; 7 Jur. N.S. 1076, and see a case from Oba. Rep. 257 cited in 2 Cox 279; See also *Bombay Baroda and Central India Railway Company v. Jacob Elias Sassoon*, 18 B. 231.

(83) *The Secretary of State v. Mir Muhammad Husain*, 1 M.H.C.R. 360. *Scotland, C.J.*, said in the course of the judgment:—It was contended "that in order to warrant an interpleader suit each of the defendants must claim the whole of the subject-matter of the suit. That very argument appears to have been used, and used unsuccessfully, in *Hamilton v. Marks*, (5 Deg. & S. 638, 642, 643) and it would require very conclusive authorities to induce me to assent to a doctrine so inconvenient and unreasonable. The only case cited on the point was *Hoggart v. Cutts* (Cr. & P. 197), the marginal note to which seems, no doubt, to support Mr. Stokes' contention. But that note does not appear warranted by the facts of the case. There Theodey, a defendant, sold an estate, which the first defendant Cutts purchased, paying a deposit. Then Hoggart, the plaintiff, an auctioneer, by Theodey's direction, put up the estate again, and Vickers, another defendant, bought it, and paid a deposit. The question was who was entitled to the deposits? Clearly this and other questions could not be decided in that suit of *Hoggart v. Cutts*, as between Cutts and Vickers on the one hand, and Vickers and Theodey on the other. The "bill," said Lord Cottenham, "is a proper bill as between Hoggart, Cutts, and Theodey: there can in that suit be no question about Hoggart's conduct. He is a mere auctioneer employed to sell the estate, and has a right to make Cutts and Theodey determine between themselves which of them is entitled to a fund in which he claims no personal interest. The suit, however, cannot be sustained as to Vickers also; and if I am to decide which of the defendants, Cutts or Vickers, is to be dismissed from the suit, I have no hesitation in retaining Cutts, because he is the first purchaser, and because the case as to him is the more simple." The bill was therefore dismissed as to Vickers. That was the decision in *Hoggart v. Cutts*, and I think that it neither justifies the marginal note nor supports the contents. (N.B.) The head note in *Hoggart v. Cutts*, is as follows:—Where a fund in the hands of a stakeholder was contested by three parties, one of whom claimed the whole of it, and the other two claimed it in certain proportions, and the stakeholder filed a bill of interpleader against the three claimants, the Court, at the hearing, dismissed the bill with costs as against one of the parties claiming a part of the fund, and decreed that the

Section II—Defendant's Costs.

Rule as to defendant's costs—Difference between plaintiff's costs and defendant's costs.

General rule—Successful defendant entitled to his costs.

Successful defendant may however be deprived of his costs if "good cause" exists.

Points to be considered in awarding or refusing costs to successful defendant.

- (i) Conduct of defendant.
- (ii) Costs of person unnecessarily made defendant or respondent.
- (iii) Costs of a person unnecessarily made defendant—Scale of costs.
- (iv) Costs of Government unnecessarily made party.
- (v) Costs of defendant unnecessarily made party, but at the suggestion of original defendant.
- (vi) Costs of *pro forma* defendants—Scale on which such costs are allowed.
- (vii) Costs of person who had to appear on account of summons erroneously served on him—Wrong description of defendant.
- (viii) Costs of disclaiming defendant.
- (ix) Costs of defendant whose interest in the subject-matter has ceased.
- (x) Costs of defendant whose admission and conduct induced supposition of his liability for claim.
- (xi) Costs of defendant inducing others to do wrongful act.
- (xii) Costs of defendant making false statement.
- (xiii) Costs of defendant colluding with plaintiff.
- (xiv) Costs of defendant having same interest as plaintiff but disapproving of the action.
- (xv) Costs of Insurance Company appearing on motion to swear death.
- (xvi) Costs of defendant unnecessarily incurred.
- (xvii) Costs of defendant raising question of jurisdiction late in appeal.
- (xviii) Costs of defendant taking plea of *res judicata* only after all evidence was taken.
- (xix) Costs of defendant taking successful plea late in second appeal.
- (xx) Costs of unfounded allegations in pleadings.
- (xxi) Costs of frivolous defences.

other two parties should interplead as to the other part. See *Secretary of State v. Mir Muhammad*, 1 M.H.C.R. 860. In a more recent Bombay case, certain bags of rape seed were delivered to the plaintiff Railway Company at Punjab by the 4th defendant for carriage to Bombay, the consignee being one X. While the goods were in transit, the consignor ordered the Company to deliver the goods to Y, his agent instead of to the original consignee X. Before the goods were delivered to Y, the defendants 1, 2 and 3, to whom X had, in the meanwhile assigned the goods for valuable consideration, claimed them from the Company. The plaintiff Company thereupon instituted the present suit against the defendants and prayed (1) that the defendants should be required to interplead, (2) for an injunction restraining the defendants from suing them as regards the goods. *Held* that the plaintiff Company was entitled to their costs the suit being a properly constituted interpleader suit, that they had a charge on the goods in respect of freight and costs of suit. *Bombay Baroda and Central India Ry. Co. v. Jacob Elias*, 18 B. 231.

- (xxii) Costs of defendant basing his defence on a statute the policy of which is not approved by the Judge.
- (xxiii) Costs occasioned by suggestion of fraud.
- (xxiv) Costs where both parties misapprehended nature of suit.
- (xxv) Costs of defendant where the construction of a doubtful point has given him great advantage.
- (xxvi) Costs where defendant took opinion of counsel before pressing groundless objection.
- (xxvii) Costs where defendant pays money into Court.
- (xxviii) Costs of defendant making offer of settlement—Tender.
- (xxix) Costs of co-defendant.
- (xxx) Costs of co-defendant made respondent by defendant.
- (xxxi) Costs of one of several defendants causing extra cost to plaintiff.
- (xxxii) Costs of alternative defendants.
- (xxxiii) Costs out of a fund in which both plaintiff and defendant are interested.
- (xxxiv) Costs where there is a claim and counter-claim.

“THERE is an essential difference between a plaintiff and a defendant. A plaintiff may succeed in getting a decree and still have to pay all the costs of the action, but the defendant is dragged into Court and cannot be made liable to pay the whole costs of the action if the plaintiff had no title to bring him there.”⁽⁸⁴⁾

Rule as to defendant's Costs—Difference between plaintiff's costs and defendant's costs.

Just as in the case of a successful plaintiff so in the case of a successful defendant, he cannot be deprived of costs in the absence of good cause,⁽⁸⁵⁾ nor can he be so deprived upon grounds which were irrelevant to the question to be adjudicated upon in the action.⁽⁸⁶⁾ *Prima facie* he is entitled to recover from the plaintiff the costs which he has incurred in successfully defending the action.⁽⁸⁷⁾

General rule—Successful defendant entitled to his costs.

(84) *Per James, L.J., Dicks v. Yates*, (1880) 18 Ch. D. p. 85; and see *Re Foster v. G. W. Ry. Co.*, (1882) 8 Q. B. D. 515; *Re Mill's Estate*, (1886) 34 Ch. D. 24; *Witt v. Corcoran*, (1876) 2 Ch. D. 69; *Lambton v. Parkinson*, (1887) 35 W.R. 545 (Eng.). On the subject-matter of this section, see *Yearly Practice*, 1914, pp. 1045–1049; *Daniell's Chancery Practice*, 7th Ed. 1901, Vol. I, pp. 960–986; *Seton on Judgments and Orders*, 6th Ed. 1901, Vol. I, pp. 246–253; *Halsbury's Laws of England*, Vol. XXIII, ss. 329–331, pp. 176–182; *Encyclopædia of the Laws of England*, 2nd Ed., Vol. IV, p. 48–53. See also Chapters on “Introductory,” “Separate Costs,” “Proportionate Costs” and “Taxation of Costs,” *infra*.

(85) *Civil Service Co-operative Society v. General Steam Navigation Co.*, (1903) 2 K.B. 756.

(86) *Edmund v. Martell*, (1907) 24 T.L.R. 25.

(87) *Beaumont v. Senior*, (1903) 1 K.B. 282; and see *Andrew v. Grove*, (1902) 1 K.B. 625.

So, also, if an action is dismissed, it is unusual to order the defendant to pay the plaintiff his costs.⁽⁸⁸⁾

Successful defendant may however be deprived of his costs if "good cause" exists.

But, there may be cases where the Court would refuse costs to the successful defendant or even require him to pay the costs of the defeated plaintiff. But in all such cases there must be some "good cause" so as to deprive the defendant of the full fruits of his success; or impose on him a burden which, according to the decision on the substantial questions involved in the case, he ought not to bear.⁽⁸⁹⁾

Points to be considered in awarding or refusing costs to successful defendant:

(i) Conduct of defendant.

(ii) Costs of person unnecessarily made defendant or respondent.

Just as in the case of the plaintiff, so in the case of the defendant, his conduct both during the litigation and prior to the commencement of the litigation is a material factor to be considered in the matter of awarding costs.⁽⁹⁰⁾

Where a defendant is sued unnecessarily and after dismissal of suit is made a respondent in appeal without just cause, he is entitled to costs in both the Courts.⁽⁹¹⁾

Where a Collector had been unnecessarily made a party to a suit in which damages might have been awarded against him had he not appeared, he was held entitled to his costs.⁽⁹²⁾

The plaintiff bought a decree obtained by a third person against the special appellants. In execution an alleged vendor (but not the special appellants) raised objections. It was held that the plaintiff

(88) *Lewis v. Loxham*, 3 Mer. 429; *Wedgwood v. Adams*, 8 Beav. 103; *Springfield v. Ollett*, cited 3 Mer. 430, n. See also, *Wykham v. W.*, 18 Ves. 395, 423; *A.G. v. Oglander*, 1 Ves. J. 246; *Cooth v. Jackson*, 6 Ves. 41; *Dixon v. Parker*, 2 Ves. 219, 223; *Tidwell v. Ariel*, 3 Madd. 403, 409; *Dufaur v. Sigel*, 4 De G. M. & G. 520, 525; *Daniell's Chancery Practice*, 7th Ed., 1901. Vol. I, p. 979.

(89) See Chapter 1, *supra*.

(90) *The Yearly Practice of the Supreme Court*, 1914, Vol. I, p. 1046.

(91) *Mehr Singh v. Devi Dyal*, 19 P.L.R. (1912). The following observations of the Court consisting of Johnstone and Shah Din, JJ. may also be noted:—"On behalf of defendant respondent No. 3, it has been urged that he was impleaded as a defendant in this case quite unnecessarily as he had never been in possession of any part of the *haveli*. We notice that Ram Singh disclaimed all interest in the subject-matter of the suit in his place; and no evidence whatever was adduced by the plaintiffs to show that he had any interest in the same, and that it was necessary for them to sue him as a defendant. In the appeal also he has been made a respondent without just cause and, therefore, apart from the merits of the case, the appeal as regards him must fail and is hereby dismissed and he will get his costs in both the Courts." *Per* Johnstone and Shah Din, JJ. *Mehr Singh v. Devi Dyal*, 19 P.L.R. (1912) at 67.

(92) *The Collector of the 24 Pergunnahs v. Wilkinson*, 12 W.R. 444.

had no cause of action against the special appellants, and was therefore liable to pay them their costs.⁽⁹³⁾

One of several judgment-debtors jointly liable under a decree, (iii) Costs of a person unnecessarily made a defendant—Scale of such costs.
 having paid a larger amount than was due as between himself and her co-defendants, brought a suit to recover from them the excess paid by her. One of the defendants having paid more than his share, the claim against him was dismissed by the Principal Sudder Ameen, who nevertheless, on the ground that it was necessary to make him a party, awarded him no costs. *Held*, that it was not necessary to make this defendant a party, and that costs should not have been refused to him.⁽⁹⁴⁾

(93) *Syed Afzul Hossein v. Heera Lall*, 2 W.R. 152. The following observations of Steer and Jackson, JJ., may also be noted :—"The only objection raised on special appeal in these cases is that the Judge has wrongly made appellants pay their own costs in the lower Court when they were unnecessarily made parties to a suit with which they had no connection, and when they had not given the plaintiff any ground for bringing any suit against them. This objection appears to us valid. The plaintiff had bought a decree obtained by the other parties against the special appellants. The plaintiff proceeded to execute it, when one of the alleged vendors raised objections, and plaintiff was obliged to bring a fresh suit as against that vendor to establish his right to execute the decree in place of that vendor. The plaintiff gained his case; but the Judge is wrong in supposing that, in such a state of facts, it was necessary to make the defendants parties to the suit. They had not objected to the execution of the decree on the part of plaintiff, and as against them plaintiff had no cause of action. Plaintiff should, therefore, on the usual rule and principle upon which costs are awarded, pay these special appellants costs in both Courts, and we modify the Judge's order to that extent. Appeal decreed with costs on respondents." *Per Steer and Jackson, JJ.*, *Syed Afzul Hossein v. Heera Lall*, 2 W.R. 152.

(94) *Kasheemath Sein v. Chunder Monee Debee*, 9 W.R. 288. Markby, J., said in the course of the judgment :—"With regard to the first point, namely, as to whether the appellant in this case is entitled to his costs, our opinion is that he is so entitled. The plaintiff and defendants were jointly liable under a decree, and the plaintiff having paid a far larger amount than was due as between herself and her co-defendants, this suit was brought for the recovery, from the defendants, of the amount so paid by the plaintiff in excess of her share of the liability. The defendant, whose case is now under consideration, had paid into Court rather more than the full amount of his share. The Principal Sudder Ameen, upon this being shown, dismissed the claim as against this defendant, the present appellant, but, upon the ground that it was necessary to make this defendant a party to this suit, awarded him no costs. The Principal Sudder Ameen says : "It appears that, as defendant No. 2 paid Rupees 208-4-0 in execution of the decree on the 19th of April 1866, he has paid Rupees 212-2-3 in excess of the liabilities in respect of his own share; consequently, the said defendant (No. 2) is in no way liable for this claim. As this party was liable under the original decree, it was indispensably necessary that he should be made a defendant; consequently he (defendant No. 2) is not entitled to recover any costs; he must bear his own costs." Now, in an ordinary case, where we saw that the lower Court had exercised its discretion as to granting or refusing costs, we should be very slow to interfere. But in this case costs have been withheld entirely upon a misconception. It was not necessary to make this defendant (appellant) a party to the suit: the plaintiff, as the result has

But the scale on which costs should be awarded to him depends on what plaintiff claims against him, and that he is entitled to costs on the usual scale on the amount for which the suit was brought.⁽⁹⁵⁾

In the case of mere *pro forma* defendants the costs awarded should only be a small sum sufficient to cover the costs of their appearance.⁽⁹⁶⁾

(iv) Costs of Government unnecessarily made party.

Where, in a suit for a certificate of administration under Act XXVII of 1860, Government did not apply for any such certificate, or oppose the plaintiff's suit, it was held that the Government having been made a defendant by the plaintiff, and obliged to make an answer, was entitled to its costs from the plaintiff.⁽⁹⁷⁾

(v) Costs of defendant unnecessarily made party, but at the suggestion of original defendant.

"The plaintiff is not justified in adding persons as defendants merely because an original defendant insists that they are necessary parties, and where persons so added are dismissed on the ground that

shown, had no claim against him, and he could in no way be affected by the result of the proceedings. We think, therefore, that the decision of the lower Court, so far as it refuses costs to the present appellant, must be reversed, and this appeal be decreed with costs and interest." *Per* Markby, J., in *Kasheemath Sein v. Chunder Monee Debee*, 9 W.R. 288 (289). See also *Golam Ahmed Shah v. Beharyloll*, Marsh 239=1 Hay 500, cited *infra*.

(95) *Kasheemath Sein v. Chunder Monee Debee*, 9 W.R. 288. The Court said in the course of the judgment "The other question that has been raised is, upon what scale is the defendant entitled to his costs? Now, that depends upon what the plaintiff claims against him. All that could be due under any circumstances from this defendant was the actual amount of his share. But the plaintiff has asked for much more; she seeks by her plaint to obtain a judgment against every single defendant for the whole amount of contribution, and as the plaintiff alone is to blame for the manner in which she has brought her suit, we think that the defendant (appellant) is entitled to costs on the usual scale." *Per* Markby, J., in *Kasheemath Sein v. Chunder Monee Debee*, 9 W.R. 288 (289).

(96) *Ramputty Kocer v. Kalee Churn Singh*, 14 W.R. 94.

(97) *Government v. Musst. Sanoola*, 3 W.R. 23. The Court said:—"In this case Government has been cast in costs, and appeals on the ground that it did not oppose plaintiff's suit; but, having been made a defendant by plaintiff, merely truly stated such facts as were within its knowledge, and then asked for the Court's adjudication of the case. We think that this appeal must be decreed. The Judge, acting under S. 7, Reg. V of 1799, directed that the Collector should take charge of the real property, and took charge himself of the movable property, because the plaintiff, and second and third defendants, who were parties to the proceeding under Act XXVII of 1860, i.e., seeking to obtain a certificate of administration, could not prove their right to it. Government did not apply for any such certificate. The answer of Government was necessary, as plaintiff had made Government a defendant. We do not think plaintiff had, under the above facts, a right to do this, and we think plaintiff should accordingly pay all the costs of Government." *Per* Bayley and Phear, JJ., in *Government v. Musst. Sanoola*, 3 W.R. 23. See, also, *The Collector of the 24 Pergunnahs v. C. J. Wilkinson*, 12 W.R. 444.

they are not necessary parties, the plaintiff must pay the costs, and will not be allowed to recover them from the original defendant.”(98)

Where co-sharers were made consenting defendants only in order to plaintiff's obtaining a complete decree for partition, plaintiff ought to pay the co-sharers' costs which, however, should be a small sum sufficient to cover the costs of their appearance.(99)

(vi) Costs of *pro forma* defendants—Scale on which such costs are allowed.

When co-sharers who have paid their shares of revenue-assessments are made defendants in a suit for contribution, together with other co-sharers whose proportion was paid by the plaintiff, the defendants who have paid are entitled to their costs of appearing, &c., notwithstanding the plaintiff may have made no claim against them, but has joined them merely for the sake of conformity.(100)

(98) *Williams v. Page*, 24 Beav. 654 ; and see *Morg. and Wurtz*, 118, 119.

(99) *Ramputty Koor v. Kalee Churn Singh*, 14 W.R. 94. The following observations of the Court in the course of the judgment may also be noted :—“ On the third ground, it appears that the plaintiff made certain co-sharers who supported the plaintiff's claim defendants in the case, but merely because they being co-sharers had a certain joint interest in the property. The question arises whether the plaintiff who brought in this party, or the opposing defendant is to pay those defendants their costs. Those costs appear to amount to Rupees 239 in the first Court, and Rupees 267 in the second Court—the vakeel's fees being the largest portion of the amount in each Court. We are of opinion that when the co-parceners—so made defendants—supported the plaintiff's case, and were only made parties in order to enable the plaintiff to get a complete decree for partition, it was the plaintiff, and not the defendants who opposed the partition, who ought to pay the costs of these defendants in the first Court. But we also think that it would be highly improper to saddle any person, plaintiff or defendant, with such enormous costs in respect of defendants who were after all little more than formal parties to the record. What we think these consenting defendants are entitled to in the first Court, is a small sum sufficient to cover their costs of appearance—and that these should be paid by the plaintiff. In the second Court, the defendants who appealed made these consenting parties respondents, and they ought, in justice, to pay the similar costs in that Court. But this which is the fair mode of dealing with the costs, is said to be prohibited by the rules relating to pleaders' fees passed by this Court on 13th June, 1866. But upon the whole we do not think so. We think the case of defendants who have a separate interest and who consent to a decree is not provided for in those rules; and that the amount of costs to be allowed in such a case is in the discretion of the Court. In this case, the Courts below evidently thought that they had no discretion as to the amount. We, therefore, direct that the plaintiff pay to the consenting defendants Rupees 16 costs in the first Court; and that the defendants, appellants, pay to the same defendants Rupees 25, costs in the lower appellate Court, and Rupees 25 in this Court. This appeal is in other respects dismissed.” *Per Bayley and Markby, JJ.*, *Ramputty Koor v. Kalee Churn Singh*, 14 W.R. 94 at p. 95.

(100) *Golam Ahmed Shah v. Beharyloll*, Marsh. 239=1 Hay 500. The plaintiff in this case being a co-sharer in an estate paying revenue, sued to recover from the other co-sharers the amount of revenue which he had paid in on their account, to save the estate from sale. He alleged, in his plaint, that only certain of the co-sharers had committed default, the rest having paid in proportion to their shares, but that these latter were made *pro forma* defendants, in accordance with the Rules of Practice. The

The costs of formal respondents, when it is not suggested they have no interest in the appeal, will not be granted when the appeal is dismissed.⁽¹⁰¹⁾

(vii) Costs of person who had to appear on account of summons erroneously served on him — Wrong description of defendant.

In a suit brought by the plaintiffs against A, the summons was by mistake served upon B, who thereupon filed a written statement denying his liability and alleging that he was erroneously described in the title to the plaint. On the day of the hearing of the case the plaintiff's agent saw B for the first time, and ascertained that he was not the real defendant in the suit. *Held*, that B having done nothing to mislead the plaintiffs as to his identity, was entitled to his costs of suit.⁽¹⁰²⁾

Principal Sudder Ameen found that, as alleged, two of the co-sharers had omitted to pay their portion of the Government revenue. He considered, therefore, that the plaintiff was entitled to recover from them the amount paid by the plaintiff in excess of his own share; he directed the plaintiff to pay the costs of the other co-sharers who had unnecessarily been made defendants. The Court consisting of Trevor and Jackson, JJ., said in course of the judgment: "The plaintiff now appeals against that portion of the decree which is against him as to costs. As to costs, we think the lower Court was right. This was a suit under the new Procedure Code. The plaintiff has alleged no ground of action against the remaining defendants, but as he has made them parties to the suit, it was necessary for them to appear, lest they should be bound by some decision passed behind their backs; they were consequently entitled to their costs." *Golam Ahmed Shah v. Beharyloll*, Marsh. 239 (240) = 1 Hay 500. See also the judgment of Markby, J., in *Kasheenath Sein v. Chunder Monee Debee*, 9 W.R. 288 (289), cited *supra*.

(101) *Karuppan Chettiar v. Ponnusawmy Thevar alias Ramachandra Thevar*, 10 M.L.T. 187.

(102) *The London, Bombay and Mediterranean Bank v. Mahomed Ibrahim Parkar*, 4 B. 619. This was a suit to recover a certain sum of money from the defendant as a contributory of the plaintiffs' bank. In this case the summons, addressed to the defendant, Mahomed Ibrahim Parkar, had been served, not upon the defendant, but upon one Mahomed Ibrahim Parkar *valad* Lootfooddeen Parkar, by affixing a copy on the door of his house. He thereupon filed a written statement denying his liability, and alleging that he had never held shares in the plaintiffs' bank. In the last clause of the written statement he stated that "the description given of him in the title of the plaint was altogether wrong and erroneous." The written statement was signed by him in full in the usual manner. The case came on for hearing on the 13th March 1880, as a short cause, and on that day was transferred, on the application of the plaintiffs, to the long-cause list. The plaintiffs' agent, who was acquainted with the real defendant, not seeing him in Court had his suspicions aroused, and on the following day the plaintiffs' solicitor wrote to the solicitor of Mahomed Ibrahim *valad* Lootfooddeen Parkar, requiring them to produce him for identification. An appointment was accordingly made for the 29th March, but on that day he was not in Bombay. Two other appointments were subsequently made, *viz.*, for the 10th and 12th April, but on both those days the plaintiffs' agent was unable to attend, being necessarily absent from Bombay. He did not return until the evening of the 12th April, and on the 13th the case came on for hearing. On that day the plaintiffs' agent saw Mahomed Ibrahim *valad* Lootfooddeen Parkar, and then became aware that he was not the real defendant in the suit.

In a suit against several defendants to recover possession of land, one of them stated in defence that he had nothing to do with it, and made good his defence. The other defendants claimed to be entitled to the land, and proved their title. The disclaiming defendant appeared by a separate pleader and incurred a separate set of costs. It was held, that the Sudder Ameen rightly awarded a separate set of costs to him, and the Judge had not exercised a sound discretion in modifying the Sudder Ameen's decree by awarding one set of costs only to all the defendants.⁽¹⁰³⁾ A party disclaiming all interest in a suit and unnecessarily made a party to it is entitled to costs.^(103-a)

Counsel for the plaintiffs at once communicated the fact to the Court, and stated that the plaintiffs had no claim against Mahomed Ibrahim *valad* Lootfooddeen Parkar, and had never intended to proceed against him. It was further alleged that the summons had not been served upon him. Evidence was thereupon given as to the service of summons, and the Court found that the summons had been posted on the house of Mahomed Ibrahim *valad* Lootfooddeen Parkar, and ordered the plaintiffs to pay his costs and was about to dismiss the suit whereupon counsel for the plaintiffs objected to the dismissal of the suit. He submitted that the right order would be to set aside the service of summons and all subsequent proceedings. A suit can only be dismissed against a real defendant. If the plaintiffs had been purposely misled, they ought not to be deprived of their remedy against the proper defendant. Mere service of summons does not make a person a defendant : *Walley v. McConnel* (13 Q.B. 903). Counsel also referred to Archbold's Practice (13th Ed.), pp. 232, 233, 236 ; *Richards v. Hanely*, [10 Jur. (Q.B.) 1057] ; *Walker v. Medland*. (1 Dow. & L. 152) ; *Kelly v. Lawrence* (33 L.J. Ex. 197). West, J., said in the course of the judgment : "The case between the parties now before me is a curious one, but one that turns upon a very simple issue. Mahomed Ibrahim *valad* Lootfooddeen Parkar says he was summoned as defendant, and claims his costs. For the plaintiff it is answered that this man never was summoned, that he has been put forward by another person who was summoned, and that he has wilfully endeavoured to prevent the plaintiffs' agent from recognizing him in good time so as to repudiate any claim against him, and to bring the intended defendant before the Court." His Lordship, after discussing the evidence which had been given with reference to the service of the summons and the conduct of the ostensible defendant, was of opinion that the summons had been served upon him, and continued : "The ostensible defendant Mahomed Ibrahim *valad* Lootfooddeen being thus *prima facie* entitled to his costs, I do not find anything in his conduct here to deprive him of that right. He said from the first who he was, and that he was not answerable. Mr. Stead (the plaintiffs' agent) attached no weight to his signature or his denial of responsibility ; but for that Mahomed Ibrahim is not responsible. There was no obvious avoidance of recognition on his part or misleading of the plaintiff or his attorneys. The professional correspondence is simply of the usual type and implies no misconduct on one side or the other beyond a certain waste of paper and accumulation of expenses. Mahomed Ibrahim *valad* Lootfooddeen must, therefore, have his costs of this suit." *Per* West, J., in *The London, Bombay and Mediterranean Bank v. Mahomed Ibrahim Parkar*, 4 B. 619—622.

(103) *Ram Chandra Goswami v. Motilal Bagchi*, 2 B.L.R. A.C.J. 168=11 W.R.

19. See also Ref. (141) *infra*.

(103-a) *Shunt Buksh v. Lalla Nund Ram*, 11 W.R. 48.

(ix) Costs of defendant whose interest in the subject-matter has ceased.

A defendant whose interest in the subject-matter of the suit has ceased is not entitled to costs.⁽¹⁰⁴⁾

(x) Costs of defendant whose admission and conduct induced supposition of his liability for claim.

Where a party's admissions and conduct induced the supposition of his liability for a claim, the Court refused him his costs, although the suit against him founded on such claim was dismissed.⁽¹⁰⁵⁾

A successful vendor was refused costs, although specific performance was decreed in a case in which his own representation had given the purchaser a probable cause of suit.⁽¹⁰⁶⁾

(xi) Costs of defendant inducing others to do wrongful act.

In a suit for recovery of the possession of land in which the plaintiff recovers a decree, it is no ground for exempting a defendant from costs that he did not himself occupy any part of the land, if he has denied the plaintiff's title in the suit, or was instrumental as the agent of others in dispossessing the plaintiff.⁽¹⁰⁷⁾

(104) *Wymer v. Dodds*, (1879) 11 Ch. D. 436.

(105) *Sreenath Roy v. Goluck Chunder Sein*, 15 W.R. 348. The Court, Mookerjee, J., said in the course of the judgment:—"But we think that the Judge was right in refusing costs. Although Goluck was not satisfactorily proved to be a partner, still his admission that he had advanced a sum of money to one of the partners, and the willingness manifested by him to pay the liabilities of the firm, might have induced the plaintiff to bring him into the category of defendants. We would not interfere with the order of the Judge refusing to give him costs." *Sreenath Roy v. Goluck Chunder Sein*, 15 W.R. 348 at 350.

(106) *Fenton v. Browne*, 14 Ves. 144, 150; *Harrison v. Coppard*, 2 Cox, 318, 320.

(107) *Mussamut Koomeroonissa Begum v. Hunooman Doss*, Marsh. 122 at 123. His Lordship Sir B. Peacock, C.J., said in the course of the judgment:—"Lastly, as to costs. On this point Muddun Loll Doss, as appellant, urges before us that he is not a lessee, nor is he sued as such; farther, that his plea in the Court below was that he was unconcerned in the act of dispossessing plaintiff. Now, in the first place, the answer of Muddun Loll Doss was not only that he was not concerned in dispossessing plaintiff, but he there added that the leases of the defendants (lessees) were good and valid leases, as against plaintiff's title. This defendant, therefore, in reality, contested plaintiff's title just as much as the lessees did, and having done so, and those leases having been found invalid against plaintiff's title, Muddun Loll Doss must, even upon this ground, pay those costs which the plaintiff has incurred in establishing his title against those alleged lessees. But we further hold that this defendant (appellant) is liable to costs upon other grounds also, namely, because he has been proved by the evidence to have been a principal agent in dispossessing the plaintiff; and he, therefore, should pay those costs to which plaintiff has been put, in order to recover possession." *Per Peacock, C.J., Mussamut Koomeroonissa Begum v. Hunooman Doss*, Marsh. 122 at 126 and 127.

A defendant who had brought the action upon himself by false statements, made under circumstances which imposed on him an obligation to be truthful, was deprived of costs.⁽¹⁰⁸⁾

(xii) Costs of defendant making false statement where he was obliged to be truthful.

A defendant who colludes with the plaintiff, and induces him to bring a suit for his benefit, may be ordered to pay the costs of his co-defendant in the Court below. It seems that he may also be ordered to pay the costs of an appeal by the plaintiff.⁽¹⁰⁹⁾

(xiii) Costs of defendant colluding with plaintiff.

"Where a defendant has the same interest as the plaintiff, but disapproves of the action, he should distinctly repudiate it; if he does not do so, the action may, in the event of the plaintiff not succeeding, be dismissed without costs as against him."⁽¹¹⁰⁾ Where however the defendant makes a distinct repudiation he will get his costs.

(xiv) Costs of defendant having same interest as plaintiff but disapproving of the action.

(108) *Sutcliffe v. Smith*, (1886) 2 T.L.R. 881, C.A.

(109) *Bhyroo Raoti v. Baboo Anoorodeb Deo Narain Singh*, Marsh. 608. Sir B. Peacock, C. J., said in the course of the judgment:—"The facts pointed out by the lower Court amount to such clear evidence of collusion and fraud that it is unnecessary for us to go into details respecting them. The appeal is, therefore, dismissed with costs and interest at twelve per cent. With reference to the costs in the lower Court, the Judge was called upon to make the defendant Anoorodeb Deo Narain Singh, as well as the plaintiff, responsible for them to the other defendants. The Judge refused to do so, considering that he could not make a defendant liable for the costs of his co-defendants. But Anoorodeb Narain Singh being a party to the suit, an express issue was raised as to whether the suit was not brought by the plaintiff in collusion with him, and that issue was found in the affirmative. Section 197, Act VIII of 1859, is very general, and we think we have the power under that section to order a defendant who colludes with the plaintiff, and induces him to bring a suit for his benefit, to pay the costs of his co-defendants; as he colluded with the plaintiff, there is no reason why the plaintiff should pay him his costs. We, therefore, order the decree of the lower Court to be amended, by declaring that the plaintiff shall pay the costs (with interest thereon at twelve per cent.) of all the defendants except the defendant Anoorodeb Deo Narain Singh, and that defendant, as well as the plaintiff, shall pay the costs of the other defendants in the Court below with interest thereon at twelve per cent. The defendant Anoorodeb Narain Singh was a respondent in this appeal. It is possible that, although the suit was brought in collusion with him, this appeal has not been brought in collusion with him. He might have been satisfied to let the decision rest as it was given in the Court below. We do not think it necessary in this case to order him to pay the costs of his co-respondents. But we wish to guard ourselves against any misunderstanding and we think that a defendant who colludes with a plaintiff for the purpose of bringing a suit may be responsible for the costs incurred by the co-defendants in all stages of the suit, including those of an appeal, in which he is merely made a co-respondent."—*Per Peacock, C. J.*, *Bhyroo Raoti v. Baboo Anoorodeb Deo Narain Singh*, Marsh. 608 (609).

(110) *Winthrop v. Murray*, 14 Jur. 302, 304; *Daniell's Chancery Practice*, 7th Ed., 1910, p. 981.

(xv) Costs of Insurance Company appearing on motion to swear death. An Insurance Company appearing on a motion to swear death would not be entitled to the costs occasioned by its appearance, although its appearance in such proceedings would be very proper.⁽¹¹¹⁾

(xvi) Costs of defendant unnecessarily incurred. The costs which a defeated plaintiff should be required to pay should be only the costs necessarily incurred by the successful party in the defence of the suit. Costs cannot be deemed necessary, if by reasonable diligence on the part of the defendant or his pleader the expenditure of them could have been avoided.⁽¹¹²⁾

(xvii) Costs of defendant raising question of jurisdiction late in appeal. Where the question of jurisdiction is not raised in the lower Court, but successfully raised in appeal the order would be set aside without costs.⁽¹¹³⁾

(xviii) Costs of defendant taking plea of *res judicata* only after all evidence was taken. Costs would not be allowed where the plea of *res judicata* was not raised until after all the evidence had been taken.⁽¹¹⁴⁾

(111) *In the goods of William H. Talentyre*, 8 C.W.N. Journal portion xiv. This was an application on behalf of the widow for leave to swear death of her husband who had gone out to Australia for the benefit of his health early in 1900. He was last heard of at Sydney in April. He left Tidswell's Hotel on the 15th April after making enquiries about bathing on Manley beach and never returned or was heard of. The Agent-General for New South Wales had been communicated with and the missing gentleman was advertised for but with no result. The Insurance Company in which Mr. Talentyre was insured appeared by Counsel and requested that there should be further advertisements in papers of world-wide circulation such as Lloyd's News. The learned President was satisfied that the local Police evidence proved that a very careful and vigilant search had been made and ordered leave to swear death on and after the 15th April 1900. He refused costs of the opposition by the Insurance Company; it was against the practice of the Court to allow Insurance Company's costs in such cases, although he was glad they were represented. *In the goods of William H. Talentyre*, 8 C.W.N. (Journal portion) xiv.

(112) *Seeta Patta Mahadevi v. Suryudamma*, 18 M. 128.

(113) *Joynarayan Singh v. Mudhoo Sudun Singh*, 16 C. 13 (14). The Court, Wilson, J., said:—"We find that this objection to jurisdiction was never taken in the first Court. It was not taken in the grounds of appeal to this Court, and indeed it was raised by the Court itself, and not by either of the parties. Under these circumstances, we may fairly set the order aside without costs." *Per* Wilson, J., *Joynarayan Singh v. Mudhoo Sudun Singh*, 16 C. 13 (16). See, on this point, Chapter I, Note 183.

(114) *Run Bahadoor Singh v. Lucho Koer*, 6 C. 406=7 C.L.R. 251. Pontifex, J., said in the course of the judgment:—"As the plea of *res judicata* was not raised until after all the evidence had been taken and great expense incurred, we think each party should bear his and her own costs both in this Court and in the Court below, and we direct accordingly."—*Per* Pontifex, J., in *Run Bahadoor Singh v. Lucho Koer*, 6 C. 406 at 418=7 C.L.R. 251. See also Chapter I, Notes 183—187.

Where a defendant takes a successful plea late in second appeal, costs may not be allowed in his favour, although he may succeed in his plea.⁽¹¹⁵⁾

(xix) Costs of defendant taking successful plea late in second appeal.

In a suit by an adopted son to recover his share in his adoptive father's estate, a son having been born to the adoptive father subsequently to the plaintiff's adoption, the Court of first instance awarded the plaintiff a fourth share of the property in dispute. The defendant appealed to the District Court, but in appeal raised no question as to the extent of the share awarded to the plaintiff. On second appeal to the High Court it was contended that, in any event, the plaintiff was only entitled to a fifth share. It was held that under the circumstances, and having regard to the nature of the question, the point might be taken in second appeal on behalf of the defendant, and the High Court varied the decree by awarding the plaintiff a fifth share instead of a fourth share, but ordered the appellant (defendant) to bear his own costs of the appeal.⁽¹¹⁶⁾

A party may, although he is successful in the action, be ordered to pay all the costs of and occasioned by unfounded and unsupported allegations in his pleadings.⁽¹¹⁷⁾

(xx) Costs of unfounded allegations in pleadings.

In this case the respondent though successful was not allowed his costs, for pressing charges of malice against the appellant which were held to be unfounded.⁽¹¹⁸⁾

Where the plaintiff's claim and the defendant's counter-claim were both dismissed, but the defendant had raised a number of frivolous defences, he was ordered to pay half the costs of the action and counter-claim.⁽¹¹⁹⁾

(xxi) Costs of frivolous defences.

The fact that the defendant bases his defence on the provisions of a statute, the policy of which is not approved by the Judge is no reason to deprive the successful defendant of his costs.⁽¹²⁰⁾ Thus, in a recent Bombay case, the plaintiff brought a suit against Government for recovery of a *vatan*, but the suit was dismissed under S. 4

(xxii) Costs of defendant basing his defence on a statute the policy of which is not approved by the Judge.

(115) *Griapa v. Ningapa*, 17 B. 100 referred to in *Nagesh v. Guru Rao*, 17 B. 303 (305); *Sharjuddin v. Govind*, 27 B. 452 (460); *Birbhadra Rath v. Kalpataru Pandu*, 1 C.L.J. 388 (392, 403).

(116) *Ibid.*

(117) *Blest v. Brown*, 4 De. G.F. & J. 367, 378.

(118) *L.O. Clarke v. Brajendra Kissors Roy Chowdhuri*, 13 C.W.N. 458=9 C.L.J. 299=36 C. 438.

(119) *Willmott v. Barber*, 17 C.D. 772; and see *Corpn. Bradford v. Pickles*, (1894) 3 Ch. 53, 71.

(120) *Secretary of State v. Venkatesh Gobind*, 2 Bom. L.R. 125.

of the Bombay Revenue Jurisdiction Act (X of 1879). The District Judge, however, refused to give the defendants costs, on the grounds that he did not approve of the policy of the Government in passing the Act, and that he doubted the power of the Legislature to pass the Act. It was *held*, reversing the order, that the reasons assigned by the District Judge were no valid reasons for ordering the defendant to bear his own costs in an action in which he had been successful and in which he had not been guilty of any improper conduct.⁽¹²¹⁾

(xxiii) Costs occasioned by suggestion of fraud.

In an English case costs occasioned by a defendant's unfounded suggestion of fraud were ordered to be paid by him although he was successful in the action.⁽¹²²⁾

(xxiv) Costs where both parties misapprehended nature of suit.

Where both the parties to a suit, misapprehending its nature, go to trial as if the suit were maintainable, and fight upon false issues, the party who ultimately succeeds will not be entitled to costs as against the other.⁽¹²³⁾

(xxv) Costs of defendant where the construction of a doubtful point has given him great advantage.

"A defendant has also been refused his costs where, upon the construction of a doubtful point of law he had obtained a great advantage over the other."⁽¹²⁴⁾

(121) *Secretary of State v. Venkatesh Gobind*, 2 Bom. L. R. 125.

(122) *Wright v. Howard*, (1823), 1 Sim. & St. 190. A defendant, engaged in the business of making and selling a substance which enabled brewers to deceive the public, is not entitled to the costs of litigation with respect to such substance even if he be successful. *Estcourt v. Estcourt Hop. Essence Co.*, (1875) L.R. 10 Ch. App. 276.

(123) *Shah Muhammad v. Kashi Das*, 7 A. 199=4 A.W.N. 338. Petheram, C.J., said in the course of the judgment:—"I am of opinion that this appeal must be allowed and the suit dismissed. The suit was brought to try a right to use a certain flight of steps in the city of Ghazipur, which led from a street in the city to the river Ganges. The plaintiff alleges that the steps are his own private property, and that nobody else without leave from him, has any right to use them. The defendants allege that the steps are not the property of the plaintiff; and further, that, even if they were, the public have a right to use them. Now, if the suit had been properly framed, that issue should be tried. But the persons conducting the litigation mistook the powers which the Courts have; and instead of bringing a suit for trespass or asking for an injunction to prevent persons from trespassing, they brought a suit against persons who had never interfered with the steps at all, and prayed for an injunction against the whole world. Now, no Court in existence has or can have such powers, and therefore the suit must be dismissed. Then it is said that, this being so, the defendants should have their costs, and that would be proper if at the beginning the defendants had taken the point that the suit was not maintainable. But instead of doing so they fought the case all along as if the suit was maintainable, and upon a false issue. The litigation, owing to the mistake of both sides, has been wholly fruitless. I think therefore that both sides should pay their own costs."—*Per Petheram, C.J.*, in *Shah Muhammad v. Kashi Das*, 7 A. 199=4 A.W.N. 338.

(124) *Dommet v. Bedford*, 3 Ves. 149. Daniell's Chancery Practice, 1901, 7th Ed., Vol. I, p. 975.

If an objection is groundless, although it is supported by the opinion of counsel upon which the defendant has acted, yet the party taking it will be ordered to pay the costs ; for " the mistaken advice of a third person cannot be allowed to operate to the disadvantage of the party who is clearly in the right. "(125)

(xxvi) Costs where defendants took opinion of counsel before pressing a groundless objection.

Where the debt has been paid after the issue of the summons but before service of the same and the plaintiff or his attorney is aware of the payment, he has no right to proceed further with the action, although he will be entitled to the costs of the issue of the summons.(126)

(xxvii) Costs where defendant pays money into Court.

" If money paid into Court, to cover certain particular demands, is taken out by the plaintiff in satisfaction of the entire cause of action, the defendant will have the costs from the date of notice of payment in Court." (127)

A plea of payment after action brought must be expressly pleaded in bar of the *further* maintenance of the action.(128)

Where defendants desire to escape from their liability to costs of an action, " they must make a clear, unconditional offer, equivalent to the whole right of the plaintiff at the time." (129)

(xxviii) Costs of defendant making offer of settlement — Tender.

" A letter from defendants' solicitors saying that they are prepared to advise defendant to settle on certain terms is not such an offer." (130)

So also an offer of substantially all the relief asked, but coupled with a denial of the right thereto, is insufficient.(131)

" It must amount in substance to an offer of everything which the Court eventually held the successful party entitled to, (132) and

(125) *Maling v. Hill*, 1 Cox. 186 ; see also, *Vancouver v. Bliss*, 11 Ves. 458, 463 ; *Flux v. Best*, 23 W.R. 228 (Eng.).

(126) *Wyllie v. Phillips*, (1837) 5 Dowl. 644.

(127) *Nichols v. Evans*, (1883) 22 Ch. D. 611 ; and as to incidence of costs where plaintiff recovers less than the amount paid in, see *Powell v. Vickers, Sons and Maxim*, (1906) 95 L.T. 774, C.A. ; *Benning v. Ilford Gas Co.*, (1907) 76 L.J.K.B. 681.

(128) *Hulledhur Bhose v. M. Coondoo*, (1846) Montrieu 47 = 1 Ind. Dec. Old Series, p. 515.

(129) The Yearly Practice, 1914, Vol. I, p. 1048. See also, Chapter on "Effect of Tender on Award of Costs," *infra*.

(130) *Trotter v. Maclean*, (1879) 13 Ch. D. 574.

(131) *Birmingham etc., Land Co. v. L. & N. W. Ry. Co.*, (1887) 57 L.T. 185.

(132) *Remnant v. Hood*, (1859) 27 Beav. 74 ; and see *Real and Personal Advance Co. v. McCarthy*, (1880) 14 Ch. D. 188.

must have been of substantially the whole of the costs which the Court holds the plaintiff to be entitled to at the trial.”⁽¹³³⁾

Where the Judge considered that the plaintiff had acted oppressively in declining an offer, such offer not including the plaintiff's costs, an order was made that the defendants should pay plaintiff's costs incurred previous to the offer, and plaintiffs should pay defendant's costs incurred subsequent thereto. ⁽¹³⁴⁾

On the other hand, where, notwithstanding the defendant's offer, the plaintiffs were compelled to come to the Court to prevent an injury, they would be held entitled to the costs of proceedings taken to protect their interests. ⁽¹³⁵⁾

(xxix) Costs
of co-defend-
ant.

A defendant whose conduct has caused the litigation may be ordered to pay to any other defendants their costs of the action. ⁽¹³⁶⁾

Thus “where a specific performance suit had been occasioned by an unfounded claim made by one of two defendants, costs were given as against both defendants accompanied by a declaration that, as between the defendants the costs ought to be borne by the defendant who had made the claim, and liberty to apply at chambers as to the payment of such costs was given to the other defendant.”⁽¹³⁷⁾

(133) *Schlesinger v. Turner*, (1890) 63 L.T. 764.

(134) *Wright v. Ransom*, (1902) 47 Sol. J. 92.

(135) *Fenesty v. Day and Martin*, (1886) 55 L.T. 161. See too, *Upmann v. Forester*, (1883) 24 Ch. D. 231; *American Tobacco Co. v. Guest*, (1892) 1 Ch. 630.

(136) *Rudow v. Great Britain &c., Assurance Society*, 17 C.D. 660; according to the practice of the Court of Chancery, one defendant was not, except in the case of suits by the A.—G., without a relator or in interpleader suits, ordered to pay the costs of a co-defendant, but where one defendant was to pay the costs of another defendant, the plaintiff was ordered to pay them, and then permitted to recover them from the defendant; see 2 D.C.P. 5th Ed. 1266, 1267; *Jones v. Lewis*, 1 Cox., 199; and see *Weymouth v. Boyer*, 1 Ves. J. 416, 426; *Parkes v. White*, 11 Ves. 209, 238; *Phillips v. Davies*, 7 Jur. 52; *Man v. Ricketts*, 7 Beav. 93, 104; *Popple v. Henson*, 5 De. G. & S. 318; *A.—G., v. Corp'n. Chester*, 14 Beav. 338; *A.—G. v. Mercers' Co.*, 18 W.R. 448 (Eng.). A case having been set down on the board *ex parte* against one defendant, an order to strike the case out of the board will not be made on the application of such defendant except upon payment of the costs of the co-defendants. *Brijunder Comar Paul Chowdry v. Isserchunder Paul Chowdry*, (1844) Fulton 451=1 Ind. Dec. Old Series, p. 913. Chief Justice Peel said in the course of the judgment:—“If defendants are exposed to extra costs by a co-defendant repairing his own laches, it is equitable that the latter should pay the costs so incurred when he seeks an indulgence from the Court.” *Per* Peel, C.J. in *Brijunder Comar Paul Chowdry v. Isserchunder Paul Chowdry*, (1844) Fulton, 451=1 Ind. Dec. Old Series, p. 913. See also this subject dealt with under “Section I—Plaintiff's Costs” *supra*.

(137) *Wilson v. Thomson*, 20 Eq. 459; and see *Furlong v. Scanlon*, Ir. Rep. 9 Eq. 202; see Daniell's Chancery Practice, 7th Ed. 1901, Vol. I, pp. 980-981.

It has been held by the Courts in England that, "Under the Judicature Acts, it is no longer necessary or proper to order a plaintiff to pay the costs of a defendant and have them over against another defendant, so that, if the second defendant is insolvent, the plaintiff loses them. The proper form of order now is to order the defendant who is liable to them as between himself and his co-defendant to pay them to his co-defendant."⁽¹³⁸⁾

Where, in a suit to recover a sum of money on a *hathchitta* against several partners, some of them denied the partnership and the liability, others admitting both, and the Court found in favour of the plaintiff, those defendants that disputed the liability and the partnership were ordered to pay the costs of the other defendants.⁽¹³⁹⁾

But it has been held in a recent case by the Punjab Chief Court that a Court has no jurisdiction to award costs of one successful defendant against another unsuccessful defendant in plaintiff's claim.⁽¹⁴⁰⁾

Where a person who is wrongly made a defendant chooses to be an active litigant in support of another party he is not entitled to say that he ought to have his costs.⁽¹⁴¹⁾

The remedy of a person who is improperly joined as a co-defendant is to apply to the Court asking that his name shall be struck out.⁽¹⁴²⁾

(138) *Per* Jessel, M.R., *Rudow v. Great Britain, etc. Assurance Society*, (1881) 17 Ch. D. at p. 603, C.A.; *Child v. Stenning*, (1879) 11 Ch. D. 82; *Besterman v. British Motor Cab. Co., Limited*, (1913) 29 T.L.R. 324; *Vine v. National Motor Cab & Co., Limited*, and another, (1913) 29 T.L.R. 311; and see *Bullock v. London and General Omnibus Co.*, (1907) 1 K.B. 264 C.A.; *Cf. Sanderson v. Blythe Theatre Co.*, (1903) 2 K.B. 553, C.A.; *Beaumont v. Senior*, (1903) 1 K.B. 282; *Cf. The Milwall*, (1905) p. 155, C.A. It is submitted that the same rule may be adopted in this country, the power as to costs given by S. 35 of the present Code of Civil Procedure being similar to those conferred on Courts in England by the English Judicature Acts.

(139) *Juggut Chunder Roy v. Roop Chund Shaw*, 6 C. 811.

(140) *Jowahir Singh v. Amin Chand*, 57 P.W.R. 1908.

(141) *Butler v. Rice*, (1910) 2 Ch. 277, at p. 283; and see *Twinebarrow v. Braid & Co.*, W.N. (1878) 169. *Cf. Geen v. Berring*, (1905) 1 K.B. 152, where a successful plaintiff was deprived of costs against a defendant unnecessarily joined. (*Burstall v. Beyfus*, (1884) 26 Ch. D. 35, C.A.). As to the rules guiding the Judge's discretion with respect to disclaiming defendants, see *Ford v. Chesterfield (Earl)*, (1853) 16 Beav. 515; *Day v. Gudgon*, (1876) 2 Ch. D. 209; *Greene v. Foster*, (1882) 22 Ch. D. 566 and note (103), *supra*.

(142) *Wilson v. Church*, (1878) 9 Ch. D. 552; *Sadler v. G. W. Ry. Co.*, (1895) 2 Q.B. 688; *Bainbridge v. Postmaster-General and another*, (1906) 1 K.B. 178 (C.A.); *Vallance v. Birmingham and Midland Land and Investment Corporation*, (1876) 2 Ch. D. 369; *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants*, (1901) A.C. 426.

(xxx) Costs of co-defendant made respondent by defendant.

In an appeal from an order passed in favour of the plaintiff and disallowing a defendant's claim for costs, the defendant unnecessarily made a co-defendant a respondent. As this respondent could not be injured in any way in this appeal, it was held by the Chief Justice (Mitter, J., dissenting) that, although the appeal was dismissed, the co-defendant was not entitled to costs, simply because he had been present watching the case.⁽¹⁴³⁾

(143) *The Collector of the 24-Pergunnahs v. Wilkinson*, 12 W.R. 444. In the course of the judgment, Mitter, J., said :—"I concur with the learned Chief Justice in holding that the Collector is entitled to obtain his costs from the plaintiff, respondent, but the respondent Sreenath Chowdhry also is, in my opinion, entitled to obtain his costs from the Collector. It is very true that the Collector has in his grounds of appeal complained against the judgment of the lower Court so far only as that Court disallowed his claim for costs against the plaintiff, but he has, in his petition of appeal, placed the respondent Sreenath Chowdhry exactly in the same category as the plaintiff. I do not think that it lies in the Collector's mouth to say that Sreenath Chowdhry ought not to have appeared. If Sreenath Chowdhry had appeared, it is only because the Collector made him a respondent in the appeal; and he was, therefore, justified in appearing to watch his own interests, that is to say, to see that the Collector did not improperly obtain any decree against him. He has good grounds, in my opinion, to say that he has been misled by the course adopted by the Collector; and although he was not interested in opposing the claim of the Collector, so far as that claim related to the demand for costs against the plaintiff, he was nevertheless interested in seeing that no decree was passed against himself. I would add that, although the Collector has not, in his grounds of appeal, advanced any specific claim against Sreenath Chowdhry, yet, when Sreenath Chowdhry was served with notice of the appeal, he was not served with a copy of those grounds. But even if he had been furnished with such a copy, he would not have possibly calculated that the Collector would not try to make him responsible by urging new grounds of appeal at the time of hearing. The very fact that a party is made a respondent in an appeal would imply that the appellant asks for some relief against him; and if the appellant is not entitled to such relief, the party who was thus made a respondent is entitled to appear before the Court, and to say that no such relief ought to be given. If Sreenath Chowdhry had not appeared in this case, notwithstanding that he was made a respondent by the appellant, the Court might have by mistake made a decree against him, and such a decree, when made, would have been just as much binding against him as if it had been passed in his presence. It may be said that Sreenath Chowdhry might have reasonably supposed that no such mistake was likely to be committed by the Court, but he was not bound to trust to his own calculation of probabilities as to what the Court would do, or would not do, and to run the risk of such a decree being passed against him in his absence." In the same case Peacock, C.J. said :—"The Collector thought he was entitled to his costs, and he appealed to this Court; but unfortunately he made, not only the plaintiff, but one of the co-defendants, a respondent in the appeal. That co-defendant has now appeared. He has not argued the question as to whether the decree of the Judge was right or wrong in refusing the Collector's costs as against the plaintiff, nor has he any interest in the question. The Collector has succeeded in his appeal, and the ordinary course would be to decree the appeal with costs. The co-defendant who appears, and who is not injured and cannot be injured in any way, and who has not argued the case, and has not supported the decree of the lower Court, contends that he is entitled to his costs, because he has been present watching the case. It appears to

In an action of tort, where there are several defendants, and judgment is obtained by the plaintiff against all, if one of the defendants has caused the plaintiff to incur extra costs by the nature of his defence, such extra costs will be recoverable from that defendant alone who has caused him to incur them.⁽¹⁴⁴⁾

In the case of claims against alternative defendants the Court can order the plaintiff to pay the costs of the defendant against whom the action fails and to add those costs to his own to be paid by the defendant against whom the action has succeeded.⁽¹⁴⁵⁾

The modern practice in order to avoid circuitry has been to order the unsuccessful defendant to pay direct to the successful defendant his costs.⁽¹⁴⁶⁾

"An order for the payment of costs out of a fund in which defendant and plaintiff are both interested, is not equivalent to ordering the defendant to pay a proportion of the plaintiff's costs, and such order may be made even though the defendant has succeeded in defeating the contentions raised by the plaintiff." ⁽¹⁴⁷⁾

(xxx) Costs of one of several defendants causing extra costs to plaintiff.
(xxxii) Costs of alternative defendants.
(xxxiii) Costs out of a fund in which both plaintiff and defendant are interested.

me that, the costs being in the discretion of the Court, we would be exercising a very unsound discretion in giving the co-defendant his costs for watching the case. Under these circumstances, it appears to me that the respondent Sreenath Chowdhry, who has appeared in this appeal, is not entitled to his costs as against the Collector. The appeal of the Collector is allowed, and the Collector is entitled to his costs in the lower Court against the plaintiff in the suit, with costs of this appeal as against the plaintiff respondent, and not against the other respondents." *Per Peacock, C.J. in The Collector of the 24 Pergunnahs v. Wilkinson*, 12 W.R. 444.

(144) *Stum v. Dixon*, (1889) 22 Q.B.D. 529, C.A.

(145) *Sanderson v. Blythe Theatre Co.*, (1903) 2 K.B. 533, C.A. (This was an action of contract, and this jurisdiction extends to cases of tort). *Bullock v. London General Omnibus Co.*, (1907) 1 K.B. 264, C.A.

(146) *Rudow v. Great Britain Mutual Life Assurance Society*, (1881), 17 Ch.D. 600; but of course a Judge has jurisdiction to follow the old practice if he thinks fit to do so, and ought to do so when necessary. See judgment of Romer, L.J., *Sanderson v. Blythe Theatre*, 8 C.W.N. (Journal portion) xiv; see also *Mullen v. London County Council* 1906) 51 Sol. J. 82; *Vine v. National Motor Cab Co.*, (1913) 29 T.L.R. 311; *Bester-mann v. British Motor Cab Co.*, (1913) 29 T.L.R. 324. See notes under "Costs of co-defendant," *supra*. An action in which there were two sets of plaintiffs acting by the same solicitor, being referred to an arbitrator and the order referring the action providing that the costs of the cause should abide the event of the arbitration then, on one set of plaintiffs being successful and the other failing: Held "that the defendant should pay to the successful plaintiff one moiety of the general costs of the action, and should be entitled as against the unsuccessful plaintiff to all extra costs to which he had been put by such extra plaintiff being joined was good." *Gort (Viscount) v. Rowney* (1896), 17 Q.B.D. 625, C.A.

(147) *Butcher v. Pooler*, (1883) 24 Ch.D. 273, C.A.

Where, it is necessary that an action should be instituted by some person, the Court may order the costs to be paid out of the fund, the subject of the action, although the action is dismissed.⁽¹⁴⁸⁾

“If through the exertions of a plaintiff the Court is enabled to distribute a fund, or if it makes a declaration of rights necessary for its administration, then, although the plaintiff may fail in his claim, the Court will not permit the other parties to carry off the fruit of his exertions without defraying his costs out of the fund.”⁽¹⁴⁹⁾

Thus, it was held by the Calcutta High Court, that the estate, and not the manager thereof, would be liable for the costs of a suit instituted in perfect good faith by the manager for the benefit of the property.⁽¹⁵⁰⁾

(xxxiv) Costs where there is a claim and counter-claim.

“Where the plaintiff succeeds in his claim and the defendant succeeds on his counter-claim, costs follow the event in this way; the plaintiff is entitled to the costs of action other than the counter-claim; the defendant is entitled to the costs of the counter-claim.”⁽¹⁵¹⁾

“It is immaterial so far as the taxation of costs is concerned, whether judgment be entered for the balance, or for plaintiff on the claim and for defendant on the counter-claim.”⁽¹⁵²⁾

It has been held by Courts in England that an order giving to the plaintiff the costs of the claim down to the date of the counter-claim, and to the defendant the costs of the counter-claim and costs

(148) *Cranch v. Brissett*, cited in *Wheldale v. Partridge*, 5 Ves. 398; *Lynn v. Beaver*, T. & R. 63, 69; *Windham v. Graham*, 1 Russ. 331, 347; *Cooper v. Pitcher*, 4 Ha. 485; *Boreham v. Bignall*, 8 Ha. 131; *Thomson v. Moses*, 5 Beav. 77, 81; *Hay v. Bowen*, 5 Beav. 610, 615; *Merlin v. Baggrave*, 25 Beav. 125; and see *Westcott v. Culliford*, 3 Ha. 274; *Lee v. Delane*, 4 De. G. & S. 1, 6; *Garth v. Townsend*, 7 Eq. 220, 223; *Morg. & Wurtz*, 96—98; but see *Anderson v. A.*, 41 L.J. Ch. 247.

(149) *Wedgwood v. Adams*, 8 Beav. 103, 105; *Leighton v. L.*, 18 Eq. 458; and see *Best v. Stonehewer*, 15 W.R. 419 (Eng.); *Johnstone v. Todd*, 8 Beav. 489.

(150) *Ram Kishore Acharjee v. Luckhee Debea Chowdhrair*, 1 W.R. Mis. 1.

(151) *Per Fry*, L.J., *Shrapnel v. Laing*, (1888) 20 Q.B.D. 334, C.A. See this subject discussed more fully in chapter on “Costs in Special Cases,” *infra*.

(152) *Per Lopes*, L.J., *ib.*; *Blake v. Appleyard*, (1878) 3 Ex. D. 195; *Hewitt v. Blumer*, (1886) 3 T.L.R. 221; *Cf. Potte v. Chambers*, (1879) 4 C.P.D. 69; *Davidson v. Gray*, (1879) 40 L.T. 192; 42 L.T. 884, C.A.

of all proceedings since the counter-claim, is not a proper order, and, in the absence of "good cause," the Judge has no jurisdiction to make it.⁽¹⁵³⁾

In another English case, where the defendant admitted the claim, and also partially succeeded in his counter-claim, the plaintiff and not the defendant was awarded the general costs of the action.⁽¹⁵⁴⁾

(153) *Wight v. Shaw*, (1887) 19 Q.B.D. 396, C.A.
(154) *The Wills, etc., Association v. Hammond*, (1889) 5 T.L.R. 196, C.A.; *Cf. Sharpe v. Haggith*, (1912) 106 L.T. 13, C.A. Regarding the subject-matter of this chapter, see also Amir Ali's Civil Procedure Code, 2nd Ed., 1916, pp. 208--210.

CHAPTER IV.

AMOUNT AND ALLOWANCE OF COSTS—CALCULATION.

Amount of costs which a defeated party should be required to pay—General rule as to.

Amount of costs to be awarded is governed by the rules framed by the several High Courts.

Scale on which costs are awarded to defendant.

Suit against several defendants—Scale of pleader's fee.

Calculation of fees paid to pleaders, vakils and other legal practitioners.

Private agreement between legal practitioner and client.

Attorney and client entering into agreement as to costs—Attorney's right when client wishes to change attorney—Practice.

"Agreed costs," allowance of—English practice—Waiver of taxation.

Amount of fees to which pleader entitled—Reasonable sum as remuneration for his work and labour.

Pleader engaged by several defendants having same interest—Amount of remuneration.

Number of pleaders for whom fees can be allowed—Unnecessary costs.

Costs to be allowed to Government Solicitor, who is also a salaried officer.

Pleader's fee in batch appeals.

Costs not recoverable if pleader or solicitor be uncertificated.

Costs in proportion to amounts decreed and disallowed.

Costs which a defeated party has to pay are only costs that were necessarily incurred.

Test to find out as to what are and what are not unnecessary costs.

Costs occasioned by joining unnecessary defendants.

Costs incurred through over-caution, negligence or mistake.

Example—Co-sharers made defendants in order that plaintiff may obtain a complete decree.

Costs occasioned by mistake of Court.

Costs of work done but becoming useless owing to abandonment of proceedings—English practice.

Costs of amendment of pleadings.

Costs occasioned by amendment of pleadings made at the trial by the Court *mero motu*.

Costs of perusing affidavit—English practice.

Costs occasioned by affidavits ordered to be taken off the file for containing unnecessary matter—Prolivity.

Costs occasioned by irrelevant or scandalous matter in affidavit or pleadings.

Costs occasioned by improper denials or non-admissions in defence—Disallowed.

Certain items allowed :—

- (i) Court-fees.
- (ii) Process-fees.
- (iii) Exhibits.
- (iv) Diet money, etc., for witnesses.
- (v) Commissioner's fees.
- (vi) Accountant's fees.
- (vii) Pleader's fees.
- (viii) Costs of working out the directions of Court.
- (ix) Costs of translation.
- (x) Correspondence, charges of.
- (xi) Costs of expert witnesses.
- (xii) Shorthand writer's notes—Expenses of.
- (xiii) Carbon copies, costs of.

Costs, scale of, in application for revocation of probate.

Conditional order for costs.

Costs on higher scale—Practice.

THE costs which a defeated plaintiff should be required to pay are those necessarily incurred by the successful party in the defence of the suit. Costs cannot be deemed necessary if by reasonable diligence on the part of the defendant or his pleader the expenditure of them could have been avoided.⁽¹⁾ As has already been seen, the Court has no power to award as costs any sum in excess of what the successful party actually expended in the course of the litigation.⁽²⁾

Amount of costs which a defeated party should be required to pay—General rule as to.

Each of the Indian High Courts have framed rules regarding the regular scale of costs ; and, as a general rule, the costs of each of the parties are taxed according to those rules.⁽³⁾

Amount of costs to be awarded is governed by the rules framed by the several High Courts.

(1) *Seeta Patta Mahadevi v. Suryudamma*, 18 M. 128.

(2) See this point discussed more fully in Chapter I, *supra*, References.

(3) As to these rules see Appendix, *infra*. Regarding the subject-matter of this chapter see Amir Ali's Code of Civil Procedure, 2nd Ed., 1916, Notes under S. 35 and O. XX, r. 6, pp. 210—217 and 856—859. Chapter on "Separate Costs," "Proportionate Costs" and "Taxation of Costs," *infra*; Halsbury's Laws of England, Vol. XXIII, Ss. 332—336, pp. 183—185 ; Daniell's Chancery Practice, 7th Ed., 1901, Vol. I, pp. 1009—1034 ; Yearly Practice, 1914, pp. 1116—1118 ; 1124—1165 ; Seton on Judgment and Orders, 6th Ed., Vol. I, pp. 258—265.

The usual course in the matter of awarding costs is for the Judge simply to give judgment to the successful litigant with costs to be taxed, and the costs are then taxed by an officer of the Court. There is no power to award in respect of costs anything more than the taxed costs.⁽⁴⁾

Scale on
which costs
are awarded
to defendant.

The scale on which costs should be awarded to a defendant depends on what the plaintiff claims against him, and he would generally be entitled to costs on the usual scale on the amount for which the suit was brought.⁽⁵⁾

Thus, it was held that where in a suit for partition among the members of a joint Hindu family certain widows who had a claim only for maintenance were made parties, their pleaders would be entitled to the fixed percentage of fees only on the amount claimed by them for maintenance.⁽⁶⁾ In this case the plaintiff sued for partition and made two widows, who were entitled to maintenance out of the estate, co-defendants in the suit. The plaintiff and the male defendants compromised the suit and a decree was passed in terms of the compromise. By the compromise the costs of the widows were to be paid by the estate, and in estimating the costs the lower Court allowed each widow a separate set of costs and calculated the amount to be paid to each as pleader's fees on the value placed on his claim by the plaintiff. On appeal to the High Court, it was *held*, that the pleaders of the widows were not employed in prosecuting or defending an original suit of the value of the plaintiff's claim so as to be entitled under S. 52, Reg. II of 1827, ⁽⁷⁾ to a percentage on the amount that the plaintiff sued for according

(4) See *Garnett v. Bradley*, (1878), 3 App. Cas. 944, 957; R.S.C., O. LXV, rr. 8, 23; *Ibid.*, App. N. See Halsbury's Laws of England, Vol. XXIII, S. 332, p. 183.

(5) *Kasheenath Sein v. Chunder Monee Debee*, 9 W.R. 288 (289).

(6) *Ramachandra Parsharam v. Bhagubai*, 21 B. 42.

(7) Section 52 of Reg. II of 1827 runs as follows:—*LII. First.* Each pleader employed in prosecuting or defending an original suit shall be entitled to a percentage on the amount sued for, according to the rates specified in Appendix L, as a remuneration for his trouble in acting in behalf of his client, until the decree in the suit is passed, and thereafter until such decree is fulfilled: *Second.* The remuneration to a pleader employed in prosecuting or defending an appeal, regular or special, shall be the same as is above prescribed in the case of an original suit: *Third.* The above rules shall not prevent an express agreement being entered into between pleader and client, for either a larger or smaller sum than the established fee: *Fourth.* But, if a larger sum than was agreed for between a pleader and client is awarded in costs against the other party, the pleader, notwithstanding his agreement with his own client, shall be entitled to the excess when recovered.

to the rates specified in Appendix L.⁽⁸⁾ The widows were in reality prosecuting a suit for their maintenance, and their pleaders were entitled to a percentage only on the amount claimed by them for maintenance.⁽⁹⁾

(8) Appendix L, S. 52, Reg. II of 1827—Statement showing the fees to which pleaders are entitled for acting throughout ordinary suits when there is no specific agreement. The pleader's fee is—

In suits for not more than Rs. 2,000	... 3 per cent.
In suits for from Rs. 2,000 to 10,000 inclusive, on Rs. 2,000 as above, and on the remainder	... 2 per cent.
In suits for from Rs. 10,000 to 20,000 inclusive, on Rs. 10,000 as above, and on the remainder	... 1 per cent.
In suits for more than Rs. 20,000, on that sum as above, and on the remainder	... $\frac{1}{2}$ per cent.

Section 7 of Act I of 1846—VII. Parties employing authorized pleaders in the said Courts shall be at liberty to settle with them by private agreement the remuneration to be paid for their professional services, and that it shall not be necessary to specify such agreement in the vakalatnama; provided that when costs are awarded to a party in any regular suit, original or appeal, decided on the merits, against another party, the amount to be paid on account of fees of pleaders shall be calculated according to the rules contained in the sections of Regulations specified in S. 6 of this Act; and that when costs are awarded in other cases the amount to be paid on account of such fees shall be one-fourth of what it would have been in a regular suit decided on its merits.

(9) Parsons, J. said in the course of the judgment:—"This was a suit for partition brought by the plaintiff against his co-sharers, the defendants Nos. 1 and 2, in which the defendants Nos. 3 and 4 were made co-defendants as widows having a right to maintenance. The suit was compromised by the plaintiff and the defendant No. 2 agreeing to buy the share of the defendant No. 1 for 1½ lakhs. The Subordinate Judge ordered the costs of the defendants Nos. 3 and 4 to come out of the estate. He gave each a separate set of costs and calculated the amount to be paid on account of fees of pleaders in each set at the full rate on the value placed on his claim by the plaintiff, and thus made those fees alone come to Rs. 6,816. Against this order the present appeal has been brought, and it is contended before us that the fees ought not to have been calculated on the value of the plaintiff's claim, or that, if that calculation is right, yet, as the suit was not decided on the merits, one-fourth only of the ordinary fees should have been allowed. It is clear, we think, that the order is bad. The pleaders of the defendants Nos. 3 and 4 were not employed in prosecuting or defending an original suit of the value of the plaintiff's claim, so that they would be entitled under S. 52 of Reg. II of 1827 to a percentage on the amount that the plaintiff sued for according to the rates specified in Appendix L. Their clients were not, strictly speaking, defending the suit at all, for their right to maintenance was admitted. Even if it had been denied, however, their position would not have been very different. They were in the suit as claimants of a right to maintenance, which right they asked to have determined and awarded to them by the Court. They were, therefore, in reality prosecuting a suit for their maintenance, and their pleaders ought to be entitled to a percentage only on the amount claimed by them for maintenance. If this claim were decided on the merits, the full percentage would be paid; in other cases one-fourth only would be paid under S. 7 of Act I of 1846. In the present case, there has been no decision passed on their claim either on the merits or in any other way. The lower Court decided the case on the compromise, which is silent as to the amount of maintenance

Suit against
several
defendants—
Scale of
pleader's fee.

Similarly when a suit contains several distinct claims against separate defendants, the amount of costs to be allowed to each depends on the claims made against them.⁽¹⁰⁾ The plaintiff sued 34 persons for the recovery of 3,820 beegahs of rent-free debutter lands. The suit was defended only by 13 defendants, and was dismissed for multifariousness, and the Court allowed each defendant a pleader's fee of Rs. 275 based on the valuation of the entire land in which the 13 defendants had only a certain share. It was *held* that the fees were excessive and that the best plan would be to allow each defendant who defended the suit in respect of a plot of land exceeding 40 beegahs a pleader's fee of five gold mohurs: to each defendant who succeeded in respect of a plot of land exceeding 20 beegahs, but not exceeding 40 beegahs, a fee of three gold mohurs: and to the defendants who succeeded in respect of a plot of land less than 20 beegahs, a fee of two gold mohurs.⁽¹¹⁾

to which the defendants Nos. 3 and 4 are entitled. It does not appear that they asked the Court below when it decided the case on the compromise to proceed on their claim and to define and award them their maintenance, and they have not here objected to the decision of the suit on the compromise alone. Had they done so, we should have been bound to have allowed the objection. We, therefore, only reverse the order of costs, and remand the case for the amount of pleader's fees to be correctly calculated. This will involve a determination of the amount of maintenance to which the defendants Nos. 3 and 4 are respectively entitled. If there is a dispute necessitating a decision on the merits as to the amount of maintenance to which either defendant is entitled, the pleader of that defendant will be entitled to the full percentage on the amount, if any, claimed, or if no amount is claimed on the amount awarded. In other cases he will be entitled to one-fourth only. We make no order as to the costs of this appeal." *Per* Parsons, J. in *Ramchandra Parshanam v. Bhagubai*, 21 B. 42 at 44 & 45.

(10) *Rajah Rooddur Narain Roy v. Cocmar Narain Patnaik*, 13 W.R. 320.

(11) *Rajah Rooddur Narain Roy v. Cocmar Narain Patnaik*, 13 W.R. 320.

Norman, J. said in the course of the judgment:—"A discussion arose as to the principle on which the costs were to be calculated. The Judge found that, as regards property to the value of Rs. 2,200 different defendants had submitted to decrees, and he took 5,440 rupees as the value of the suit so far as it was dismissed. Having done that, he allowed to each defendant full costs upon a valuation of Rs. 5,440, and as a consequence, to 15 defendants a vakeel's fee of Rs. 257 each. Practically speaking, the vakil's fee allowed is, in a very large number of instances, much greater than the whole value of the property in respect of which the successful defendants came into Court. It is clear that this cannot be said to be a just and equitable way of awarding payment of fees according to the rules of this Court. The defendants by this means got costs as upon a total valuation of 79,600 rupees, not at the rate of five per cent. on the first 5,000 rupees, two per cent. on the next 15,000 rupees, one per cent. on the next 30,000 rupees, or up to 50,000 rupees and half per cent. on the 29,600 rupees exceeding the sum of Rs. 50,000, but for every separate defendant costs are calculated at the maximum rate of five per cent. on the first 5,000 rupees or 5,440 rupees. Now, if the separate defendants having separate interests had set up distinct defences and succeeded thereon—in other words, if the Judge had gone on to try this case notwithstanding the

In calculating the amount to be allowed in respect of services rendered by pleaders, vakils, attorneys and other legal practitioners, the Courts are governed by the rules framed by the several High Courts under the powers conferred upon them by the legislature. (12)

Calculation of fees paid to pleaders, vakils and other legal practitioners.

A Court is bound to award as costs to a successful party his pleader's fees calculated according to the provisions of the Acts relating to the subject and the rules framed under such Acts. The defeated party cannot take advantage of any private arrangement between the successful party and his vakil. (13) Any private arrangement between the legal practitioner and client will not affect the power of the Courts to award cost according to the scale prescribed by the rules of their respective High Courts. (14)

Private agreement between legal practitioner and client.

objection of multifariousness and dismissed the whole of it as against each defendant separately upon the merits—under Rule 7 (5 W.R. Rules of Practice, p. 15), it would appear that the costs of each defendant would have been allowed at a rate according to the value of his separate interest to be ascertained by reference to the Scale in Rule 1. It is said, and said with some truth, that, owing to the peculiar form of the present suit, the defendants have been put to greater expense than would have been the case if the plaintiff had shown that, as regards each one of the defendants, the plaintiff sought to recover only the property held by such defendant separately. There is no doubt that that is what he meant and what the opposite parties understood him to have meant notwithstanding the defective form of his plaint. We think, however, that it is fair that each defendant should be allowed a larger sum by way of costs than if the plaintiff had confined his claim against each defendant to the land held by him. But there is no doubt that the amount awarded by the Judge must very greatly exceed anything that these small holders can have paid or been expected to pay to their vakeels in the Judge's Court. We think that, in a case of this kind, it would have been a convenient course to have taken a valuation, say, double that of the amount at which the entire land claimed was originally valued in the suit, and allowed to the several successful defendants costs in proportion equal to their shares upon that valuation. We think the best plan in the present case will be to allow each defendant who defended the suit in respect of a plot of land exceeding 40 beegahs a vakeel's fee of five gold mohurs; to each defendant who succeeded in respect of a plot of land exceeding 20 beegahs not exceeding 40 beegahs a fee of three gold mohurs; and to the defendants who succeeded in respect of a plot of land less than 20 beegahs, a vakeel's fee of two gold mohurs. The intervenors appear to have come in of their own accord. There has been no adjudication as to their rights, and there seems to be no reason why they should be allowed any costs. The decrees of the lower Court will be modified accordingly. Each party will bear his own costs of this appeal." *Per Norman, J., in Rajah Rooddur Narain Roy v. Coomar Narain Patnaik*, 13 W.R. 320 at pp. 321 & 322.

(12) As to those rules, see App. *infra*. See *Umirtionath Jha v. Roghoonath Pershad*, 6 W.R. Mis. 35 (1886) cited in Amir Ali's Code of Civil Procedure, 1908, p. 208.

(13) *Umirtionath Jha v. Roghoonath Pershad Roy*, 6 W.R. Mis. 35.

(14) See *Umirtionath Jha v. Roghoonath Pershad*, 6 W.R. Mis. 35 cited in Amir Ali's Civil Procedure Code, 1908, p. 208, Notes under S. 35.

Attorney and client entering into agreement as to costs—Attorney's right when client wishes to change attorney—Practice.

Where there was a written agreement between the defendant and his attorney, whereby the latter agreed to conduct a suit by accepting a certain sum for his personal services, (and not in respect of costs out of pocket and Counsel's fees) and in the event of the client being successful to refund the amount received and to recover full costs from the plaintiff, *held*, on the client insisting on a change of attorneys, he could do so, on the attorney being paid his taxed costs.⁽¹⁵⁾

"Agreed Costs" allowance of—English Practice—Waiver of taxation.

Subject to the production of a written consent by the client (the party interested) to waive a taxation, an order was made for payment of an agreed sum for costs.⁽¹⁶⁾

Amount of fees to which pleader entitled—Reasonable sum as remuneration for his work and labour.

In the absence of any express agreement to the contrary between the pleader and the client, the former is entitled to a reasonable sum as remuneration for his work and labour.⁽¹⁷⁾

Pleader engaged by several defendants having same interest—Amount of remuneration.

In the present case, the plaintiff was employed as pleader by several persons of whom the defendant was one and there was nothing to show that the defendant had an interest distinct and separate from that of the others. Consequently, the plaintiff ought not to be allowed a full separate fee from each of the persons whom he so represented. Still less could he claim to be entitled to a full fee from each of the parties calculated upon the full valuation of the entire suit.⁽¹⁸⁾

Number of pleaders for whom fees can be allowed—Unnecessary costs.

It was held by the late Supreme Court that a plaintiff is not to be saddled with the costs of three pleaders if two were sufficient.⁽¹⁹⁾

Costs to be allowed to Government Solicitor, who is also a salaried officer.

Where in a suit on the Original Side of the High Court, to which the Secretary of State for India is a party, costs are awarded to him, the Government Solicitor is entitled to have his bill of costs

(15) *Ghassee Jamadar v. Nassiruddin Mistry*, 26 C. 769.

(16) *Re Cosier, Hill Bros. v. Humphreys*, W.N. (1898), 8.

(17) *Musst. Ameeroonissa v. Mr. C. Chapman*, 6 W.R. 108.

(18) *Ibid.*

(19) *Sukeena Bibee v. Usud Ali*, S.W.N.W. 1861, p. 333 cited in *Amir Ali's Civil Procedure Code*, 1908, p. 208, Note (13).

taxed in the ordinary way against the losing party notwithstanding the fact that the Government solicitor is a salaried officer of Government.⁽²⁰⁾ An arrangement between Government and their solicitor whereby the latter receives a fixed salary and in addition the costs awarded to Government in any litigation would not affect a party condemned to pay costs to Government.⁽²¹⁾ In the *Attorney-General v. Shillibeer*⁽²²⁾, Baron Parke remarked: "It is perfectly clear that the Crown incurred expenses about this suit; and unless the Crown is to be compensated by the payment of the ordinary fees, there would be no mode of compensating it at all, because it is impossible for the Crown to say what proportion the expense of conducting this particular suit must bear to the entire salary for the year until the end of the year, when all the suits are known, and when the expense of each would be calculated, which at the time the costs are taxed it is impossible to know; and therefore it is impossible, if the Crown is to be compensated at all, that it should be compensated except in the way of payment of the ordinary fees."⁽²³⁾

Where a District Judge, in disposing of a batch of appeals in summary suits under the Madras Estates Land Act, fixed the vakil's fee payable to the successful party in each of the appeals at one Rupee, instead of the minimum fee of Rs. 20 prescribed by the rules, *held* that the direction as to costs could not be supported, as the Court had no power, if it gave costs in each case, to reduce the minimum fee as it did, and that the proper course to be allowed in cases in which a number of appeals had been heard together, involving the same point of law and not requiring separate argument, was to grant the usual costs in first three appeals of the batch and to make each party bear his costs in the other appeals.⁽²⁴⁾

"No costs, fee, reward or disbursement on account of and in relation to any act or proceeding done or taken by any person who acts as a solicitor without being duly qualified so to act are to be

Pleader's fee in batch appeals.

Costs not recoverable if pleader or solicitor be uncertificated.

(20) *P. Nusserwanji & Co. v. SS. Wartenfels*, 18 Bom.L.R. 118.

(21) *Azimulla Saheb v. Secretary of State for India*, 15 M. 405; *Muhammad Alim Oollah Sahib v. The Secretary of State for India*, 17 M. 162 cited and followed in *P. Nusserwanji & Co. v. SS. Wartenfels*, 18 Bom.L.R. 118 (120).

(22) (1849) 19 L.J. Ex. 115.

(23) *Per* Baron Parke, in *The Attorney General v. Shillibeer*, (1849) 19 L.J. Ex. 115, cited in *P. Nusserwanji & Co. v. SS. Wartenfels*, 18 Bom. L.R. 118 (122).

(24) *Ramayya v. Narasimha Apparayanam*, 3 L.W. 249 = (1916) M.W.N. 194.

recoverable in any action, suit, or matter by any person whomsoever; (25) and, consequently a party to the proceedings cannot, where the solicitor employed by him has been uncertificated, recover his costs or disbursements from a person who would otherwise be liable to pay them." (25-a)

Costs in proportion to amounts decreed and disallowed.

Where the decree in a suit directs the payment of costs by the plaintiff and defendants respectively, in proportion to the amounts decreed and disallowed, the proper mode of giving effect to such a decree is to calculate the amount of the costs of the suit as laid, and then divide the entire sum proportionately between the parties according as they have respectively succeeded or failed. (26)

Costs which a defeated party has to pay are only costs that were necessarily incurred.

As has already been seen the successful party is, however, not entitled to more than the necessary costs. Thus costs may be disallowed in the following cases:—(i) where the costs have been lavishly incurred, (ii) where costs were incurred in proving points admitted by the other side, (iii) where they were incurred in adducing overwhelming, or irrelevant evidence, (27) (iv) where the defendant's pleader, who could have had the plaint rejected without trial, files a written statement raising a variety of defences, but not raising the very point which ultimately causes the shipwreck of the suit, it was held that the defendant ought to bear the loss which his pleader, by dint of care, might have avoided. "To hold otherwise would be to make the plaintiffs answerable for the mistake of their adversary's vakil," (28) (v) so also where the plaintiff joins unnecessary parties, they must be discharged with costs upon him. (29)

All such costs, charges, and expenses are to be allowed by the judge or the taxing master as appear to him necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same, no costs are to

(25) St. 37 & 38 Vic., Ch. 68, S. 12; *Verlander v. Eddolls*, 51 L.J. Q.B. 55.

(25-a) *Fowler v. Monmouthshire Railway Co.*, 4 Q.B.D. 334; *Re Sweating*, (1898) 1 Ch. 268.

(26) See *Leckie v. Joygobindo Nath*, 7 C.L.R. 114; *Bamasoondery Debia v. Rogers*, 7 W.R. 127, upheld on review in 8 W.R. 55. See also *Tara Chand v. Jadoonath*, Marsh 79=1 Hay 141=1 Ind. Jur. O.S. 102.

(27) *Bishenmun Singh v. Land Mortgage Bank*, 11 C. 244 (P.C.); *Rajah of Pittapur v. Sri Raja Row*, 12 I.A. 16.

(28) *Seeta Patta v. Suryadumma*, 18 M. 128 (130); *Run Bahadoor v. Lucho Koer*, 6 C. 406; *Hari Das v. Gamble*, 12 B.H.C.R. 23.

(29) *Devarikonda v. Devarikonda*, 4 M. 134; *Shunt Buksh v. Lalla Nund Ram*, 11 W.R. 48; *Bishen Dyal v. The Bank of Upper India*, 13 A. 290 (295).

be allowed which appear to have been incurred or increased through over-caution, negligence, or by mistake, or by payment of special fees to counsel or special charges or expenses to witnesses or other persons or by other unusual expenses. (30)

No costs shall be allowed which do not appear to the Court or the taxing officer to have been necessary and proper for the conduct of the case, or for defending the rights of the party, or which appear to have been incurred through over-caution, negligence or mistake, or merely at the desire of the party. (31)

The true test in exercising the discretion is whether the costs "were necessary or proper for the attainment of justice" under the circumstances existing at the time a particular proceeding was taken, irrespective of the eventual state of circumstances at the trial when the result of such proceeding could not be known. (32) So where the examination of a witness before trial is not used at the trial for some good reason, *e.g.*, the attendance of the witness at the trial or the taking of a judgment by consent, the costs of the examination should not be disallowed merely on the ground that the examination had become unnecessary. (33) If the Judge or Taxing Master comes to the conclusion that costs were incurred improperly or unnecessarily he is bound to disallow them. (34)

Test to find out as to what are and what are not unnecessary costs.

The Court disallowed costs incurred by the plaintiff unnecessarily bringing several actions and joining as defendants numerous weekly sub-tenants on a claim for breach of contract to repair and for forfeiture. (35)

Costs occasioned by joining unnecessary defendants.

Costs incurred or increased through over-caution, negligence or mistake may be disallowed. (36)

Costs incurred through over-caution, negligence or mistake.

(30) See Halsbury's Laws of England, Vol. XXIII, S. 335, p. 184.

(31) See Original Side Fee Rules of the Madras High Court, O. IV, r. 29.

(32) *Bartlett v. Higgins*, (1901) 2 K.B. 230, C.A.; approving *Delaroque v. Oxenholme & Co.*, W.N. (1883) 227, and disapproving *Ridley v. Sutton*, (1863) 1 H. & C. 741; 32 L.J. Ex. (N.S.) 122.

(33) *Ibid.*

(34) *Simmons v. Storer*, (1880) 14 Ch. D. 154.

(35) *Geen v. Herring*, (1905) 1 K.B. 152, C.A.

(36) *Geen v. Herring*, (1905) 1 K.B. 152, C.A.; see Halsbury's Laws of England, Vol. XXIII, S. 335, p. 184.

Example—
Co-sharers
made defend-
ants in order
that plaintiff
may obtain a
complete
decree.

Where co-sharers were made consenting defendants only in order to plaintiff's obtaining a complete decree for partition, plaintiff ought to pay the co-sharers' costs which, however, should be a small sum sufficient to cover the costs of their appearance. (37)

Costs occa-
sioned by
mistake of
Court.

Where a defendant fails in his defence, he can legally be charged with only that amount of stamp duty which can be legally demanded from the plaintiff and not with the excess which he was obliged to pay through a mistake in law of the Court (38).

Costs of work
done but
becoming use-
less owing to
abandonment
of proceedings
—English
practice.

Courts have always acted upon the principle that the costs of all in preparing, briefing, or otherwise relating to affidavits or pleadings, reasonably and properly and not prematurely done down to the time of any notice which stops the work, is allowable; and the Taxing Masters, having regard to the circumstances of each case, would decide whether the work was reasonable and proper and the

(37) *Ramputty Koor v. Kales Churn Singh*, 14 W.R. 94. The following observations of the Court in the course of the judgment may also be noted :—"On the third ground, it appears that the plaintiff made certain co-sharers who supported the plaintiff's claim defendants in the case, but merely because they being co-sharers had a certain joint interest in the property. The question arises whether the plaintiff who brought in this party, or the opposing defendant is to pay those defendants their costs. Those costs appear to amount to Rs. 239 in the first Court, and Rs. 267 in the second Court, the vakeel's fees being the largest portion of the amount in each Court. We are of opinion that when the co-parceners—so made defendants—supported the plaintiffs' case, and were only made parties in order to enable the plaintiff to get a complete decree for partition, it was the plaintiff, and not the defendants who opposed the partition, who ought to pay the costs of these defendants in the first Court. But we also think that it would be highly improper to saddle any person, plaintiff or defendant, with such enormous costs in respect of defendants who were after all little more than formal parties to the record. What we think these consenting defendants are entitled to in the first Court, is a small sum sufficient to cover their costs of appearance—and that these should be paid by the plaintiff. In the second Court, the defendants who appealed made these consenting parties respondents, and they ought, in justice, to pay the similar costs in that Court. But this which is the fair mode of dealing with the costs, is said to be prohibited by the rules relating to pleaders' fees passed by this Court on 13th June 1866 (5 W.R. Rules, p. 15). But upon the whole we do not think so. We think the case of defendants who have a separate interest and who consent to a decree is not provided for in those rules; and that the amount of costs to be allowed in such a case is in the discretion of the Court. In this case, the Courts below evidently thought that they had no discretion as to the amount. We, therefore, direct that the plaintiff pay to the consenting defendants Rs. 16 costs in the first Court; and that the defendants-appellants, pay to the same defendants Rs. 25 costs in the lower appellate Court, and Rs. 25 in this Court. This appeal is in other respects dismissed." See the judgment in *Ramputty Koor v. Kales Churn Singh*, 14 W.R. 94.

(38) *Ajoodhya Chowbey v. Daibee Singh*, 3 Agra (Rev.) 5.

time for doing it had arrived. The same principle would apply in taxing costs on discontinuance of action or dismissal of the suit.⁽³⁹⁾

"Costs of an amendment will be disallowed if it is oppressive or vexatious,⁽⁴⁰⁾ or due to the striking out of unsubstantiated charges,⁽⁴¹⁾ but not where the amendment was made under the advice of counsel for purposes other than vexation or oppression⁽⁴²⁾ or to correct an error made inadvertently in hurriedly taken proceedings to check a wrong-doer."⁽⁴³⁾

An amendment of pleadings made at the trial by the Court, *mero motu*, in order to raise the real point at issue, is no ground for departing from the usual rule as to the costs of the action.⁽⁴⁴⁾ Where a witness's expenses were allowed by the Master on proper consideration the Court will not review the allowances on the ground that they were incurred through over-caution or mistake.⁽⁴⁵⁾

Where there were a number of important exhibits, such as the opinions of foreign lawyers on questions of foreign law and translations of foreign documents, an order was made that the Taxing Master should be at liberty to allow a special charge for perusal, the amount (if any) to be in his discretion.⁽⁴⁶⁾ Where affidavits filed on behalf of several defendants were the same the plaintiff's solicitor was not allowed to make a separate charge for perusing each of them.⁽⁴⁷⁾

Costs occasioned by affidavits ordered to be taken off the file for containing unnecessary matter or for being of unnecessary length, may be ordered to be borne by the party at fault.⁽⁴⁸⁾

The Court has complete jurisdiction over its own records, and may order affidavits to be taken off the file and destroyed.⁽⁴⁹⁾ The

(39) *Harrison v. Leutner*, (1881) 16 Ch. D. 559, C.A.; see also *The St. Olaf*, (1877) 2 P.D. 113; *Whiteley Exerciser v. Gamage*, (1898) 2 Ch. 405.

(40) *Watts v. Manning*, (1823) 1 Sim. & St. 421; *Strickland v. Strickland*, (1840) 3 Beav. 242; *Mavor v. Dry*, (1824) 2 Sim. & St. 113.

(41) *Bullock v. Perkins* (1746), 1 Dick. 110; *Kernot v. Critchley*, W.N. (1867) 252; *Finch v. Westrope*, (1871) L.R. 12 Eq. 24.

(42) *Monck v. Earl of Tankerville*, (1839) 10 Sim. 284.

(43) *Att.-Gen. v. Tomline*, (1877) 5 Ch. D. p. 769.

(44) *Nottage v. Jackson*, (1883) 11 Q.B.D. 637, C.A.

(45) *Oliver v. Robins*, (1894) 64 L.J. Ch. 203.

(46) *In Re De Rosaz*, (1883) 24 Ch. D. 684; see also *Prac. Notes*, Hilary, 1902.

(47) *Betts v. Cleaver*, (1872) L.R. 7 Ch. 513.

(48) See *Hirst v. Proctor*, W.N. (1882) 12; R.S.C. of England, O. LXV, r. 27 (20).

(49) *In re F.*, an infant, (1913) W.N. 4.

Court has, therefore, an inherent power to order pleadings or affidavits to be taken off the file for prolixity; but where an affidavit of documents was of oppressive length, and it appeared that the taking it off the file would cause delay and expense, it was allowed to remain, and the party filing was ordered to pay the costs.⁽⁵⁰⁾ But where an affidavit as to documents set out a very large number of letters instead of referring to them in bundles properly identified, it was ordered to be taken off the file and the costs to be paid by the defendants personally.⁽⁵¹⁾

Costs occasioned by irrelevant or scandalous matter in affidavit or pleadings.

Affidavits or pleadings containing scandalous matter may be ordered to be taken off the file.⁽⁵²⁾ Similarly where the affidavit is too long and also contains scandalous or irrelevant matter, the scandalous or irrelevant portion may be ordered to be expunged.⁽⁵³⁾ Where the Court thus orders the affidavit to be taken off the file or the irrelevant or scandalous portion to be taken off the file, it may also order the person who had filed such affidavit to pay the costs of it.⁽⁵⁴⁾

(50) *Hill v. Hart-Davis*, (1884) 26 Ch. D. 470, C.A.

(51) *Walker v. Poole*, (1882) 21 Ch. D. 835.

(52) *Goddard v. Parr*, (1885) 24 L.J. Ch. 783.

(53) *Osmaston v. Association of Land Financiers*, W.N. (1878) 101.

(54) *Cracknall v. Janson*, (1879) 11 Ch. D. at p. 13 (*Per Fry, J.*). As a rule a pleading or allegation will not be struck out merely because it is unnecessary unless it is also scandalous or embarrassing; *Knowles v. Roberts*, (1888), 38 Ch. D. 263, 270, C.A.; *Rock v. Purssell* (1887) 84 L.T. Jo. 45; *Tomlinson v. S.E. Ry. Co.*, (No. 2) (1887, 57 L.T. 358). Allegations made in a pleading for the mere purpose of abusing or prejudicing the opposite party and any indecent or offensive matters are scandalous (*Christie v. Christie*, (1873) L.R. 8 Ch. 499, C.A.; *Coyle v. Cuming*, (1879) 40 L.T. 455; *Cashin v. Cradock*, (1876), 3 Ch. D. 376. A pleading or allegation which is scandalous cannot be struck out if it is necessary or relevant to the issue or one of the issues in the action (*Christie v. Christie*, *supra*; *Cracknall v. Janson*, (1879) 11 Ch. D. 1, 13). However grave the imputations they involve, whether of immorality or otherwise, if they are material to the issue, that is, will affect the result of the action if proved to be true, they are not scandalous within the rule (*Millington v. Loring*, (1880) 6 Q.B.D. 190, C.A.; *Lump v. Beaumont*, *infra*; *Appleby v. Franklin*, (1885) (17 Q.B.D. 93; *Ex parte Simpson* (1809), 15 Ves. 476; *St. John v. St. John*, (1805) 11 Ves. 526). The Court will not, upon application to strike out such allegations, go into the question of their truth or falsehood. The sole question is: Are they relevant to the issues in the action? If they are, they must go to trial. If not, they will be struck out. The Court will go so far as to allow affidavit evidence showing that the pleading is simply an abuse of the process of the Court. In some cases it may be possible to show this without any decision as to the truth or falsity of the charges. If not, the case must go on. (*Remington v. Scoles*, (1897) 2 Ch. 1, distinguishing *Hildinge v. O'Farrell*, (1881) 8 L.R. Ir. 158). Very often if allegations made are "unnecessary" they will likewise be held to be scandalous (*Brooking v. Maudslayi*, (1886) 55 L.T. 343, where charges of concealment were abandoned in reply). This power to strike out scandalous matter

Where the Court or a Judge shall be of opinion that any Cost occasioned by improper denials or non-admissions in defence—Disallowed.
 allegations of fact denied or not admitted by the defence ought to have been admitted, the Court or Judge may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted. This rule is designed to compel parties only to dispute such material allegations as are really in contest. There is a tendency on the part of Judges, which is gradually becoming more marked, to strictly enforce this Rule. It has always been utilised to shorten and simplify litigation. (55)

The following items are generally allowed as costs :—(i) Court fees on the plaint, (ii) Process-fees; (iii) Exhibits in the case; (iv) Diet money for witnesses; (v) Other legal expenses (as) for travelling, etc., for witnesses; (vi) Fees for Commissioners; (vii) Fees for Accountants; (viii) Costs of necessary translations; (ix) Pleader's fees, this last being *ad valorem*, irrespective of any private arrangement between pleader and client. (56)

Certain items allowed :—
 (i) Court-fees
 (ii) Process-fees.
 (iii) Exhibits.
 (iv) Diet money etc., for witnesses.
 (v) Commissioner's fees.
 (vi) Accountant's fees.
 (vii) Pleader's fees.

When costs are awarded to a successful litigant, the costs which are allowed are the reasonable costs of the proceedings of such a party in the action, including the costs incurred in obtaining the assistance of solicitors and counsel, the expenses of the various steps in the action, of any interlocutory proceedings of the trial itself, and of the proceedings upto the signing of judgment. (57)

Where a suit was decided after trial, and the decision being reversed by the High Court on appeal, the case was remanded with orders allowing the plaintiff to amend his plaint, but requiring him to pay all the costs of the first two hearings it was *held* that the stamp for the plaint was properly included in the costs of the second hearing in the Court below, and that, as the case was sent

does not only apply to pleadings. By O. XXXI, r. 7 of R.S.C. in England it also applies to interrogatories. Moreover, in *Goddard v. Parr*, (1855) 24 L.J. Ch. 789, affidavits were ordered to be taken off the file for containing scandalous and irrelevant matter, and there is a general jurisdiction in the Court to prevent any process of the Court being used for the purposes of disseminating scandalous and irrelevant matter. See *Re Miller*, (1884) 54 L.J. Ch. 205, where certain parts of a bill of costs were ordered to be expunged.

(55) See Rules of Supreme Court, (1883) O. XXI, r. 9.

(56) See Gour's Transfer of Property Act, 4th Ed., Vol. II, citing *Umritonath v. Raghonath*, 6 W.R. Mis. 35; *Arimullah v. Secretary of State*, 15 M. 405 affirmed in 17 M. 162. See also *P. Nusservanji & Co. v. SS. Wartenfels*, 18 Bom. L. R. 118.

(57) See Halsbury's Laws of England, Vol. XXIII, S. 335, p. 184.

back for re-trial and not as a mere remand, the whole of the pleader's fees should be paid for the second trial. (58)

In a suit to set aside a settlement, two accountants were employed at the plaintiff's instance, and not by order of Court, to examine the settlor's books and give evidence: It was held that the investigation being most useful to the Court, and adapted to the ends of justice, the Taxing Master was right in allowing their expenses. (59)

(58) *Madhub Chunder Bera v. Ram Lochun Bera*, 14 W.R. 143. The stamp fee which the party liable to pay costs would be required to pay is only the amount which ought, according to law, to be paid on the plaint. Any excess fee paid by mistake, whether of the Court or of the plaintiff, cannot be demanded from the defendant. See *Ajoodhya v. Daibee*, 3 Agra Rev. 5.

(59) *Macnair v. Hogg*, 2 Hyde 89. Macpherson, J., said in the course of the judgment:—"This is an application that the Taxing Officer be directed to review his taxation of the plaintiff's costs as respects two sums—One of Rs. 1,500 and one of Rs. 200—allowed to Mr. Burgess and to Mr. Bonwood, who are employed to investigate certain accounts, and to give evidence as to them at the hearing of the suit. There is no doubt that the expense of preparing or qualifying a witness to give evidence is not usually allowed in an ordinary case, *Severn v. Olive*, 3 B. & B. 27; *May v. Silby*, 1 Dowl. N.S. 701; *Gravatt v. Attwood*, 21 L.J. Q.B. 215; *Small v. Batho*, 21 L.J.Q.B. 254. But the decisions are not invariably consistent, nor do they always follow the same principle. We find that the expenses of successful searches for pedigree are allowed (*Johnson v. Lawson*, 2 Bing. 341); so also are the cause of a witness called to translate and explain old records, and to give evidence on them, as an antiquary (*Bastard v. Smith*, 10 A. and E. 213). In the latter of these cases, both of which have some bearing on the one now before me, Lord Denman remarked that it might be, perhaps, be said that the judge should have been able to translate and explain the record to the jury, adding "but it is at all events convenient that such a person as Mr. Doven should be present to do so." The case I have to deal with, however, is on a different footing from any of those which have been referred to, owing to the objects for which, and the peculiar circumstances under which, the suit was instituted. The plaintiff, a creditor of one John Law Turnbull, deceased, sued on behalf of himself and all other creditors of the deceased, the Administrator-General as representing the estate of Turnbull, and the Trustees of a deed of settlement executed by Turnbull, to have that deed set aside as void by reason of Turnbull's having been insolvent at the time he executed the deed. The Court set aside the deed as prayed, and ordered the costs of all the parties to the suit, taxed according to scale No. 3 to be paid by the Administrator-General out of the estate of the deceased. The whole question turned upon the fact whether Turnbull was or was not solvent at a certain date, and, he being dead, there were no possible means of ascertaining the true state of his circumstances, except by a careful examination of his books of account. These books were carefully examined by the accountants, whose expenses it is now sought to disallow; and it was only by reason of their having been so examined, and by reason of the attendance in Court of one of the accountants, Mr. Burgess, that the Court was enabled to understand the accounts, or to judge of the solvency or insolvency of Turnbull. The expenses of a plan used for the information of the Court at the trial have been allowed (*Holmes v. Holmes*, 2 Bing. 75), and, on the same principle, it appears to me that the expenses of statements of accounts prepared and used for the information of the Court, when their being so prepared and used is absolutely essential to the due understanding of the

Where the Court gives at the hearing the costs of a suit or (viii) Costs of proceeding, the subsequent costs of working out the directions of the order of the Court will, in the absence of any direction to the contrary, (60) be included, unless further consideration is reserved.⁽⁶¹⁾

"If, therefore, the subsequent costs are not intended to be included, further consideration should be reserved, or the direction should be confined to the costs up to the judgment."⁽⁶²⁾

question at issue, and is in fact the main evidence in the case, ought also to be allowed. Moreover, this suit is in fact a suit brought for the benefit of the estate of the deceased by a creditor suing on behalf of himself and all other creditors; and if there had been an express order of the Court that all costs, as between solicitor and client, should be paid out of the funds in the hands of the Administrator-General, the directions would have been in accordance with what is commonly ordered in regular creditors' suits (see the cases collected in Williams' Executors (5th Ed.), pp. 1847, 1848, etc.). The Taxing Officer is not wholly without discretion so long as he introduces one distinct rule as principle; and in this case it seems to me that in allowing these costs as between Solicitor and Client, he was acting quite in accordance with the spirit of the rule usually followed by the Court in similar cases. Finally, it appears to me that, looking at the matter in another point of view, I ought not to interfere with what has been done by the Taxing Officer. The question of costs in this Court is now regulated by S. 188 of the Civil Procedure Code; and I am not prepared to say that the Courts in England are necessarily to be strictly followed in every instance. S. 188 declares what charges ought to be allowed under the head of "Costs," and, amongst others, mentions "expenses of Commissioners on investigations into accounts." Here, no doubt, the investigation was not made by order of the Court. But had it not been made when it was, probably a Commissioner would have been appointed by the Court to make the investigations, or the plaintiff would have failed in his suit. As investigation made at the plaintiff's instance, although made without the order of the Court, was most useful to the Court, and essential to the ends of justice, I think that, under S. 188 of the Civil Procedure Code, if under no other rule, the Taxing Officer was justified in allowing the expenses of the accountant. As I am of opinion that some allowance was rightly made, the question of the amount allowed is not open to discussion before me. I may add that I have consulted Mr. Justice Morgan, by whom the suit was heard, as regards the necessity for the employment of the accountants. He is of opinion that the affidavit which declares that it was absolutely necessary does not go at all too far, and that the investigation of the accounts by Mr. Burgess, and his attendance at the trial to explain them, were absolutely essential." *Per Macpherson, J.*, in *Macnair v. Hogg*, 2 Hyde. 89 (90-93).

As to the fees of accountants, see *Meymott v. Meymott*, (1864) 33 Beav. 590; *Re Charles Lafitte & Co., Limited*, (1875) 20 Eq. 650; see *Smith v. Buller*, (1875) L.R. 19 Eq. 473; *Bailey v. Kynock*, (1875) L.R. 20 Eq. 632; *Turnbull v. Janson*, (1878) 3 C. P.D. 264; *East Stonehouse Local Board v. Victoria Brewing Co.*, (1895) 2 Ch. 514.

(60) *Slack v. Midland Ry. Co.*, 16 C.D. 81. For form of inquiry as to damages after judgment, with direction as to payment of costs, see Seton, 519.

(61) *Krehl v. Park*, 10 Ch. 334; Seton, 257. This will be the case, although the costs not before provided for are reserved, if there are other costs which might be included under these words (*Quarrell v. Beckford*, 1 Madd. 269, 286).

(62) See Seton on Judgment and Orders, Vol. I, p. 184.

(ix) Costs of translation.

Where the Privy Council specifies a sum as the costs of an appeal to itself, the sum does not include the costs of translation, &c., incurred in the High Court.⁽⁶³⁾

(x) Correspondence, charges of.

It has been held by the English Courts that a solicitor cannot charge for letters unless properly written in his character of solicitor and for the purpose of advancing the business of the client.⁽⁶⁴⁾

(xi) Costs of expert witnesses.

Costs of experts' expenses would be disallowed in absence of special order where they are not called as witnesses though assistance was given to counsel.⁽⁶⁵⁾

(xii) Short-hand writer's notes—Expenses of.

General costs do not include shorthand writer's notes; these require a special direction.⁽⁶⁶⁾

(xiii) Carbon copies, costs of.

Carbon copies produced mechanically simultaneously with the original cannot be charged for as if made by a copying clerk.⁽⁶⁷⁾

Costs, Scale of, in application for revocation of probate.

A proceeding instituted for revocation of probate cannot be regarded as a regular civil suit but is a miscellaneous proceeding and pleader's fees in such a proceeding should be fixed upon that footing.⁽⁶⁸⁾

(63) *Mussamut Oomatool Fatima v. Ashur Ali*, 15 W.R. 356. See, also, p. 183, *supra*.

(64) *Re Brady*, (1867) 15 W.R. 632 (Eng.).

(65) *Consolidated Pneumatic Tool Co. v. Ingersoll Sergeant Drill Co.*, (1908) 125 L.T. Jo., p. 106, but allowed in *G.W. Ry. Co. v. Carpala United China Clay Co.*, (1909) 2 Ch. 471.

(66) The "*Turrett Court*," 5 C.W.N. (Journal portion) p. clxxix. See Halsbury's Laws of England, Vol. XXIII, pp. 334-336, Notes.

(67) See *Re Morse*, (1891) 65 L.T. 552, C.A.; Pract. Notes, Hilary, 1902.

(68) *Pratap Chandra Shaha v. Kali Bhanjan Shaha*, 4 C.W.N. 600. The Court, Banerjee and Stevens, JJ., said in the course of the judgment:—"Evidently the Court below has treated the proceeding instituted by the applicant for revocation of probate as a suit which was terminated by a decree, and has allowed pleader's fee as in a regular civil suit. The question is whether that view of the matter was correct. We are inclined to think that it was not, and that the proceeding ought to have been treated as a miscellaneous proceeding. It is true that S. 83 of the Probate and Administration Act (V of 1881) provides that "in any case before the District Judge in which there is contention the proceeding shall take as nearly as may be the form of a suit according to the provisions of the Code of Civil Procedure;" but the latter part of the section clearly shows that that applies only to an application for probate or letters of administration; and that the section cannot apply to an application for revocation of probate. The section of the Act applicable to such a proceeding is S. 55 which says that "the proceedings of the Court of the District Judge, in relation to the granting of probate and letters of administration, shall, except as hereinafter otherwise provided, be regulated, so far as the circumstances of the case will admit, by the Code of Civil Procedure." And treating the proceeding in this case as a miscellaneous proceeding, we think that

It is not proper for a Court to make a conditional order as to costs. (69) Conditional order for costs.

Thus an order of the lower Court directed that as defendant, special appellant, did not dispossess the plaintiff, he should be released from costs except in the event of his further opposing the plaintiff's claim in which case costs are to be realized from him. It was held that a conditional order of the above nature is inadmissible and as petitioner has been released from the suit he should unconditionally have his costs. (70)

The Court or a Judge at the trial or hearing or further consideration of a cause or matter, or of any application therein, may allow costs on the higher scale, if there are special grounds for such allowance arising out of the nature and importance or difficulty or urgency of the case. (71) Costs on higher scale — Practice.

Similarly the rules which the Madras High Court has framed for observance in its original side declare:—"Unless otherwise ordered the fees allowed shall be those set forth in the column headed "lower scale." On special grounds the Court may, at the trial or hearing of a suit, matter, or appeal, or at the hearing of any application therein, order that the fees set forth in the column headed "higher scale" shall be allowed, either generally in the case, or as to the costs of any particular application made, or business done, therein." (72)

According to the practice of the Courts in England, "Costs on higher scale are allowed, either generally or as to particular business in any case or matter if, "on special grounds, arising (1) out of the nature and importance, or (2) the difficulty, or (3) urgency of the case," the Court or a Judge shall so order, or if the taxing officer, under directions given to him by the Court or a Judge, shall think such allowance ought to be made upon such special grounds." (73)

the pleader's fee ought not to have been fixed at any amount exceeding Rs. 80." See also *Garbini Dasi v. Pratap Chandra Shaha*, 4 C.W.N. 602 (604).

(69) *Buttleshurnath v. Neema Koonwur*, (1857) 13 S.D.A.R. 1145=16 Ind. Dec. Old Series, 143.

(70) (*Ibid*).

(71) See Halsbury's Laws of England, Vol. XXIII, S. 334, p. 183.

(72) See Original Side Fee Rules of the Madras High Court, O.V, r. 40; there are similar provisions in the Rules made by the other High Courts also. See Appendix, *infra*.

(73) Seton's Judgments and Orders, 6th Ed., Vol. I, 1901, p. 260.

Where there are no 'special reasons' for the grant of costs on the higher scale, it is not proper to award costs on the higher scale.⁽⁷⁴⁾

In order that the higher scale should be allowed, it is not sufficient that the case is one of importance and difficulty, but there must be "special grounds arising" in one of the three ways mentioned in the rule.⁽⁷⁵⁾

The following have been considered as sufficient and special grounds for the award of costs on the higher scale:—(i) trial occupying considerable time and raising matters of great importance to both sides; ⁽⁷⁶⁾ (ii) where a number of scientific witnesses were found essential; ⁽⁷⁷⁾ (iii) the fact that the case required special knowledge. ⁽⁷⁸⁾

The following have been considered not to afford special or sufficient grounds for awarding costs on the higher scale:—(i) the fact that the case lasted five days; ⁽⁷⁹⁾ (ii) allegation of fraud; ⁽⁸⁰⁾ (iii) points of difficulty raised in the case; ⁽⁸¹⁾ (iv) amount of the fund in question being large; ⁽⁸²⁾ (v) difficulty and complication, and the fact

(74) *C. Ramanjulu Naidu v. Apparanji Amma*, 9 M.L.T. 383=21 M.L.J. 313=9 Ind. Cas. 417. The Court (White, C.J.) said:—"I am always reluctant to interfere in the matter of costs which are in the discretion of the learned Judge. In this case the learned Judge gave the plaintiff costs upon the higher scale. Now, the rule empowers the Judge to award costs on the higher scale for special reasons. The learned Judge says: "The defendants must pay the costs of the suit.....Under the circumstances, I direct them to be taxed on the higher scale." He gives no reasons why costs on the higher scale should be given and I must say, speaking for myself, I fail to see any circumstance in this case which constitutes "special reasons," within the meaning of the rule. If the learned Judge had specified any special reasons I should certainly not be disposed to interfere; but, as he has not, I think the plaintiff should only have costs on the lower scale." Per White, C.J., in *C. Ramanjulu Naidu v. Apparanji Amma*, 9 M.L.T. 383=21 M.L.J. 313=9 Ind. Cas. 417. In the case of *Bamasoondaree Dossee v. Verner*, the Calcutta High Court allowed costs of appeal on the higher scale No. 2."

(75) *Williamson v. North Staffordshire Ry. Co.*, 32 Ch. D. 399, C.A. (containing observations on *Lydney & Wigpool Co. v. Bird*, 31 Ch. D. 328); *The Horace*, 9 P.D. 86; *Paine v. Chisholm*, 39 W.R. 353 (Eng.).

(76) *Rivington v. Garden*, (1901) 1 Ch. 561.

(77) *The Robin*, (1892) p. 95.

(78) *Moseley v. Victoria Rubber Co.*, (1887) 57 L.T. 142. For instances of special grounds where costs on a higher scale were given, see *Davies v. Davies*, (1887) 36 Ch. D. 359, C.A.; *Re Leeuw Rein v. Wrathall*, (1892) 93 L.T. Jo. 333; *Marriott v. Cobbett*, (1894) 38 Sol. Jo. 620.

(79) *Williamson v. North Staffordshire Railway Co.*, (1886) 32 Ch. D. 399, C.A.

(80) *Assets Development Co. v. Close*, (1900) 2 Ch. 717.

(81) *Stamford (Earl) v. Dawson*, (1867) L.R. 4 Eq. 352.

(82) *Re Spettigne's Trusts*, 32 W.R. 385 (Eng.).

that a case has been conducted with extreme ability, are not special grounds for allowing costs on the higher scale.⁽⁸³⁾

The fact that the plaintiff has certified the lower scale does not interfere with the discretion of the Court to allow the higher scale if proper grounds exist for such allowance.⁽⁸⁴⁾

Where the higher scale was allowed in the Court of first instance, it was allowed also by the Court of appeal on reversing the decision and dismissing the action.⁽⁸⁵⁾

An appeal lies from an order allowing costs on the higher scale on the question whether there are special grounds, but not on the mode in which discretion has been exercised.⁽⁸⁶⁾

(83) *Rivington v. Garden*, (1901) 1 Ch. 561 (a patent action); nor an allegation of fraud: *Assets Development Co. v. Close Bros.*, (1900) 2 Ch. 717. As to allowing costs on higher scale where an expensive class of witnesses are required, as in patent actions, see *Frazer v. Brescia Steam Tram Co.*, 56 L.T. 771; *Hopkinson v. St. James, &c., Electric Co.*, W.N. (93) 5, C.A.; Seton's Judgments and Orders, 6th Ed., Vol. I, 1901, p. 261. For instances of cases in which it was held there were not special grounds for award of costs on high scale, see *Williamson v. North Staffordshire Railway Co.*, (1886) 32 Ch. D. 399, C.A.; *Assets Development Co. v. Close*, (1900) 2 Ch. 717. The following also have been held not to be good ground for allowing costs on a higher scale:—The fact that defendant submits to an injunction for a deliberate infringement of plaintiff's rights (as so to rule would be to impose a penalty on him for submitting); *Hudson v. Osgerby*, 32 W.R. 566 (Eng.); 50 L.T. 323; the fact that on motion for interlocutory injunction important questions are raised; *Grafton v. Watson*, 51 L.T. 141; the mere fact that an issue of fraud is raised, *Re Terrell*, 22 Ch. D. 473, C.A.; *Secus, Harrison v. Leutner*, 24 Ch. D. 594.

(84) See *Moseley v. Victorial Rubber Co.*, 57 L.T. 143, 148; *Pooley's Trustees v. Whetham*, 33 Ch. D. at p. 120; *Re Chaytor's Settled Estates Act*, 25 Ch. D. 651; *Cardiff Steamship Co. v. Barwick*, 53 L.T. 56; *Ellington v. Clark*, 38 Ch. D. 332; 58 L.T. 818; *Horner v. Oyler*, 49 L.J.C.P. 655; Seton's Judgments and Orders, 6th Ed., Vol. I, 1901, p. 261.

(85) *Turton v. T.*, 42 Ch. D. 128, 149, C.A.

(86) *Paine v. Chisholm*, (1891) 1 Q.B. 531, C.A.; and see *Automatic Weighing Machine Co. v. Knight*, (1889) 6 R.P.C. 297 (310); Halsbury's Laws of England, Vol. XXIII, p. 184, Note.

CHAPTER V.

CONSTRUCTION OF DECREE AS TO COSTS.

Necessity for construing decrees.

General rule as to construction of decree.

Decree being ambiguous—Construction of.

Decree containing vague and indefinite clauses—Construction of.

Decree for costs—Construction—General rule and practice in India.

Decree for costs "according to usual practice"—Construction of.

Decree awarding plaintiff's claim "with usual costs and interest"—Construction of.

Decree for "plaintiff's claim with costs"—Construction of.

Decree "according to judgment-debtor's written statement"—Construction of.

Decree awarding defendant's costs collectively—Construction of.

Decree for costs "between party and party"—Construction of.

Decree for "proportionate costs"—Construction of.

Decree that "costs should follow the event"—Construction of.

Decree for "costs to abide the result"—Construction of.

Decree directing "costs to abide the result" and "to abide and follow the result"—
Difference.

Decree giving costs as alternative remedy—Construction of.

Decree apparently awarding costs twice—Construction of.

Decree for costs and interest—Construction of.

Decree for costs, whether personal or charged on estate—Construction of.

Decree for costs—Jurisdiction of Court executing decree in the matter of construing
it.

Decree for costs in foreclosure decree—Construction of—Execution.

Decree against guardian or next friend—Whether personal or against estate—
Construction of.

Decree of appellate Court as to costs—Construction of.

Decree "allowing appeal with costs"—Construction of.

Decree in appeal that "appeal dismissed or decreed with costs"—Construction of.

Decree in appeal allowing a set of costs to respondents—Construction of.

Decree in appeal directing payment of "costs incurred in lower Court"—Construc-
tion of.

Decree reversed on appeal with costs of both Courts—Costs of superseded decree if
recoverable—Construction.

Appeal by several defendants—Costs—Construction.

Decree of Privy Council—Construction—Costs of translation and printing.

Decree for costs expressed in fluctuating currency—Construction of.

Agreement to pay costs of litigation—Construction of.

"Subsisting decree"—Meaning of.

Error in the construction of decree—Effect.

Construction of decree—View of Judge that passed the decree.

"THERE is no difficulty in construing a decree drawn up in the form prescribed for the purpose in the Code of Civil Procedure.⁽¹⁾ But decrees are often drawn up in a crude and inartistic form. It becomes then necessary to construe them. Ordinarily a decree must be construed as it is, for the rule is that, a claim made but not decreed is presumed to have been refused. But a party benefiting by a particular construction of the decree is not debarred from showing it."⁽²⁾

A decree is not absolutely bad for being not worded in the prescribed form.⁽³⁾

Thus a decree that the claim of the plaintiff with costs of the suit and future interest be decreed has been construed in the light of the claim, by the majority of the Allahabad Full Bench to be a decree for the enforcement of a lien.⁽⁴⁾

(1) *Broughton v. Rajah Saheb*, 19 W.R. 152 (153). On the subject-matter of this chapter see also chapter on "Interest on Costs," *infra*.

(2) *Sri Raja Rao v. Sri Raja Innuganti*, 21 M. 344, P.C.=25 I.A. 102=2 C.W.N. 337=7 Sar. 325; *Lachmi Narain v. Jwalanath*, 18 A. 344; *Amolak Ram v. Luchmi Narain*, 19 A. 174. See also Gour's Transfer of Property Act, 4th Ed., Vol. II, 1491.

(3) *Anna Pillai v. Thangathammal*, 20 M. 78.

(4) *Debi Charan v. Pirbhu Din*, 3 A. 388, F.B.; see also *Ram Prasad v. Raghunundun*, 3 A. 239; see also Gour's Transfer of Property Act, 4th Ed. Vol. II, Sr. 1491—1493. In the case of *Debi Charan v. Pirbhu*, 3 A. 388, F.B., Pearson, J., said:—"The claim was decreed, not a part of the claim but the whole claim. The decree contains the particulars of the claim, but, in ordering that the claim of the plaintiff be decreed with costs and interest at eight annas per cent. per mensem, it may be that it does not "specify the relief granted" in the manner intended by S. 206 of the Civil Procedure Code. Notwithstanding the defect of specification, I am, however, of opinion that the decree is one for the enforcement of a lien and not merely a money-decree. Indeed if, in consequence of that defect, it could not be regarded as a decree for the enforcement of a lien, it could not for the same reason be regarded as a money-decree. But the decree cannot be treated as a nullity nor can execution of it be reasonably refused merely on account of such a defect. There can be no doubt as to what relief was really granted by the decree because it is the same as what was claimed, and is specifically stated in the plaint and in the heading of the decree. No difficulty is caused in the execution of the decree by reason of any doubt of that sort. To deprive the decree-holder of the benefit of his decree on the ground of the defect noticed would be to administer the law so as to defeat the ends of justice. For that defect the Judge

General rule
as to
construction
of decree.

In construing a decree, the plain language of the decree alone should be looked into ; when the language of the decree is clear and unambiguous, reference cannot be made to the plaint, the judgment, or any other record connected with the case.⁽⁵⁾

Where the terms of a decree are clear and free from doubt, the Court cannot refer to the judgment or the award in case the judgment is passed on an award.⁽⁶⁾

If, however, the decree be not self-contained, and if, in order to construe the decree, it is necessary to determine what was in issue in a former suit, such decree may be construed with reference to the pleadings and the record in such suit.⁽⁷⁾

If, in the construction of a decree, it is necessary to see what was in issue in a suit or what has been heard and decided therein, it is the judgment that can and must be primarily looked at.⁽⁸⁾

Generally speaking, the Judge is bound to construe the decree as it stands and not to go beyond it or incorporate anything into it.⁽⁹⁾

It is only when a decretal order is not self-explanatory, that it would be necessary, in order to its being rendered intelligible, to read it with the judgment and the record. ⁽¹⁰⁾

and ministerial officers of the lower Court and the pleaders of the parties in that Court are responsible. The last clause of S. 206 provides that, "if the decree is found to be at variance with the judgment, or if any clerical or arithmetical error be found in the decree, the Court shall of its own motion or on that of any of the parties amend the decree so as to bring it into conformity with the judgment or to correct such error." In the present instance the decree is not at variance with the judgment ; and the defect of specification is hardly a clerical or arithmetical error ; but I cannot conceive that the Court would be incompetent to supply the defect, if it were absolutely impossible for the decree to be executed without amendment. But I have already intimated that in my judgment the decree framed is clearly and unambiguously in terms as well as in intention one both for money and enforcement of lien, and should be executed as such." *Debi Charan v. Pirbhu Din Ram*, 3 A. 383 = A.W.N. (1881) 43.

(5) *Sheonarain v. Ishri Prasad Narain Singh*, A.W.N. (1883) 148.

(6) See *Rallia Ram's Civil Procedure Code*, 1908, 1st Ed., 1908, p. 233, citing P.R. 1907.

(7) *Shamboo Teli v. Sukhra Gond*, 11 C.P.L.R. 130, referring to *Kali Krishna Tagore v. Secretary of State*, 16 C. 173 and *ref. to in Anand Rao v. Bansinath*, 3 N.L.R. 35; *Seth Narsinghdas Mokhum Chand v. Seth Tarachand Mokhum Chand*, 2 N.L.R. 57.

(8) *Sri Raja Rau Lakshmi Kantaiyammi v. Sri Raja Inuganti Rajagopal Rau*, 21 M. 344 = 25 I.A. 102, P.C. = 2 C.W.N. 387 = 7 Sar. 325.

(9) *Oolfutoonissa Beetee v. Akbur Ali*, 4 W.R. Mis. 20.

(10) *Lachman Singh v. Mohan*, 2 A. 497, F.B. = 4 Ind. Jur. 644 (*dissented from in D. Narasamma v. D. Kannaya*, 4 M. 124; *followed in Rajab-un-nissa v. Habib Baksh*, 66 P.W.R. 1907 = 57 P.R. 1907; and *referred to in Ram Prasad Ram v. Raghunundun Ram*, 3 A. 239; *Krishna Chandra Goldar v. Mohesh Chandra Saha*, 9 C.W.N. 584).

In order to determine whether a question was determined by the decree in a former suit, the judgment on which the decree is based can be referred to. (11)

The Court is bound to interpret a decree according to the language to be found in it. It is not justified in ignoring the terms of the decree and assuming that the parties have made a mistake. Where there is no ambiguity in the terms of a decree, the Court is bound to interpret it according to the plain meaning which its language would bear. (12)

In construing a decree drawn up inartistically, regard must be had to the intention of the parties as disclosed by the pleadings in the suit in which the decree has been passed as well as the intention of the Court, which passed the decree, so far as it can be gathered from the judgment and the decree. (13)

In a case where the words of a decree are open to doubt "that construction must be placed on the words used which does not impose a liability on the judgment-debtor which is not in express and specific terms imposed upon him." (14)

An ambiguous decree must be construed so as to bring it into harmony with the words of the law. (15)

Decree being
ambiguous—
Construction
of.

Where a decree is ambiguous, the Court executing it must put its own construction on it, and, if possible, will construe it as a decree, properly framed according to law; but where there is no ambiguity in the decree the executing Court is bound to execute it according to its terms whether the decree be right or wrong. (16)

(11) *Magnitram v. Mehdi Hossein Khan*, 31 C. 95=8 C.W.N. 30 (following *Kali Krishna Tagore v. Secretary of State*, 16 C. 173, P.C.; *Jagatjit Singh v. Sarabjit Singh*, 19 C. 159, referred to in *Gurdeo Singh v. Chandrikah Singh*, 5 C.L.J. 611=36 C. 193). "When the language of a decree is plain and unambiguous, the Court cannot look at its judgment to interpret it. It is only when the terms of a decree are ambiguous that it can be interpreted in the light of the judgment." *Kasim Ali v. Manik Chand*, 5 O.C. 35.

(12) *Sita Ram v. Ram Sarup*, 6 Ind. Cas. 75.

(13) *Syed Meer Hussain v. Subbaramappa*, 5 M.L.J. 230.

(14) *Per Rattigan, J.*, in *Balshahi Ram v. Gumano*, 13 P.R. 1907, noted *infra*.

(15) *Asma Bibee v. Ram Kant Roy Chowdhry*, 19 W.R. 251.

(16) *Prihhu Narain v. Rup Singh*, 20 A. 397; *Maharaja of Bhartpur v. Rani Kanno Dei*, 23 A. 181, P.C.=28 I. A. 35=5 C.W.N. 137=3 Bom. L.R. 51; *Parkhit v. Chamdra*, 15 C.P.L.R. 134. It has been held in Calcutta that the executing Court cannot go behind it or question its validity (*Chhoti Narain v. Mt. Rameshwar*, 6 C.W. N. 796; *Kashi v. Jamuna*, 31 C. 922; *Rama v. Anukul*, 20 C.L.J. 512), but it would appear that the contrary has been maintained in Bombay where it has been held that

Decree containing vague and indefinite clauses—Construction of.

In construing a decree vague and indefinite clauses are to be ignored. Thus an order for costs if made payable personally by the mortgagor must be expressly made. A clause to the effect: "It is further ordered that the defendant aforesaid do pay to the plaintiffs aforesaid the sum of Rs. 876-8, the amount of costs incurred by them in this Court"—is not by itself sufficient to entitle the decree-holder to recover the amount from the mortgagor personally.⁽¹⁷⁾

Decree for costs—Construction—General rule and practice in India.

According to the practice of the Courts of this country, the costs which fall to be paid under an order for payment of costs are not the actual expenditure which the parties may have been put to, but a lump sum of money in lieu thereof estimated in a certain proportion to the valuation of the suit. This is a matter of general expediency, and the main object of the rule is to avoid the difficulty which would otherwise be experienced in the Mofussil Courts of checking and ascertaining, in the case of each party the actual expenditure to which he had been put.⁽¹⁸⁾

The Court has no power to import into the decree for costs anything which is not expressly or by necessary implication specified therein.⁽¹⁹⁾

A person, who in the course of execution of a decree, had been turned out of possession by an order under S. 269, Act VIII of 1859, and who was compelled to pay the costs of that order, brought a regular suit for its reversal and obtained a decree, which was silent as to the costs of the summary order, in consequence of the plaintiff not having demanded them; subsequently the plaintiff made an application that the costs of the summary order should be repaid to her. It was *held* that, supposing the application to be an application in the suit in which the summary order was passed, the Court had no power to entertain it under S. 11, Act XXIII of 1861, and it should therefore be dismissed. The Court also *held* that if the application be considered an application in the suit which was brought for the reversal of the summary order, then

the executing Court is entitled to see that the decree it is called upon to execute is of a Court competent to pass it (*Bagwantappa v. Vishwanath*, 28 B. 378; *Trimbak Rao v. Balvant Rao*, 30 B. 101 (108); *Gour's Transfer of Property Act*, 4th Ed., Vol. II, p. 1491).

(17) *Maqbul v. Lala*, 20 A. 523, F.B. = A.W.N. (1898) 157; (*Chiranjiv v. Moti Ram*, A.W.N. (1898) 33, *overruled*); see also *Maruti v. Krishna*, 23 B. 392.

(18) *Gunesh Dutt Singh v. Mungay Ram Chowdhry*, 21 W.R. 288.

(19) *Mussamut Beebee Toyboon v. Mahomed Wajid*, 2 C.L.R. 504.

the Court had no power to import into the decree in that suit anything which was not specified therein, and that the application must therefore be dismissed.⁽²⁰⁾

Where the plaintiff had asked, in his plaint, for future interest on the amount decreed, and he obtained a decree in the following terms:—"The plaintiff's claim for the amount claimed, together with costs, by enforcement of lien, is *according to the usual practice*, decreed," it was *held* that the terms of the decree were wholly inadequate to carry future interest.⁽²¹⁾

Decree for costs "according to usual practice"—Construction of.

Where a decree was passed awarding plaintiff's claim "with usual costs and interest," without any specification of the costs intended, save the mention of some items in the schedule, and without mentioning the rate of the interest or the date from which it should run, it was *held* that the decree was meant to give all the costs which the successful party had incurred in the prosecution of the suit from the commencement until the date of the final decree, including costs incurred in the abortive part of the proceedings, *i.e.*, in trials set aside; and that the interest was to be at 12 per cent. on the amount of money actually decreed.⁽²²⁾

Decree awarding plaintiff's claim "with usual costs and interest"—Construction of.

(20) (*Ibid*). The reversal of a decree by an appellate Court implies an order setting aside all that has been done under orders contradictory of the final order in the suit; but where a summary order made in the course of execution proceedings has been set aside in a separate suit brought for that purpose, it cannot be necessarily implied that the intention of the Court was to cancel everything that had been done in the course of the summary proceedings. See *Mussamut Beebee Toyboon v. Mahomed Wajid*, 2 C.L.R. 504.

(21) *Jatan v. Bahadur Singh*, 3 A.W.N. 128. In this case the respondent sued the appellant for certain money, asking in the plaint in the suit for future interest, that is to say, interest on the amount decreed from the date of the decree to the date of realization. No particular rate of interest was claimed by him. He obtained a decree in these terms:—"The plaintiff's claim for the amount claimed, together with costs, by enforcement of lien, is *according to the usual practice (hasb-i-zabita mugarrari)*, decreed." The respondent sought to recover in execution of this decree "future interest", or interest on the decretal amount, at six per cent. from the date of the decree. *Held*, by Straight and Oldfield, JJ., that the terms of the decree were wholly inadequate to carry future interest.

(22) *Broughton v. Rajah Saheb Perhlad Sen*, 19 W.R. 152 (153). Phear, J., said in the course of the judgment:—"It is obvious on the perusal of the translation of the formal decree, which is now before us, that the decree was very loosely drawn up indeed. It does not otherwise specify the claim of the plaintiff which it purports to decree than by a recital of the principal heads of the plaint, and in that recital it omits altogether to mention so much of the plaint as was a claim for interest; moreover, it does not specify the items for costs in words, but simply says in general terms *usual costs*. And the schedule does not clear up this matter, because it only specifies some of the items of the costs incurred by the parties in the whole of the

Decree for
"plaintiff's
claim with
costs"—
Construction
of.

A decree for "the plaintiff's claim with costs" would mean the claim as laid in the plaint.⁽²³⁾

The words "the plaintiff is to have judgment for his moiety with interest at the full legal rate and the costs of the proceedings in the Court below" have been held to give plaintiff a decree for the moiety claimed by him (*i.e.*) a sum which he alleged to be due for

proceedings in the suit, and not all of them. This formal decree also omits altogether to mention the rate of the interest awarded, the date from which the interest is to run, and leaves it altogether uncertain whether the Court intended to award the plaintiff any interest at all upon the several items of the money claimed for any time previous to the date of the decree. It is quite clear that all uncertainty of this kind ought to have been prevented, and would have been prevented, if the decree had been clearly drawn up according to the provisions of the Civil Procedure Code. After the best consideration that we can give to the matter, it seems to us that the Judge, by using in this decree the term *usual costs*, meant to give all the costs which the successful party had incurred in the prosecution of the suit from the commencement until the date of the final decree. And if so, those costs would unquestionably comprehend the costs which have been incurred in what we may term the abortive part of the proceedings, namely, in the trials had in the different Courts which were set aside by the Privy Council; it would also include the costs of the Privy Council proceedings as well, because the Privy Council directed that those costs should be treated as costs in the cause, and the Judge does not deal with them separately from the rest. It is no doubt very unfortunate that the formal decree omitted to make this clear beyond all doubt; and it is also very unfortunate that the schedule which ought to contain all the items of costs only specified three of them." *Per* Phear, J., in *Broughton v. Rajah Saheb*, 19 W.R. 152 at p. 153. Where a decree was given for a certain amount with interest, the rate not being specified, the High Court considered itself bound by the authorities to affirm an order made by the Court executing the decree, allowing the Court-rate usual at the time of the making of the decree. *Madhub Lal Khan v. Noyan Ghose*, 6 C.L.R. 231. In the case of *Mussamut Soobudra Bebee v. Sheo Churn Lali*, 7 W.R. 375, Mr. Justice Macpherson, in delivering the judgment of the Court says: "As the decree does not specify the rate of interest, we think the Court ought to have allowed interest at 12 per cent., the usual Court-rate, and that it was wrong to allow a higher rate." In *Syud Shah Abdoolah v. Meer Reasut Hossein*, 17 W.R. 414, the usual rate prevailing at the date of the decree was allowed. In *Broughton v. Rajah Sahib Ferliad Sein*, 19 W.R. 152, the claim was decreed with usual costs and interest: and, though there seems to have been a doubt in the mind of Mr. Justice Phear, whether the word "usual" was to be taken as coupled with the word "interest," he ultimately held that it was to be so taken. The same learned Judge in an earlier decision in *Rajah Rughoonundun Singh v. Arcott*, 19 W.R. 46, declined to disturb an order allowing interest at a particular rate, although the decree was silent as to rate. These cases are cited and followed in *Madhub Lal Khan v. Noyan Ghose*, 6 C.L.R. 231 (232).

(23) *Soude Shrinivasapa v. Krishnappa Hegde*, 11 B. 177. In *Thamman Singh v. Ganga Ram*, 2 A. 842, the Court refused to give a relief not mentioned in the decree "in favour of his claim" though it was alleged it formed part of the claim. See *Amir Ali's Civ. Pro. Code*, 1908, p. 830.

principal *plus* interest, with interest from the date of suit up to realization.⁽²⁴⁾

"A decree according to the terms of the judgment-debtor's written statement" would incorporate the terms of such statement.⁽²⁵⁾

Decree according to judgment-debtor's written statement—Construction of.

"When the Court orders the defendants, speaking of them collectively, to be paid their cost by plaintiff, it means that each defendant who appeared in the suit as a separate party is to be paid his separate costs, estimated in this way."⁽²⁶⁾

Decree awarding defendant's costs collectively—Construction of.

Under a decree awarding proportionate costs on the amount decreed and disallowed, the lower Court gave the plaintiff costs at the rate of 5 per cent., upon the amount decreed, and the defendant at the rate of 2 per cent. only upon the amount disallowed. It was held that the proper mode of giving effect to the decretal order was to calculate the amount of costs on the suit as laid, and then to divide the sum proportionately between the parties as they had respectively succeeded.⁽²⁷⁾

Decree for "costs between party and party"—Construction of.

An order decreeing the plaintiff his costs in proportion must be taken to mean as if costs were given in proportion to the amounts decreed and dismissed.⁽²⁸⁾

Decree for "proportionate costs"—Construction of.

Therefore except where there is a distinct order restricting costs to the plaintiff, the defendant is entitled to his costs on the portion of the claim dismissed, although the order does not in words provide for it.⁽²⁹⁾

The expression "costs in proportion" means that costs are to be awarded in the proportion that the amount of the claim in respect of which plaintiff succeeds bears to the amount mentioned in the plaint.⁽³⁰⁾

(24) *Gopee Kissen v. Brindabun Chunder*, 19 W.R. 41.

(25) *Ram Nandan Rai v. Lal Dhar Rai*, 8 A. 775.

(26) *Gunesh Dutt Singh v. Mungay Ram Chowdhry*, 21 W.R. 288 (299). This must however be taken to be under the special circumstances of this case.

(27) *W. Leckie v. Joy Gobindo Nath Roy*, 7 C.L.R. 114.

(28) *Bykuntinath Chowdhry v. Moheshsuree*, 4 W.R. Mis. 9.

(29) *Ibid.*

(30) *Vasudev Pandurang Kale v. Ramhat bin Gangadharbhat Dante*, Unreported Printed Judgments of the High Court of Bombay, Appellate Civil Jurisdiction, Vol. VII, 1888-1891 (Rajkot Edition), 1912, p. 598.

Decree that
"costs should
follow the
event"—
Construction
of.

Where the trial Judge made an order that the costs should follow the event but it was not clear as to how the learned Judge intended the order to be worked out the Court felt itself at liberty to interfere with the order, as the order, as interpreted, was not a proper order.⁽³¹⁾

(31) *Numbermal v. Krishnajeel*, 26 M.L.J. 356 at 357 = (1914) M.W.N. 310. The following observations of White, C.J., in the course of the judgment may well be noted:—"Now we come to the most difficult question in the case and that is, can we interfere with the order of the learned Judge as to costs, and if we can, ought we to interfere? As I have said, the learned Judge gave the plaintiff a judgment for a certain sum of money. His order as to costs was "I think under the circumstances the cost must follow the event." The words "must follow the event" have been construed in different ways. They have been construed as meaning that the event means the result and if the plaintiff succeeds he is to get the costs. They have been construed especially in cases of counter-claims as distributive. I do not propose to discuss the various English authorities which have been cited. They are in connection with O. LXV, r. 1 of the Rules of the Supreme Court. I only refer to *Hoyes v. Tate*, (1907) 1 K.B. 656, where it was held that in an action tried with a jury where there are separate issues and the plaintiff obtains a verdict and judgment, but the defendant is successful as to one of the issues, if the Judge makes no order with regard to that issue interfering with the incidence of costs under O. LXV, r. 1, the defendant is entitled to have the judgment drawn up so as to give him the costs of the issue on which he succeeds. The question has been discussed in India. The only Indian authority to which I need refer is the judgment of Sir Lawrence Jenkins in *Parshiram v. Dorabji*, (1898) 2 Bom.L.R. 254, an appeal from the original side. There the learned Judge says "An appellate Court will not interfere with an exercise of discretion of a lower Court unless it has proceeded on a manifestly wrong ground, such as the application of an erroneous principle or a misapprehension of the facts. So long as the discretion was in fact exercised, an appellate Court will not interfere simply because it would itself have exercised the discretion differently." The learned Judge cites *Bew v. Bew*, (1899) 2 Ch. 472, in which it is laid down that "if the costs are in the discretion of the Judge the Court of appeal will assume that the Judge exercised his discretion unless it is satisfied that he has not exercised his discretion." For the purposes of this case I do not want to attempt to lay down any general proposition as to what are the circumstances in which an appellate Court should interfere, if it so desires, with an order as to costs where the order purports to be made in the exercise of the discretion vested in the Judge. I do not want to suggest that I am not prepared to accept the proposition as laid down by Sir Lawrence Jenkins. But here we are dealing with a case in which the facts are of an unusual character. I think one is entitled to say, having regard to the history of this case, that it is not clear how the learned Judge intended his order as to costs to be worked out when he used the words, "the costs must follow the event." When the draft decree came before him for settlement (it was an accident that the decree had already been "issued") it seems clear from the terms of his order either that he thought that the draft decree did not carry out his intention as to how the order should be worked out, or at any rate that it was a matter for doubt as to how his order should be worked out. Otherwise it is impossible to understand why the learned Judge should have observed that the decree had been issued by mistake and that it should be recalled and that no decree should be passed until approved by him. When the matter was before him on July 26th or 27th for the purposes of the review application, there was an agreement that the decree should be taken as if it had been

Where an appellate Court after setting aside the decree of the lower Court, remanded the case, and the order as to costs provided "costs will abide the result," it was *held* that, if the result of the remand was entirely in favour of the successful party, he was entitled, as a matter of course, to the costs in question, even if the decree of the lower Court after remand did not contain any such direction.⁽³²⁾

Decree for
"costs to
abide the
result"—
Construction
of.

drawn up. That agreement was for the purposes of that application only and for the purpose of enabling the learned Judge to deal with the application to review and I think it may be said that the agreement was without prejudice to any question as to whether the decree as drawn up and, according to the learned Judge, issued by mistake, really embodied the learned Judge's intention. It is quite true that the learned Judge on the 26th or 27th of July had not an opportunity of saying "the decree which you have agreed should be treated as having been drawn up does not represent my intention" and that he did not say so. It seems to me that is not conclusive when we consider that the learned Judge was then dealing with the question whether the case was one for review. He came to the conclusion that it was not a case for review because, as he puts it, he did not feel at liberty to interfere under O. XLVII but he leaves on record the observation that he had doubts as to the correctness of the order as to costs. That, I take it, means that he had doubts as to the correctness of the manner in which the decree purports to work out his discretion as to costs. Having regard to the special facts of this case I think it is open to us to consider the order as to costs as interpreted in the decree and that, if we come to the conclusion that the order, as interpreted, is not the order which should have been made I think we are at liberty to interfere." *Per White, C.J.*, in *Numberumal Chettiar v. Krishnajee*, 26 M.L.J. 356 (360—362).

(32) *Fani Bhusan Roy Chowdhury v. Bama Sundari Debi*, 4 C.W.N. 343. The following extracts from the judgment of the Court may also be noted :—"The decree is a decree of the appellate Court by which a preliminary decree for partition made by the first Court was set aside and the case was remanded for trial on the merits; and the order as to costs was in these terms, namely, that 'costs will abide the result.' The amount of the costs of the appellate Court is specified in the decree, but the order being that costs will abide the result the decree necessarily left it undetermined as to which party was to pay those costs and which party was to receive them. The Courts below have held that this indefiniteness in the decree as to costs makes it incapable of execution. The learned vakil for the appellant contends that though the order was indefinite when first made, it has been rendered definite by the result of the remand; and as that result has been entirely in the appellant's favour he is entitled to recover the costs in question. We have come to the opinion, though not without some hesitation, that this contention of the appellant is correct. The decree of the appellate Court, from the nature of the order made as to costs, could not have been more definite than it is. The only question is whether it was absolutely necessary for the appellant to have the matter rendered explicitly definite when the case was disposed of by the first Court after remand. That he might have asked that Court when it disposed of the case after remand to make some express order with reference to the costs of the appellate Court is not disputed; but what the learned vakil for the appellant in effect urges is that though that might have been done, yet it was not absolutely necessary for the appellant to do that, and that he would be entitled to the relief he now asks for if he could show that the result of the remand was entirely in his favour, and that he is therefore entitled as a matter of course to the costs in question. If the appellate Court

It has been held in a recent case by the Madras High Court that the words "costs would abide the result" do not mean costs will follow the result.⁽³³⁾

The discretion ordinarily vested in a subordinate Court, to decide how the costs shall be borne, is not curtailed by the mere use of the phrase "costs would abide the result" in an order of the appellate Court.⁽³⁴⁾

Decree directing "costs to abide the result" and "to abide and follow the result."

The expressions costs "to abide the result" and costs "to abide and follow the result" are not synonymous. There is a distinction between these two expressions.⁽³⁵⁾ The words "abide the result" only connote that the order as to costs is to await till decision is given in the case. But the words "abide and follow the

in its order for costs had left it to the discretion of the first Court to apportion the costs in such manner as it thought proper, the appellant could not have succeeded in his present contention, because he did not ask the first Court to exercise its discretion and to apportion the costs on the result of the remand. But the appellate Court left no such discretion to the first Court. It cannot, therefore, be said that it was absolutely necessary for the appellant to have the matter definitely stated in the decree of the first Court. But here the question arises whether the result of the remand has been entirely in favour of the appellant as the appellant contends. Upon this question the materials placed before the Court are not sufficient to enable it to arrive at any decision; and as it was the appellant's fault that full and proper materials were not placed before the Court, we think that though he is entitled to succeed upon his contention that the decree is not incapable of execution and may ask us to remand the case the remand must be in terms as to costs. We think it right that the appellant should pay all the costs that have been thrown away, namely, the costs in the first Court and the costs in this appeal the lower appellate Court not having made any order for costs. We would add that the only materials which it would be allowable to the appellant to place before the Court in order that it may come to a decision upon the question whether the result of the remand was entirely in his favour are the judgments and decrees made in the case. The result is that the order of the lower appellate Court will be set aside and the case sent back to that Court in order that it may dispose of the appeal after determining the question we have indicated upon the materials just referred to. The appellant will have an opportunity of placing those materials before the lower appellate Court; but it will be a condition precedent to this remand taking effect that the appellant should pay to the respondent his costs in this and the first Court." *Fani Bhusan Roy v. Bama Sundari*, 4 C.W.N. 343 (344). But see also *Godavarthi v. Godavarthi*, 28 M.L.J. 441 and *Numberumal Chettiar v. Krishnajeet*, 26 M.L.J. 356 (357) = (1914) M.W.N. 310.

(33) *Godavarthi Peria v. Godavarthi Lakshmi Devamma*, 24 Ind. Cas. 96.

(34) (*Ibid.*).

(35) *Godavarthi Periah alias Ethirajah v. Godavarthi Lakshmi Devamma*, 28 M.L.J. 441.

result" may be interpreted as conveying the suggestion that the successful party must be given his costs.⁽³⁶⁾

Where a decree awards costs, and then provides that if the judgment-debtor fails to pay, his property should be sold, and the costs be added to the mortgage-deed as a charge on the property, it was *held* that this alternative remedy does not deprive the decree-holder of the right which the first part of the decree gives him of executing the order for costs in the same manner as any other money decree.⁽³⁷⁾

Decree giving costs as alternative remedy—Construction of.

As has already been stated, a decree must be construed as far possible so as to avoid making it appear absurd or inequitable.⁽³⁸⁾

Decree apparently awarding costs twice—Construction of.

A decree drawn up under S. 88 of the Transfer of Property Act, 1882, was properly framed in accordance with the requirements of that section, but, in addition to the prescribed contents of such a decree, contained a clause to the following effect:—"It is further ordered, that the defendant aforesaid do pay to the plaintiffs aforesaid the sum of Rs. 876-8, the amount of costs incurred by them in this Court." It was *held*, that this latter clause was merely a formal compliance with the provisions of the Code of Civil

(36) *Godavarthi Periah alias Elthirajah v. Godavarthi Lakshmiddevamma*, 28 M.L.J. 441. Their Lordships Seshagiri Aiyar and Kumaraswami Sastri, JJ., said:—"In remanding the Civil Miscellaneous Appeal, the High Court ordered 'that the costs shall abide the result.' On the re-hearing the Court below in the exercise of its discretion refused to give costs to the appellant. It is contended that the language of the order of the High Court makes it incumbent upon the Court below to award costs to the person who succeeds and that the District Judge had no jurisdiction to pass any other order. We are not prepared to agree with this contention. If the words used were 'to abide and follow the result' they may be interpreted as conveying the suggestion that the successful party must be given his costs. But the words 'abide the result' only connote that the order as to costs is to await till decision is given in the case. They have not the effect of fettering the discretion of the trying Court. In *Templeton v. Laurie*, 25 B. 230 at p. 237, the language was 'to follow the event.' The learned Judges held that the Court below had no discretion in the matter. The expression used in the Bombay judgment have the same import as the words 'to abide and follow the result.' The words *abide the result* broadly speaking are equivalent to the words 'costs in the cause.' We are of opinion the Courts below had a discretion to apportion costs. The observations of Lord Esher in *Brotherton v. Metropolitan District Railway Joint Committee*, (1894) 1 Q.B. 666, support this view. The decision in *Fani Bhushan Roy Chowdury v. Bama Sundari Debi*, 4 C.W. N. 343, is not inconsistent with this conclusion as pointed out by Mr. Justice Tyabji. The learned Judge is right in the view he has taken." See *Godavarthi v. Godavarthi*, 28 M.L.J. 441.

(37) *Adjim Nullah Moodeen v. Cruickshank*, 21 W.R. 299.

(38) *Maqbul Faima v. Lalia Prasad*, 20 A. 523 (F.B.) = A.W.N. (1898) 157.

Procedure, and was not intended to be a direction for the recovery of costs personally from the judgment-debtor.⁽³⁹⁾

Decree for costs and interest—Construction of.

A decree which finds a sum due on account of a loan and further directs payment of costs and interest thereon, should be construed as making no provision for interest on the sum decreed in respect of the loan.⁽⁴⁰⁾

Decree for costs, whether personal or charged on estate—Construction of.

In a suit to recover money which had been lent on the security of a mortgage upon certain immoveable property, the first Court gave a decree for payment of the amount claimed with costs and interests, and for recovery of the same by sale of the property pledged; it was *held*, that the decree did not limit the plaintiff's right to recover the money only by sale of the property in question;

(39) *Magbul Fatima v. Latta Prasad*, 20 A. 523 (F.B.) = A.W.N. (1898) 157, (overruling *Chiranji v. Moti Ram*, A.W.N. (1898), 33). The Court (Banerji, J.) said in the course of the judgment:—"The decree, however, contains a further direction in the following terms:—It is further ordered that the defendants aforesaid do pay to the plaintiffs aforesaid the sum of Rs. 876-8, the amount of costs incurred by them in this Court." It is contended that the second direction in the decree to which we have referred is independent of the order contained in the first portion of the decree as to the inclusion of costs in the amount on failure to pay which the mortgaged property could be sold, and it is urged that under this last clause the mortgagees-plaintiffs are entitled to recover the costs over again from the defendants personally. We are unable to accede to this contention. We do not think that we should be justified in construing this decree in a manner which would make it an inequitable decree, which the decree in this case must be if, as is contended, it directs the same amount of costs to be paid twice over. In our opinion there is no ambiguity in the decree, and the second provision in it as to payment of costs is only a repetition of what is already contained in the first portion of the decree about the realization of costs out of the mortgaged property. S. 219 of the Code of Civil Procedure provides that the judgment shall direct by whom the costs of each party are to be paid, and by S. 206 it is directed that the decree shall state the amount of costs incurred in the suit, and by what parties and in what proportions such costs are to be paid. In our opinion the clause in the decree relied on by the decree-holders is only a formal compliance with the provisions of the Code of Civil Procedure. It was never intended to be a direction for the recovery of costs personally from the debtor. In this view we are unable to agree with the observations contained in the judgment of this Court in *Chiranji v. Moti Ram*, A.W.N. (1898) 33. Even if there were any ambiguity in the decree, it would be the duty of the Court to construe the decree by the light of the judgment. The judgment in this case does not in the slightest degree indicate that the Court intended to award costs against the defendant personally. The claim in the plaint was only for a decree for the sale of the mortgaged property, and the judgment directed that a decree should be prepared according to S. 88 of the Transfer of Property Act. In our opinion the judgment, so far from indicating, negatives an intention to make the defendant personally liable for the amount of the costs." *Per Banerji, J.*, in *Magbul Fatima v. Latta Prasad*, 20 A. 523 (F.B.) = A.W.N. (1898) 157.

(40) *Kalee Nath Paul v. Nubooodeep Chunder Sircar*, 17 W.R. 175.

and that defendant's personal liability arose on receipt of the money, the mortgage merely giving additional security.⁽⁴¹⁾

An executing Court's business is simply to interpret the decree as it stands and not to question its correctness; but it is at full liberty to refer to the judgment or any other document on the file in order correctly to interpret it; and when there is a divergence between the decree and the judgment, the proper course is to direct the decree-holder to apply for amending the decree to the Court which originally passed it.⁽⁴²⁾

It is a most erroneous practice for Courts, in executing the decree, to go into the question of what the decree meant beyond what is plainly said.⁽⁴³⁾

Thus when execution of a hypothecation decree was limited to the hypothecated property, the Court cannot go behind it to find the intention of the Court in passing the decree and order the sale of property not hypothecated.⁽⁴⁴⁾

(41) *Kalee Pershad Singh Nundee v. Raye Kishoree Dossee*, 19 W.R. 281. Jackson, J., said in the course of the judgment:—"This case appears to us to be very clear. The plaintiff lent money to the defendant, and obtained, by way of security for the loan, a mortgage upon certain immoveable property of the defendant. He then brought a suit to recover the money, and made a special prayer in the suit that the property pledged be made liable to satisfy his claim. Thereupon, the Moonsiff's Court gave a decree to plaintiff in these terms:—That is to say, that there be a judgment against the defendant to pay the amount sued for with costs and interest at the rate of one per cent. per mensem, and, further, that the amount be recovered by sale of the property pledged. The Judge considers the decree to limit the plaintiff's right to recover the money only by sale of the property in question, and it is contended before us for the respondent that this is the true meaning of the decree, as the mortgage-bond said nothing as to the defendant's personal liability to pay the money. It appears to us that no express stipulation to that effect was necessary, and that the defendant's personal liability arose as soon as she received the money from the plaintiff, the mortgage merely giving the latter an additional security in the shape of the pledged property. The decree accordingly directed quite properly that the amount claimed be recovered from the defendant." *Per* Jackson, J., in *Kalee Pershad Singh Nundee v. Raye Kishoree Dossee*, 19 W.R. 281.

(42) *Radha Mal v. Imam Bakshi*, 60 P.W.R. 1909, on this point see, also, *Ohhoti Narain v. Mt. Rameshwar*, 8 C.W.N. 796; *Kashi v. Jamuna*, 31 C. 922; *Rama v. Anukul*, 20 C.L.J. 512; *Bagvantappa v. Vishwanath*, 28 B. 378; *Trimbak Rao v. Balwant Rao*, 30 B. 101 (108).

(43) *Kombi v. Lakshmi*, 5 M. 201, referred to in *Sankaran v. Parvathi*, 12 M. 434. But a Court executing a decree must interpret the terms of the particular decree before it with reference to the facts of the case. *Muhammad Sadiq v. Ghous Muhammad*, 11 A.L.J. 975=22 Ind. Cas. 42.

(44) *Sheonarain v. Ishri Prasad Narain Singh*, A.W.N. (1883) 148.

If what is contained in the decree is so uncertain that it is impossible to ascertain what is decreed, execution cannot be directed.⁽⁴⁵⁾

Where the appeal of a defendant in respect of the costs with which he was mulcted by the original Court was dismissed in these terms: "The order of the lower Court is upheld, the appeal is dismissed, the appellant to pay the costs," it was *held*, that the costs awarded by the Court of the first instance, although not specified in the appellate Court's decree, was recoverable in execution of the decree, for, they were the subject-matter of the appeal and became, by the affirmance of the first Court's decision, on that point, the substantive portion of the appellate decree.⁽⁴⁶⁾

There is no reason why the costs of the first Court should not be included in the decree, where the appellate Court has decreed the appeal and has given costs of its own Court.⁽⁴⁷⁾

Where, in the statement of costs appended to a decree, the Judge has separately detailed the amount of costs payable to the two defendants, such costs ought not be apportioned subsequently contrary to the terms of the decretal order which was unambiguous in its terms.⁽⁴⁸⁾

Decree for
costs in
foreclosure
decree—
Construction
—Execution.

Where costs have been distinctly and separately ordered in a foreclosure decree, they cannot be considered as part and parcel of the money due upon the mortgage. Therefore, where such a decree is afterwards confirmed by an order absolute for foreclosure and the mortgagee obtains possession thereunder, he is still entitled to proceed with execution as to costs.⁽⁴⁹⁾

(45) *Dwarkanath Haldar v. Kamalakanth Haldar*, 3 B.L.R. App. 128=12 W.R. 99. Evidence cannot be given in the execution department to amend any uncertainty in the decree. The law allows certain matters to be ascertained in execution, but beyond those it is the duty of the Judge to take care that his decree is so precise that it is capable of execution without leaving it to the Court of execution to decide what the Judge intended to decree. *Dwarkanath Haldar v. Kamalakanth Haldar*, 3 B.L.R. App. 128=12 W.R. 99.

(46) *Himayat Husain v. Jai Devi*, 5 A. 589=A.W.N. (1883) 123, distinguishing *Shohrat Singh v. Bridgman*, 4 A. 376 (F.B.).

(47) *Sheikh Mahomed Busseroolah Chowdhry v. Ram Kanti Chowdhry*, 16 W.R. 266.

(48) *Manick Chunder Lushkur v. Huro Pershad Roy Chowdhry*, 6 W.R. Mis. 80.

(49) *Damodar Das v. Budh Kuar*, 10 A. 179=A.W.N. (1888) 68, referred in *Shaffar Khan v. Satyanunda Das Gupta*, 13 C.W.N. 742 (743) and distinguished in *Raj Kumar Singh v. Sheo Narayan Sahu*, 35 C. 431 (432)=12 C.W.N. 364=8 C.L.J. 152. A mortgagee who has obtained an order absolute for foreclosure may proceed against the

Where a mortgage decree proceeded to assess the amount due for principal and interest, and also the amount due for the costs, and then to make an order that the mortgagor should pay the whole (*i.e.*) the debt and costs, and the Court eventually made a decree absolute for possession of the property on default, it was *held*, the decree-holders were entitled to their costs of suit from the judgment-debtors personally or from their other properties.⁽⁵⁰⁾

Under S. 220, Civil Procedure Code,⁽⁵¹⁾ the Court has jurisdiction to decree the costs against the debtor personally, if it thinks fit to do so. A declaration that he shall pay the whole means that he shall pay it out of any property of his; the liability to pay is not limited to any particular property.⁽⁵²⁾

"The decree for costs can be executed under S. 87, Transfer of Property Act.⁽⁵³⁾ Under the 4th clause of the section, the foreclosure will only discharge the debt secured by the mortgage, and not the decree for the costs."⁽⁵⁴⁾

mortgagor personally for the costs of the suit [*Shaffur v. Satyanunda*, 13 C.W.N. 742 (743)]. The decree for costs is a part of a mortgage-decree, and the decree-holder must proceed in the first instance against the property mortgaged. The decree in 10 A. 179 was distinguishable as not being one for sale of the mortgaged properties. It was a decree passed for foreclosure where the mortgage had been by way of conditional sale. [*Raj Kumar v. Sheo Narayan*, 35 C. 431 (432) = 12 C.W.N. 364 = 8 C.L.J. 152.]

(50) *Rutnussur Sein v. Jusoda*, 14 C. 185.

(51) Of the Code of 1882 (Act XIV of 1882) corresponding to S. 35 of the present Code (Act V of 1908).

(52) *Rutnussur Sein v. Jusoda*, 14 C. 185 (*per* Petheram, C.J.).

(53) Act IV of 1882.

(54) *Rutnussur Sein v. Jusoda*, 14 C. 185 (*per* Beverley, J.). "The expression 'the debt secured by the mortgage' in S. 87 (3), Transfer of Property Act, is wide enough to include costs of the foreclosure suit, if the decree in that suit makes the right to redeem depend on the payment of the costs. Where the order absolute is made on the mortgagor's failure to pay the decretal amount, the costs are discharged equally with the mortgage money proper; and no execution for costs can issue against the mortgagor's person, notwithstanding that under the terms of the decree he is made personally liable for the same." *Khushal Singh v. Shrinivas Rao*, 2 C.P.L.R. 94 (96). The costs awarded by a decree directing the sale of mortgaged property form part of the mortgage decree, and the decree-holder must proceed to recover the costs by a sale of the mortgaged property in the first instance, and it is only when the mortgaged property is found to be insufficient to satisfy the decree that the decree-holder can proceed against the other properties of the mortgagor in the manner provided by S. 90 of the Transfer of Property Act. 14 C. 185 and 10 A. 179 were not cases where the decrees had been for sale of the mortgaged property. They were decrees passed for foreclosure in a mortgage by conditional sale. *Raj Kumar Singh v. Sheo Narain Sahu*, 12 C.W.N. 364 (365) = 8 C.L.J. 152. Under S. 86 of the Transfer of Property Act, the mortgagee can include costs of the suit in the decree for foreclosure. The costs thereby become a charge on the property, and in default of payment of costs foreclosure follows.

Decree
against
guardian or
next friend—
Whether
personal or
against
estate—
—Construc-
tion.

When a suit is against a minor, if the Court considers that there are circumstances connected with the defence which make it proper that the guardian should be personally ordered to pay the costs, it should be so stated in the decree or order of the Court. Where the guardian is simply declared liable for them as the defendant in the case, the liability must be taken to refer to him as the representative of the minor and representing his estate.⁽⁵⁵⁾

It does not necessarily follow that, because a suit instituted by the guardian of a minor in *forma pauperis* is unsuccessful, the guardian is therefore, as a matter of course to be ordered personally to pay the costs; and if the Court intends by its decree to make the guardian personally liable for costs, it should express its intention in clear and unmistakeable language; for "the right to execute a decree depends upon its terms, and it cannot be supplemented by any subsequent expression of opinion by the Judge."⁽⁵⁶⁾

Where a woman brought a suit as the guardian of her son, but the plaintiff's office of guardian had ceased when she brought the suit, and she brought the suit knowing that she had no authority to sue as guardian, and the decree for costs was given against her personally, and not against the estate of her son, she alone could be held responsible for the costs.⁽⁵⁷⁾

Under S. 440 of the Civil Procedure Code,⁽⁵⁸⁾ the decree of a Court of first instance contained an order directing the next friend of a minor to pay the costs of the suit. On appeal, the decree was reversed. On second appeal, the High Court restored the first Court's decree, but its order directing that the respondent should pay costs did not specifically mention whether costs were to be paid by the next friend or by the minor. The decree-holder took out execution against the next friend, who objected, but his objection

Sakina Bibi v. Abdul Hafiz Khan, 2 O.C. 103 (109). There is nothing in S. 86, Transfer of Property Act, to prevent the mortgagor being held personally liable for costs according to the special agreement in the mortgage-deed. *Dhondru Pandit v. Mahant Daulat-puri*, 3 N.L.R. 97 (100). Where the time for paying the mortgage amount is enlarged under S. 87, Transfer of Property Act, on condition of paying interest which is not provided for by the decree, the mortgagor is personally liable for such interest. *Mukund Lal Parwar v. Seth Mangaljeet*, 12 C.P.L.R. 78 (81).

(55) *Komul Chunder Sen v. Surbessur Doss Goopto*, 21 W.R. 298. See also Chapter on "Costs in special Cases."

(56) *Brijessuree Dossia v. Kishore Doss*, 25 W.R. 316.

(57) *Luchmun Pershad v. Juggurnath Doss*, W.R. (1864) Mis. 17.

(58) Of the Code of 1892 (Act XIV of 1882) corresponding to O. XXXII, rr. 1 and 4 of the present Code (Act V of 1908).

was overruled by the executing Court, and again on appeal. It was *held* that the High Court's decree restoring that of the Court of first instance, must be construed as directing that the order as to costs was to be enforced in the same manner.⁽⁵⁹⁾

Where the decree to be executed is the decree of an appellate Court, and where such decree merely confirms the decree of the Court below, the terms of the decree of the Court below may and must be looked at for the purposes of the execution of the decree of the appellate Court.⁽⁶⁰⁾

Decree of
appellate
Court as to
costs—Con-
struction of.

The decree of the appellate Court merely directing the dismissal of the appeal cannot be said to be incapable of execution.⁽⁶¹⁾

Where the Court of first instance dismissed a suit with costs, and the appellate Court affirmed the decree of the lower Court, specifying, in its decree, the costs of the respondent in the appellate Court payable by the appellant, but not the costs of the lower Court, the Court executing the decree of the appellate Court could execute it for the costs of the lower Court, by ascertaining the amount of the same from the original decree.⁽⁶²⁾

A suit for damages instituted by A was dismissed with costs in the Court of first instance. On appeal, the Judge gave a decree for a portion of the amount, dismissing the rest of the claim and awarding costs in proportion to the amount decreed and dismissed. R, the defendant, preferred a second appeal and the High Court confirmed the decree of the lower appellate Court and dismissed the second appeal with costs. Then A applied to recover in execution of the High Court's decree the costs of that Court and the costs of the first Court and the lower appellate Court. R contended that the costs of the High Court alone was payable by him on the ground that the costs of the other Courts were not specified in the High Court's decree. It was *held* that this contention was untenable. The decree of the High Court affirmed the decree of the lower appellate Court which in terms provided for the costs in the first and lower appellate Courts and by whom they were to be paid.⁽⁶³⁾

(59) *Razauddin v. Amir Singh*, A.W.N. (1889), p. 173.

(60) *Kasim Ali v. Manik Chand*, 5 O.C. 35. See, also, *Razauddin v. Amir Singh*, A.W.N. (1889), p. 173, noted *supra*.

(61) *Kasim Ali v. Manik Chand*, 5 O.C. 35.

(62) *Behari Lal v. Khub Chand*, 6 A. 48 (referring to *Shohrat Singh v. Bridgman*, 4 A. 376 (F.B.); and referred to in *Muhammad Sulaiman Khan v. Muhammad Yarkhan*, 11 A. 267 (275) (F.B.) = A.W.N. (1889) 55.

(63) *Sheoghulam v. Radha Mohan*, A.W.N. (1893) 245.

Where final decree is applied for after an appellate decree for costs has been passed against one only of the several defendants, the decree-holder cannot ask for the costs of the appeal to be included in the amount finally held due.⁽⁶⁴⁾

Where the decree of the District Munsif provided that, "on the plaintiff's paying into Court the balance of consideration, Rs. 10, within a month from this date," the defendant should execute a sale-deed of the suit land, and the money was not paid within the month, and after the expiration of the month the defendant appealed and the decree of the appellate Court simply confirmed the decree of the lower Court and dismissed the appeal, and within a month from the date of the appellate decree, the decree-holder made the deposit of Rs. 10 and applied for execution of the decree, *held* that he was not entitled to execute the decree and that the appellate decree, as it merely affirmed the lower Court's decree, did not give him fresh time for performing the condition.⁽⁶⁵⁾

It is desirable that appellate Courts should frame their decree in such a manner as to leave no doubt as to whether it is intended to extend the time for performing the conditions precedent imposed by the original decree.⁽⁶⁶⁾

The words appeal "allowed with costs" in the order of the High Court would mean "the costs of the High Court only and not the costs of the original Court as well."⁽⁶⁷⁾

The proper interpretation of the words "appeal dismissed or accepted with costs" is that the costs of the appellate Court alone are awarded and not that of the Courts below.⁽⁶⁸⁾

(64) *Muhammad Sadiq v. Ghacous Muhammad*, 22 Ind. Cas. 42 = 11 A.L.J. 975.

(65) *Ramaswami Kone v. Sundara Kone*, 31 M. 28 = 3 M.L.T. 26 = 17 M.L.J. 495, distinguishing *Blup Indar Bahadur Singh v. Bijai Bahadur Singh*, 23 A. 152 (155), and followed in *Venkatapathy Iyer v. Tirupathi Goundan*, 4 M.L.T. 341. In dismissing appeals on the ground of limitation, the High Court has power to extend time for payment. *Venkatapathy Iyer v. Tirupathi Goundan*, 4 M.L.T. 341.

(66) *Ramasamy Kone v. Sundara Kone*, 17 M.L.J. 495 = 3 M.L.T. 26 = 31 M. 28.

(67) *Surendra Nath Roy Choudhury v. Girija Nath Roy Choudhury*, 15 C.L.J. 658 (660).

(68) *Bakhshi Ram v. Gumano*, 18 P.R. 1907. The following remarks of Justice Rattigan in the course of the judgment may also be noted:—"The plaintiff's suit was decreed with costs by the District Judge. Defendant appealed to this Court, and the order on this appeal was as follows:—'We hold that the suit must be dismissed, and we decree accordingly with costs. Appeal accepted and decree of lower Court set aside.' In our opinion the intention of this Court in decreeing the appeal 'with costs' was

Decree
"allowing
appeal with
costs" —
Construction
of.

Decree in
appeal that
"appeal
dismissed or
accepted with
costs" —
Construction
of.

Where some of the defendants only appealed against the decree ordering the setting aside of certain execution sales, and the appellate Court's decree was in the following terms, " appeal decreed with costs, and decision of lower Court being reversed, plaintiff's claim will stand dismissed ; " it was held that this decree must be construed as applicable only to the defendants who had appealed and whose appeals were decreed, and not to the defendants who had not appealed and who were not before the Court and had not objected to the decision of the lower Court. (69)

Where a decree describes a set of costs as due to the respondent by the appellant, who has partly succeeded in his appeal, it means, not that any sum should be actually paid by the latter to the former, but that the appellant should only recover the net sum due under the decree, that is, the sum which would remain after deducting from the gross amount decreed, the amount of costs payable by the appellant. (70)

Where a decree of the High Court directed that the respondent (the plaintiff) should pay to the appellants (the defendants) " the costs incurred by them in the lower Court, " it was held that the

Decree in appeal allowing a set of costs to respondents-- Construction of.
 Decree in appeal directing payment of " costs incurred in lower Court--" Construction of.

clearly that the then respondent should pay the then appellant the costs incurred in this Court only, for had it been intended that the then respondent was to pay the costs of both Courts, words to that effect would undoubtedly have been used. The decision of this Court reported as *Ramji Das v. Charanji Lal*, 45 P.R. 1877, is an authority directly in point, whereas the ruling relied upon by the present respondent *Broughton v. Perhlad Sen*, 19 W.R. 152, is easily distinguishable, as the facts in the latter case were entirely different. But apart altogether from authority we would have no hesitation in holding that in a case where the words of the decree are open to doubt, that construction must be placed on the words used which does not impose a liability on the judgment-debtor, which is not in express and specific terms imposed upon him. If then an appeal is dismissed or accepted ' with costs, ' *simpliciter*, the proper interpretation of the words ' with costs ' is that the costs of the appellate Court alone are awarded." See also *Himayat Husain v. Jai Devi*, 5 A. 589=3 A.W.N. (1883) 128; *Behari Lal v. Khub Chand*, 6 A. 48, where a decree under which costs have been recovered is set aside in appeal an express order is not needed for a refund of the costs with interest. See *Dorab Ally Khan v. Abdool Azeez*, 4 C. 229; and *Mary Macdonald Watkins v. Sahenzada Mahomed*, 1 C.W.N. cxvii. His Lordship (Jenkins, J.), remarked that parties should bring to the notice of the appellate Court the fact that costs have been paid under the decree of the lower Court, and obtain from that Court the usual order for repayment. *Mary Macdonald Watkins v. Sahenzada Mahomed Zohoorooden*, 1 C.W.N. (Journal portion), p. cxvii.

(69) *Zain-Ul-Abdin Khan v. Muhammad Asghar Ali Khan*, 10 A. 166 (P.C.)=15 I. A. 12=5 Sar. 129.

(70) *Issur Chundur Mookerjee v. Mun Mohun Chowdhry*, 12 W.R. 308.

costs referred to were those which were specified in the decree appealed against as the costs incurred by the defendants. (71)

Thus if several defendants have severed in their defence, and the lower Court has specified the costs incurred by each of them, the costs payable under the above directions will be their several costs. If they have joined in their defence, or though they have severed their defence, but the lower Court has specified a single set of costs as the only cost which it will allow or treat as costs in the suit, then the cost payable will be the single set of costs. (72)

Where the lower Court has improperly awarded separate sets of costs to defendants who have severed in their defence, the attention of the appellate Court should be drawn to this circumstance before the decree in appeal is passed. It is too late to raise the objection when this latter decree is being executed. (73)

Decree reversed on appeal with costs of both Courts—Costs of superseded decree if recoverable—Construction.

Where in decreeing a suit in plaintiff's favour, the first Court directed the defendants to pay the plaintiff's costs, but following the direction contained in the Civil Procedure Code (Act XIV of 1882) set out at the end of the ordering portion of the decree the amounts of costs respectively incurred by the several defendants; and on the defendant's appeal to the High Court, the decree was reversed and the plaintiff was directed to pay to the "defendants appellants the costs of the appeal" and "the costs incurred by them in the lower Court," it was *held*,—On a construction of the High Court's decree, that the defendants were entitled to recover in addition to the costs of the appeal the several amounts entered against their names in the decree of the first Court as their costs. (74)

Appeal by several defendants—Costs—Construction.

Seven defendants preferred their appeal by one petition and were represented by one counsel in the High Court. In the lower Court, three of these appellants had pleaded separately from the other defendants (appellants) and appeared by separate counsel. In the High Court, the appeal was dismissed with costs, except as to the said three appellants who were released and to whom costs were awarded. It was *held* that, as the said three appellants incurred no separate costs on account of the appeal to the High Court,

(71) *Ramchunder Sen v. Koomar Doorga*, 2 C.L.R. 152; see also *Ramchunder Sen v. Durga Nath Roy*, 1 Shome 143.

(72) *Ram Chunder Sen v. Koomar Doorga*, 2 C.L.R. 152.

(73) *Ramchunder Sen v. Koomar Doorga Nath Roy*, 2 C.L.R. 152.

(74) *Raghu Nandan Lal v. Rajendra Prosad Narain Singh*, 14 C.W.N. 556=11 C.L.J. 207=5 Ind. Cas. 342.

they had nothing as costs to gain from the High Court's order and that the costs in the Zillah Court which were separately incurred by them should be paid to them by the party cast below. (75)

A decree was passed against two defendants and both of them preferred an appeal. The first defendant died during the pendency of the appeal, and without his legal representatives being brought on the record, the appeal was heard and decided on behalf of the surviving appellant and the suit dismissed with costs, and it was expressly stated in the decree that the appeal was prosecuted only on behalf of the surviving defendant. It was *held* that it would be unreasonable to construe the decree as being intended to enure for the benefit of the first defendant also, and to consider that the decree appealed against was reversed in favour of his representative; and that, therefore, the decree of the lower Court must be regarded as still in force as against the first defendant, and so his heir was not entitled to restitution of the costs levied from his father under that decree until he successfully prosecutes the appeal. (76)

Where the Privy Council reversed a decree of the High Court with a specified sum as costs in England, and affirmed the decree of the Zillah Court with "costs in the Courts below," it was held (1) that "the Courts below" included the High Court, and that "costs in the Courts below" included the cost of translation and printing incurred in the High Court; (2) that the decree of the Zillah Court having given interest on the costs incurred, the decree-holder was entitled to interest on the costs incurred on account of translation and printing, and (3) that the decree of the Privy Council had made no provision for interest on the sum specified as costs incurred in England. (77)

Decree of
Privy Council
—Construc-
tion—Costs of
translation
and printing.

Although, upon ordinary principles, where an order directs payment of costs, and afterwards specifies a particular sum, such sum comprises all costs, yet as it has never been the practice of the Privy Council to make a specific order as to costs incurred in India for preparation and transmission of the record, and as it had been too long the practice of the High Court to allow costs to adopt now

(75) *Emam Banded Begum v. Syud Kufil Ali*, W.R. (1864) Mis. 11.

(76) *Natesa Ayyar v. Annasami Ayyar*, 25 M. 426 referred to in *Pasupati Nath Bose v. Nando Lal Bose*, 30 C. 718.

(77) *Madan Thakur v. Lopez*, 9 B.L.R. App. 22=18 W.R. 253.

a different rule, and as there had not been unnecessary expense in this case, the Court allowed the costs.⁽⁷⁸⁾

Decree for costs expressed in fluctuating currency—Construction of.

Costs expressed in fluctuating currency must be deemed to have been allowed at the rate prevailing on the date of the order, and not the date when it is put in execution. So, in a case decided before the recent currency legislation fixing the rate of exchange at Rs. 15 per sovereign, it was held that in converting into Indian currency the amount of costs expressed in sterling by the Privy Council, the rate of exchange should be taken to be the rate which prevailed at the time of the order. ⁽⁷⁹⁾

It has been held by the Allahabad High Court in an early case, that under the last paragraph of S. 610 of the Code of Civil Procedure, ⁽⁸⁰⁾ the amount of costs payable must be estimated at the rate of exchange "for the time being fixed by the Secretary of State for India in Council." The words "for the time being" mean the year in which the amount is realised or paid, or execution taken out, and not the year in which the decree was passed. The rate of exchange being fixed yearly by the Secretary of State for India in Council, the proper rate of exchange to which the decree-holders must be taken to be entitled would be the rate obtaining on the date of their application for execution. ⁽⁸¹⁾

Agreement to pay costs of litigation, construction of.

Where defendant had agreed to pay plaintiff all costs of a litigation conducted on his behalf by plaintiff, it was *held*, on a construction of the agreement, that limitation began to run only from the termination of the litigation when plaintiff was able to ascertain the total amount of the costs. ⁽⁸²⁾

(78) *Saroda Prasad Mullick v. Lachmipat Sing Dugar*, 9 B.L.R. App. 23 N.=18 W.R. 89 (followed in *Madan Thakur v. Lopez*, 9 B.L.R. App. 22=18 W.R. 253; and referred to in *Asgur Ali v. Nugendro Chunder Ghose*, 23 W.R. 463).

(79) *Mahomed Abdul Hye v. Gajraj*, 25 C. 283; following *Dakhina v. Saroda*, 23 C. 357.

(80) Code of 1882 (Act XIV of 1892), corresponding to O. XLIV, r. 15 of the present Code (Act V of 1908).

(81) *Param Sukh v. Ram Dayal*, 8 A. 650=6 A.W.N. 249, dissented from *Dakina Mohan Roy Chowdhry v. Saroda Mohan Roy Chowdhry*, 23 C. 357 (359). See also *Mahomed v. Gajraj*, 25 C. 283. There seems to be some conflict of authority on this point between the Allahabad High Court and the Calcutta High Court as would appear from the cases cited above.

(82) *Sivasubramania Mudaliar v. Somasundaram Oheltiar*, 25 M.L.J. 422.

"Subsisting decree" means a *decree unreversed* and in full force, and not merely one upon which execution cannot be issued. ⁽⁸³⁾ "Subsisting decree"—
Meaning of.

An error in construing a decree not properly drawn, if it is followed by just and proper execution, cannot be considered as affecting the decision on its merits. ⁽⁸⁴⁾ Error in the construction of decree—
Effect.

The officer that passed the decree properly to be regarded as the most suitable person to construe it subsequently. ⁽⁸⁵⁾ Construction of decree—
View of Judge that passed the decree.

(83) *Mahomed Hossein v. Kokil Singh*, 7 C. 91=9 C.L.R. 53, referring to *Bassappa v. Dundaya*, 2 B. 540 and followed in *Saroda Churn Chuckerbutty v. Mahomed Isuf Meah*, 11 C. 376.

(84) *Bullee Roy v. Mohunt Kishen Gir*, 18 W.R. 336.

(85) *Shaikh Besharut Ali v. Shah Golam Nazuf*, 4 W.R. Mis. 13.

CHAPTER VI.

SEPARATE COSTS.

Several defendants incurring separate costs.

(I) Cases where separate costs were allowed.

- (i) Several defendants severing their defences though taking same line of defence—Severance proper.
- (ii) Several defendants one of whom engaging separate attorney.
- (iii) Several defendants pleading separately represented by different counsel, but by same attorney.
- (iv) Several defendants one of whom suffering judgment by default—Others succeeding.
- (v) Several defendants being members of same family.
- (vi) Co-trustees.
- (vii) Co-heirs.
- (viii) Co-sharers.
- (ix) Separate appointees.
- (x) Zemindar and Patneedar.
- (xi) Builder and employer.
- (xii) Joint wrong-doer.
- (xiii) Several defendants—Judgment in favour of some and against others.
- (xiv) Several defendants—Separate taxation—Practice.
- (xv) Separate costs awarded—Objection in appeal—Practice.
- (xvi) Award of separate costs by decree—If can be altered in execution.

(II) Cases where separate costs were not allowed.

- (i) Several defendants having identical defence appearing separately.
- (ii) Several defendants having common defence engaging separate vakils.
- (iii) Several defendants engaging same solicitor.
- (iv) Several defendants, one of whom employing an attorney for all.
- (v) Several defendants appearing by different attorneys, but all business practically being done by one.
- (vi) Several defendants conducting defences separately, but *bona fide*, by same solicitor.
- (vii) Several defendants engaging same solicitor—One set of counsel.
- (viii) Several defendants of one class engaging separate counsel.
- (ix) Several defendants—Two pleas.
- (x) Members of same family living in same place.
- (xi) Husband and wife.

- (xii) Trustee and *cestui que trust*.
- (xiii) Owner and encumbrancer.
- (xiv) Partners.
- (xv) Joint-tenants.
- (xvi) Direction as to costs in decree—Separate or single—Practice.

(III) Miscellaneous.

Joinder of plaintiffs—Some successful.

Co-defendants—Separate defences—Liability for plaintiff's costs.

Co-defendants—Judgment obtained in different ways.

Co-defendants—Payment into Court by one.

IN certain cases more persons than one may join as plaintiffs in instituting a suit; ⁽¹⁾ and similarly there may be cases in which more persons than one are joined as defendants in a suit. ⁽²⁾ In the latter case where several persons are joined as defendants in one suit, it may happen that they conduct their defence jointly, as for instance, by engaging one counsel, by filing one set of documents and by summoning one set of witnesses. In short they may act jointly in the whole conduct of their defence. It is also open to them, if they choose, to sever their defences. For instance they may engage separate counsel for each; or they may take out separate summons for the witnesses. Each defendant may file a separate

Several
defendants
incurring
separate
costs.

(1) As to who may join as plaintiffs O. II, r. 1 of the Code of Civil Procedure (Act V of 1908) provides as follows:—Every suit shall, as far as practicable, be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them; Rule 2 provides that:—Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted. (Explanation):—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

(2) As to who may be joined as defendants in a particular suit, O. II, r. 3 of the Code of Civil Procedure (Act V of 1908) provides as follows:—Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit. Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

list of documents. In short, each defendant may act independently of the other defendants in the conduct of his defence.

In such cases the question would arise whether these defendants are to get a single set of costs, or each defendant is to be awarded a separate set of costs.

In the former case (*i.e.*) where the defendants conduct their defence jointly, no more than a single set of costs will be allowed. This is only in accordance with the principle that Courts would not allow a successful party any further amounts as costs than what were actually incurred by such party as expenses of the litigation.⁽³⁾ The several defendants having incurred no more than one set of costs, they would not be entitled to any further amounts by way of such costs.

The second case, (*i.e.*) where the defendants sever their defences, is somewhat more complicated. In awarding costs in such cases, the further question would have to be determined whether the severance of the defences was proper. If the severance was proper the defendants would be entitled each to a separate set of costs; if the severance was not proper or unnecessary then the Court would allow the defendants no more than a single set of costs.⁽⁴⁾ In examining the decided cases on this branch of the subject it would be convenient to divide them into two broad divisions—those cases in which the Court allowed a separate set of costs to each of the defendants; and those in which only one set was allowed. We shall first deal with the cases where separate costs were allowed.

(I) Cases where separate costs were allowed.

(i) Several defendants severing their defences though taking same line of defence—Severance proper.

The defendants, although taking the same line of defence, if entitled to sever in their defences, would be allowed the costs of separate counsel.⁽⁵⁾ The real point to be considered in such cases is not whether the defence was common or separate, but whether the severance of the defences was proper or improper.⁽⁶⁾

(ii) Several defendants one of whom engaging separate attorney.

One of two defendants (after appearing and pleading jointly), two days before the trial, obtained an order to appoint a new attorney for himself. The taxing master allowed him separate

(3) See *Abdul Shukur Khan v. Ataulah*, A.W.N. (1887) 227; *P. Nusservanji and Co. v. S.S. Wartenfels*, 18 Bom. L.R. 118 (120); *Seeta Patil v. Suryudamma*, 18 M. 128, cited in Ch. I, *supra*.

(4) See *Franciscode Assis v. Anjos*, 17 W.R. 188; *Juggu Lall v. Beharee*, S.W.N. W. 1859, p. 349; *Bhup Singh v. Zain-ul-Addin*, 9 A. 205 (210).

(5) *Bainbrigge v. Moss*, 3 Kay & J. 62; 3 Jur. (N.S.) 107.

(6) *Ibid.*

costs of the trial, as the defendant had reasonable grounds for changing his attorney. The Court refused to interfere with the taxing officer's discretion. (7)

The defendants pleading separately, and being represented by different counsel, although by the same attorney, are entitled to present, for taxation, separate bills of costs.⁽⁸⁾

(iii) Several defendants, pleading separately, represented by different counsel, but by same attorney.

In an action against several defendants, where one suffers judgment by default, and judgment is passed in favour of the others, those for whom judgment is given are entitled to their costs.⁽⁹⁾

(iv) Several defendants, one of whom suffering judgment by default—Others succeeding.

In a suit to recover possession of land, one of the defendants pleaded successfully that he had nothing to do with the land, and conducted his defence by a separate pleader, and incurred separate costs; the other defendants claimed title, and also succeeded in their defence. It was held that the lower appellate Court did not exercise a sound discretion in awarding only one set of costs to the defendants upon the assumption that they were members of the same family, without regard to their having set up separate defences of different natures.⁽¹⁰⁾

(v) Several defendants being members of same family.

(7) *Rolfe v. Johnson*, 6 Man. & G. 759.

(8) *Newton v. Boodle*, 4 C.B. 359.

(9) *Price v. Harris*, 10 Bing. 557; 3 L.J.C.P. 188.

(10) *Ram Chunder Gossain v. Mutty Lall Bagchee*, 11 W.R. 19. Peacock, C.J., said:—"This is a very clear case. It has been held that although an appellate Court may entertain an appeal upon the subject of costs only, still, in dealing with the decision of the lower Court, any interference upon the subject of costs ought to be exercised with discretion. In this case, a suit was brought against several defendants to recover possession of land. One of the defendants stated that he had nothing to do with the land. The other defendants claimed to be entitled to it. The defendant, who stated that he had not interfered with the land, conducted his defence by a separate pleader and incurred separate costs; and the first Court considered that as he had made good his defence, he was entitled to a separate set of costs, and awarded one set of costs to him, and another set of costs to the other defendants who claimed title, and who also succeeded in their defence. It appears to me that the order of the first Court in that respect was very reasonable, and that the plaintiff, if he thought fit to sue a defendant who had nothing to do with the case, had no reasonable cause of complaint if he was ordered to pay a separate set of costs to that defendant. The Judge, upon appeal, held that as all the defendants were members of the same family, they ought to have had only one set of costs amongst them. No evidence whatever was given to show that all the defendants were joint in estate, nor was there any evidence, as I

(vi) Co-trustees.

Co-trustees, who are made defendants in a suit, may sever in their defence, where relief is sought against the one in a matter with which the other has nothing to do.⁽¹¹⁾

The rule that, where a joint fiduciary character exists, a joint defence should be always adopted, is too general. It does not apply where the joint parties are liable to account, and incur responsibility.⁽¹²⁾

Where several persons are made defendants in respect of a joint fiduciary character only, or some having a beneficial interest unconnected and not conflicting with their duty, separate costs will not be allowed; but if, from personal interest or other cause, it becomes impossible for them to answer with prudence together, they will be allowed costs separately.⁽¹³⁾

A trustee ought not to be deprived of his costs out of the trust estate merely on the ground that he has severed from his co-trustee in his defence to an action to administer the estate. The Court must decide judicially whether the severance was proper.⁽¹⁴⁾

(vii) Co-heirs.

The two co-heiresses of a trustee, who lived at a distance from each other, were made parties to a suit for enforcing the performance of marriage articles. They submitted to act as the Court might direct, and defended separately: It was *held*, they were entitled to two sets of costs.⁽¹⁵⁾

(viii) Co-shares.

The Court does not compel persons, who have different shares in an estate, to appear by the same solicitor, because their interests

understand, even to show what relationship existed between the several defendants. Even if they were joint in estate, some of the members of the family might have separate property. Under these circumstances, it appears to me that the Judge did not exercise a sound discretion in modifying the order of the Sudder Ameen, and awarding one set of costs only to all the defendants upon the assumption that they were members of the same family, without having regard to the circumstance that they set up separate defences of different natures. The order of the Judge is reversed with costs of this appeal and costs in the lower appellate Court. The decision of the Sudder Ameen is affirmed."—*Per Peacock, C.J., Ram Chunder Gossain v. Mutty Lall Bagochee*, 11 W.R. 19. But see also *Ref. (38), infra*.

(11) *Pince v. Beattie*, 9 Jur. (N.S.) 1119; 9 L.T. 315. For a case where trustees were allowed separate sets of costs in appeal, see *Petters v. Manuck*, 13 B.L.R. 383=22 W.R. 175.

(12) *Reade v. Sparkes*, 1 Moll. 8.

(13) *Gaunt v. Taylor*, 2 Beav. 346; 7 L.J. Ch. 2.

(14) *Re Isaac*, (1897) 1 Ch. 251 on this point. See also chapters on "Costs out of Estate" and "Costs in Special Cases."

(15) *Aldridge v. Westbrook*, 4 Beav. 212.

as regards their opposition to the claim of the plaintiff are identical.⁽¹⁶⁾ So, where, in such a case, the suit is dismissed with costs, each of such persons will have his separate costs.⁽¹⁷⁾

The separate appointees of portions of an entire charge (and ^{(ix) Separate appointees.} not those claiming partial or sub-interests in portions of it) are entitled to separate costs, as defendants in a suit relating to the estate charged.⁽¹⁸⁾

In a Calcutta case, where a zemindar and putneedar were both ^{(x) Zemindar and Putneedar.} compelled to appear for the protection of their separate interests, and whose defences were not necessarily identical, were held to be entitled to separate costs.⁽¹⁹⁾

In an action for injunction brought against a builder and his ^{(xi) Builder and Employer.} employer to restrain an interference with light in which the builder had severed from his co-defendant, the Court, being of opinion that the severance was reasonable under the circumstances, ordered the employer to pay the builder's costs as between solicitor and client.⁽²⁰⁾

Where the case is against several defendants charging them ^{(xii) Joint wrong-doer.} jointly with misappropriation of property, one defendant is not bound to entrust his defence to the counsel of the other defendants, but each has a right to defend himself separately, and the Judge

(16) *Remnant v. Hood*, 27 Beav. 613.

(17) (*Ibid*).

(18) *Hoops v. Kingston (Lord)*, 11 Ir. Eq. R. 471, cited in Mew's Digest, Vol. IV, Heading "Costs." Col. 717.

(19) *Gobindnath Roy Bahadoor v. Ranee Luchmee Koomaree*, 11 W.R. 36. Norman, J., said in the course of the judgment:—"Only one set of costs has been allowed to the respondents—the one the zemindar, and the other a person who holds a talook in dispute in putnee. These defendants object in cross-appeal they are entitled to separate sets of costs. We think that this is so. They have clearly separate and distinct interests, namely, the zemindar, an interest equal to the value of the putnee-rent, the annual amount of which appears on the statement of the vakeel to be Rs. 6,500. The putneedar has a distinct interest, the value of which is equivalent to that of the profit of his holding—an interest, in fact, which is probably little less considerable than that of the zemindar. It is quite clear, that, for the protection of their own interests, both these parties were compelled to appear. Their defences are not necessarily identical. The putneedar's case is probably stronger than that of the zemindar. They are, therefore, clearly entitled to defend separately, and must be allowed separate sets of costs both in this Court and in the first Court. We think that, in this particular case, their costs should be allowed on the valuation of the suit, the parties preferring the cross-appeal not asking for more. We do not think it necessary to enquire into the value of the suit as might have been done under rule 3 of the Rules of Practice of 10th May 1866." *Gobindnath Roy Bahadoor v. Ranee Luchmee Koomaree*, 11 W.R. 36 (37 and 38).

(20) *Born v. Turner*, (1900) 2 Ch. 211.

would, therefore, be right in awarding separate costs to the several defendants.⁽²¹⁾

When two defendants in an action of trespass sever in pleading, but plead the same pleas, all going to the whole action, and one succeeds upon one issue, and the other fails upon all the issues, the successful defendant is entitled not only to his separate costs of the issue on which he has succeeded, but to an *aliquot* part of the joint costs, unless the Court or the taxing officer is satisfied that, by reason of any special circumstances, less ought to be allowed.⁽²²⁾

(xiii) Several defendants—Judgment in favour of some and against others.

Where there are several defendants, and a judgment is passed against some and in favour of the rest, the latter are entitled to their *aliquot* proportion of the whole costs incurred.⁽²³⁾

(xiv) Several defendants—Separate taxations—Practice.

Where there are several defendants who defend separately, and obtain a verdict generally, the costs of all need not be taxed at the same time.⁽²⁴⁾

(xv) Separate costs awarded—Objection in appeal—Practice.

Where the lower Court has improperly awarded separate sets of costs to defendants who have severed in their defence, the attention of the appellate Court should be drawn to this circumstance before the decree in appeal is passed. It is too late to raise the objection when this latter decree is being executed.⁽²⁵⁾

(xvi) Award of separate costs by decree—If can be altered in execution.

Where a decree of the lower Court allows separate costs to separate defendants, his successor is not competent, in execution, to alter the decree of his predecessor, although the High Court thought fit to allow in respect of the appeal only one set of costs to

(21) *Nilakanth Surmah v. Soosela Debia*, 6 W.R. 324.

(22) *Gambrell v. Falmouth (Earl)*, 5 L.J. K.B. 253.

(23) *Griffith v. Jones*, 4 D.P.C. 159 ; 5 L.J. Ex. 267.

(24) *Brueford v. Griffin*, 20 L.J. Ex. 287. A suit was decreed by the first Court and the decree directed that the defendants do pay the costs of the plaintiffs amounting to a certain sum. At the bottom of the ordering part, the costs of the several defendants, who had appeared by separate *vakalatnamahs* and put in separate defences, were recorded separately, each being credited with the full pleader's fee. The defendants preferred one appeal to the High Court, and the decree of the first Court was reversed, and the plaintiff was directed to pay to the defendants the costs of the appeal and the "costs incurred by them in the lower Court": *Held*, that those words meant the costs as entered in the superseded decree of the first Court. *Raghunandan Lal v. Rajendra Prosad Narain Singh*, 5 Ind. Cas. 342=11 C.L.J. 207=14 C.W.N. 556 (referring to *Nubo Kristo Mookerjee v. Parbutty Churn Bhuttacharjee*, 13 W.R. 28 and *Mothoora Mohun v. Huree Kishore*, 18 W.R. 286).

(25) *Ramchunder Sen v. Kumar Doorga Nath Roy*, 2 C.L.R. 152.

the respondents, and although the principal defendants had purchased the interests of the other defendants.⁽²⁶⁾

Where a decree awards separate costs to separate sets of defendants, the Court, after levying the costs from the plaintiff, should not direct that the whole amount is to remain in Court until all the defendants come and grant a joint receipt for the whole amount and take it out of Court. On the application of one set of defendants for payment, the proper course is that the Court should cause notice to be served on the other defendants, giving them a reasonable time to come in and prove what portion of the costs they were entitled to.⁽²⁷⁾

(II) Cases where separate costs were not allowed.

Several defendants were sued in respect of the same matter, and their defences were identical,—and the defendants appeared separately. It was *held* that the Judge, in dismissing the suit, properly allowed to the defendants the costs of a joint defence only.⁽²⁸⁾

(i) Several defendants having identical defence appearing separately.

Where the obligees of a bond brought a suit against their joint obligors, the heirs of their surety, a purchaser from those heirs of the property mortgaged in the money bond, and one *D*, in which suit they claimed to recover the money due on the bond by the sale of the property mortgaged therein, a $6\frac{1}{4}$ biswas share in certain property, and also by the sale of the property mortgaged in the security bond: *Held*, that one set of costs was enough for the heirs of *S* and the purchaser from them of the property mortgaged in the security bond, as their defences were identical, and that *D*'s costs

(26) *Nuffurchunder Paul v. Naduroonissa Beebee*, 9 W.R. 387.

(27) *Nuffur Chunder Paul v. Naduroonissa Beebee*, 9 W.R. 387, followed in *Syed Wajed Hossein v. Moulvee Abdool Kadir*, 13 W.R. 418.

(28) *Joykishen Mookerjee v. Hurrybungso Burrall*, Marsh. p. 95=1 Hay 162. The suit was brought to recover damages for an alleged trespass committed on the plaintiff's kutoberry, and carrying away his goods. The Judge below was of opinion that the damage claimed had not been sustained; and the defendants having been punished for the trespass by criminal prosecution, he dismissed the suit with costs; but, inasmuch as the defence of the defendants was identical costs were allowed to them only on the same scale as if they had jointly appeared, notwithstanding they had appeared severally, and put in separate defences. On appeal against this decree, it was urged that the defendants were entitled to be allowed the costs of a separate appearance. The Court said in the course of the judgment: "As to the request of the defendants that each should be allowed his costs of a separate appearance as each appeared separately, we see no ground to interfere with the order of the Sudder Ameen. The answer of each of the defendants was identical, and might and ought to have been joint. By separating, they seek to put the plaintiff to an unnecessary expense." *Joykishen Mookerjee v. Hurrybungso Burrall*, Marsh. 95=1 Hay 162.

should be calculated on the value of the $6\frac{1}{4}$ biswas, the decree of the Court of the first instance being modified to this extent.(29)

(ii) Several defendants having common defence engaging separate vakils.

Where the defence is common and not separate, one set of costs should be awarded to all the defendants, even though they appear by separate vakeels.(30)

(iii) Several defendants engaging same solicitor.

Where several defendants retain the same solicitor, each of them can only be charged with his proportion of the general costs of proceedings taken on behalf of all.(31)

(iv) Several defendants, one of whom employing an attorney for all.

Where there are several defendants, and one alone employs an attorney for all, the others are not entitled to claim any costs in respect of the employment of that attorney.(32)

(v) Several defendants appearing by different attorneys, but all business practically being done by one.

Where several defendants defend separately, and apparently by different attorneys, but all the business is virtually done by one, they are not entitled to charge by separate bills of costs, but must make a joint charge.(33)

(vi) Several defendants conducting defences separately, but *bona fide*, by same solicitor.

In a case where separate defences were unnecessarily but *bona fide* delivered by the same solicitor for different defendants, the costs of one defence only were allowed.(34)

(vii) Several defendants engaging same solicitor—One set of counsel.

A solicitor who acts for two defendants in the same interest should employ one set of counsel for both, although he may act directly for one and as agent for the solicitors of the other.(35)

(viii) Several defendants of one class engaging separate counsel.

Where several persons of one class and having the same defence are represented by separate counsel, there will be only one set of costs allowed for each class.(36)

(29) *Bhup Singh v. Zain-ul Abidin*, 9 A. 205=A.W.N. (1886), 279. Two sets of defendants having put in separate answers, the taxing master refused to allow more than one set of costs. *Held*, that there was no appeal. *Beattie v. Ebury (Lord)*, 43 L. J. Ch. 80=29 L.T. 419.

(30) *Francisco de Assis v. Louisa Dos Anjos*, 17 W.R. 188.

(31) *Ford, Ex parte; Colquhoun, In re*, 2 Eq. Rep. 304=23 L.J. Ch. 515.

(32) *Starling v. Cozens or Cousins*, 4 L.J. Ex. 223.

(33) *Nanny v. Kenrick*, 2 D.P.C. 334.

(34) *De Burgh v. Chichester, Ir. R.* 4 Eq. 623.

(35) *Walters v. Webb*, 39 L.J. Ch. 414=L.R. 9 Eq. 83.

(36) *Stevenson v. Abington*, 6 L.T. 345.

Where the same solicitor put in and set down for hearing two (ix) Several defendants—
pleas for want of parties, for two several defendants, and they were Two pleas.
both allowed, the plaintiff was ordered to pay the costs of one of
such pleas only. (37)

Members of the same family, and living in the same place, (x) Members
when sued together on a cause of action common to all, are entitled of same
to only one set of costs. (38) family living
in same place.

As a general rule, under the practice of the Courts in England, (xi) Husband
no order would be made as to costs in the case of a suit between and wife.
husband and wife; (39) and where a husband and wife, living apart
from each other, severed in their defence, and appeared by different
solicitors, only one set of costs was allowed between them. (40)

Where a husband and wife, who were living apart, had put in
separate answers, and appeared by different solicitors, separate
costs were allowed, there being no evidence in the cause of the
grounds of their separation. (41)

Generally a trustee and his *cestui que trust* get but one set of (xii) Trustee
costs between them. (42) and *cestui*
que trust.

So, also, the person entitled to a share, and all his encumbran- (xiii) Owner
cers, have only one set of costs, which may be made payable to the and encum-
first incumbrancer. (43) brancer.

(37) *Tarbuck v. Woodcock*, 3 Beav. 289.

(38) *Kassee Nath Chowdhry v. Hulloodhur Roy*, 2 W.R. 60. The Court, Steer and Jackson, JJ., said:—On the point as to how the costs of suit have been awarded by the Court below, we think that, considering all the defendants are members of the same family, and live in the same place, they are sued on a cause of action common to all, and that they decidedly put their heads together as to the defence, for they answer in exactly the same words. We think they have unnecessarily augmented the costs by each filing a separate answer, and each employing a separate vakeel, when one answer and one vakeel would have sufficed. On these grounds we think the defendants are entitled only to one set of costs between them. We affirm the decision of the lower Court, dismissing the plaintiff's suit; but in modification of the order of the lower Court, we declare the plaintiff liable to costs to the other side to the extent he would have been liable, had the defendants joined together to make one defence, and had employed only one vakeel. Each party will pay his own costs of this appeal. *Per* Steer and Jackson, JJ., in *Kassee Nath Chowdhry v. Hulloodhur Roy*, 2 W. R. 60. But see also Ref. (10), *supra*.

(39) *Vansittart v. V.*, 4 K. & J. 62; see, however, S.C., 2 De G. & J. 249, 258; *Walrond v. Walrond*, 1 Johns, 18; *Re Wills*, 3 N.R. 107; *Rotherham v. Battson*, 2 Sm. & G. App. 8. And see as to costs between husband and wife, *Morg. & Wurtz*. 367—371.

(40) *Garey v. Whittingham*, 5 Beav. 268, 270; *Kewan v. Crawford*, 6 C.D. 29.

(41) *Barry v. Woodham*, 5 L.J. Ex. Eq. 20.

(42) *Remnant v. Hood*, 27 Beav. 613.

(43) (*Ibid*).

(xiv) Part-
ners.

A and B, two surveyors in partnership, who were employed as a firm with respect to the matters in question in the suit, were made defendants for the purpose of discovery only. The plaint also prayed that "the defendants might pay the costs of the suit." They put in separate answers, and appeared by separate counsel at the hearing. Prior to the hearing they had dissolved partnership. At the hearing a decree was taken by consent (as between the plaintiffs and the principal defendants) as to the matters in question in the suit, and it was admitted that A and B were entitled to their costs: *Held* that they were only entitled to one set of costs between them, as they were not justified in severing in their defence.⁽⁴⁴⁾

(xv) Ijmallee
holders.

Ijmallee-holders who are made defendants should ordinarily be represented ijmallee by one pleader and one set of pleadings, and are not entitled to separate costs.⁽⁴⁵⁾

(xvi) Direc-
tion as to
costs in
decree--Sepa-
rate or single
—Practice.

If several defendants have severed in their defence and the lower Court has awarded and specified the costs incurred by each of them, the costs payable under the above directions will be their several costs. If they have joined in their defence, or though they have severed their defence, but the lower Court has specified a single set of costs as the only costs which it will allow or treat as costs in the suit, then the costs payable will be the single set of costs.⁽⁴⁶⁾

Under the Code of Civil Procedure it is the duty of the first Court to ascertain the costs of suit, *i.e.*, the costs of all the parties to the suit; but, when the first Court does not consider that the defendants have properly severed in their defence, and properly employed different vakeels, the Court ought not to allow more than one set of costs to the defendants, and should only specify in its decree the costs so allowed.⁽⁴⁷⁾

(III) Miscellaneous.

Joinder of
plaintiffs—
Some
successful.

Two plaintiffs joined in one action, claiming for separate and distinct causes of action. The case was referred, with power to the arbitrator to enter judgment, the costs of the cause to abide the event. The arbitrator found in favour of one plaintiff, and against the other, and entered judgment accordingly. On an application to review taxation of costs it was *held* that the successful plaintiff

(44) *Bull v. West London School Board*, 34 L.T. 674.

(45) *Brindabun Chunder Chowdhry v. Ram Coomar Chowdry*, 1 W.R. 139.

(46) *Ram Chunder Sen v. Koomar Doorga Nath Roy*, 2 C.L.R. 152.

(47) (*Ibid*).

was entitled to recover from the defendant the whole of his general costs of the action, and the defendant was only entitled to recover from the unsuccessful plaintiff the costs occasioned by joining such plaintiff. (48)

Two owners of distinct properties joined in a suit to restrain a nuisance. The Court considered that a sufficient case of nuisance had in the case of the first plaintiff not been made out, but in the case of the second plaintiff had been made out. A decree was made for an injunction so far as regarded the second plaintiff, and for the defendant to pay his costs; the suit as regarded the first plaintiff was ordered to be dismissed, and the costs occasioned by the addition of the first plaintiff to be deducted from the costs so to be paid by the defendant. (49)

Where there are two or more defendants, and judgment is given against them all with costs, each is liable to the plaintiff for all the costs properly incurred by him, but, if one of such defendants delivers a separate defence and thereby occasions extra costs, that defendant only is liable for such extra costs. (50)

Co-defendants—
Separate
defences—
Liability for
plaintiff's
costs.

Where damages for personal injuries were claimed against two sets of defendants and the jury found against one set but in favour of the other, and judgment was entered accordingly, the costs ordered to be paid by the plaintiff to the successful defendants were allowed to be included in the costs recovered by him against the unsuccessful defendants. (51)

Where a plaintiff is given his costs against two defendants, against one of whom judgment is obtained on motion for judgment and against the other after trial in the action, the form of order giving plaintiff the costs of the action should provide that "it be referred to the Taxing Master to tax such costs and to certify how much thereof is properly attributable to the defendants jointly and to

Co-defendants—Judgment obtained in different ways.

(48) *Gort (Viscount) v. Rowney*, 55 L.J. Q.B. 541; 17 Q.B.D. 625; 54 L.T. 817; 34 W.R. 696 (Eng.)—C.A.

(49) *Umfreville v. Johnson*, 44 L.J. Ch. 752; L.R. 10 Ch. 530; 23 W.R. 844 (Eng.).

(50) *Stumm v. Dixon*, (1869) 22 Q.B.D. 529, 533; cf. *Kelly's Directories v. Gavin*, (1901) 2 Ch. 763. See further *Hughes v. Key*, (1855) 20 Beav. p. 397; *Catton v. Banks*, (1893) 2 Ch. 221; *Ancell v. Rolfe*, W.N. (1896) 9; cf. *Belcher v. Williams*, (1890) 45 Ch. D. 510.

(51) *Medley v. London United Tramways, Limited*, (1910) 26 T.L.R. 815. See this point dealt with more fully in Chap. III, *supra*.

each defendant separately, and that the respective defendants do pay to the plaintiff the amount so certified.”⁽⁵²⁾

Co-defend-

ants—

Payment

into Court by
one.

“Where, in an action of tort against several defendants, the plaintiff accepts the money paid into Court by one defendant in complete satisfaction of the claim, the Court has a discretion to order the plaintiff to pay the costs of the other defendants, on the ground that the defendants have been deprived by the plaintiff’s act of an opportunity of defending themselves against the charge of tort, and must be assumed to be innocent.”⁽⁵³⁾

(52) *Dansk Rekyllrifel Syndikat v. Snell*, (1908) 2 Ch. 127.

(53) *Beadon v. Capital Syndicate, Limited*, (1912) 28 T.L.R. 427, C.A.

CHAPTER VII.

PROPORTIONATE COSTS.

Proportionate costs—When awarded.

Costs “in proportion”, meaning of.

Costs allowed in proportion to amounts decreed and disallowed—Calculation of.

Costs in case of partial decree, rule as to.

Examples :—

(i) Where plaintiff gets a smaller amount than that claimed by him.

(ii) Where plaintiff succeeds on one of two distinct matters.

(iii) Costs in case of alternative claims—One succeeding the other failing.

An exception to the above rule.

Costs where partial relief granted—A portion being *sub judice*.

Costs where a party substantially succeeds.

Costs where a party succeeds, but gets relief not in the precise form in which he asked for it.

Example :—

Costs where lower Court grants injunction and appellate Court refuses injunction but awards damages.

Costs, apportionment of, in cases where there are distinct issues.

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Costs of separate issues and costs of separate causes of action.

Costs where one of two plaintiffs succeeds and the other fails.

Costs, apportionment of, as between co-defendants.

Costs apportioned as between different estates.

Costs incurred before tender and after tender—Apportionment of.

Costs where parties have separate interests in suit property.

Costs, apportionment of, in case of claim and counter-claim.

Costs in case of joint decree.

Costs in matters of account.

Costs, apportionment of, in pauper suit.

Costs out of particular fund.

Costs in case of partial alteration of decree in appeal.

Costs in proportion—Practice of Privy Council.

Costs—Apportionment and set off.

Plaintiff's right.

Defendant's right.

Proportion-
ate costs—
When award-
ed—

WE have examined in the previous chapter some of the circumstances under which the Court would award separate sets of costs to defendants severing in their defence. We shall examine in this chapter some of the cases where the parties were awarded "proportionate costs". There are several modes in which, and several grounds on which, proportionate costs are awarded. For instance costs may be awarded in some cases in proportion to the extent of relief granted or refused. A plaintiff may succeed in part and fail as to the other part; or a defendant may win with regard to some of his pleas—the other pleas being disallowed; or there may be several plaintiffs or several defendants who would be entitled to share in the costs awarded; or there may be several estates which had jointly contributed to the expenses of the litigation and which would be entitled to the benefit of the costs ultimately awarded by the Court. In all such and similar cases, the Court generally adopts the essentially equitable principle of awarding costs in proportion. This proportion may be with reference to the amount of success or failure which a plaintiff or defendant had; or it may be with reference to the number of persons who are entitled to share in the costs, or with reference to the number of different estates or interests represented in the litigation, and which may be entitled to the benefits of the decree.

We shall examine in this chapter some of the important cases in which the Courts have awarded "proportionate costs" and the principles underlying those cases. (1)

(1) On the subject of this chapter see Encyclopædia of the Laws of England, 2nd Ed., Vol. IV, pp. 54—56; Yearly Practice, 1914, notes under R. S. C., O. LXV, r. 2, pp. 1102—1105; Mew's Digest, Vol. IV, Heading "Costs," cols. 694, 695 & 715—722; Seton on Judgments and Orders, 6th Ed., 1901, Vol. I, pp. 263—265; Ameer Ali's Civil Procedure Code, 2nd Ed., 1916, pp. 210, 211; Morg. and Wurtz. 162—164. As regards English Law the practice in the Ch. D. and K.B.D. as to apportionment of costs had been divergent, as appears by the decisions in *Sparrow v. Hill*, (1881) 18 Q.B.D. 479, C. A.; *Jones v. Curling*, (1884) 13 Q.B.D. 262, C. A.; and *Jenkins v. Jackson*, (1891) 1 Ch. 89, C.A. and see *Real and Personal Advance Co. v. Mc Carthy*, (1881) 18 Ch. D. at p. 368, C.A. Methods of apportionment were considered by Keewich, J., in *Re Pollard*, (1902) W.N. 49, and 46 Sol. J. 290. See also *Wagstaffe v. Bentley*, (1902) 1 K.B. 124, C.A.; *Ridout v. Green*, (1902) 18 T.L.R. 709; *Re Wright, Crossley & Co.*, (1902) 86 L.T. 280, C.A.; *Todd v. N.E.Ry. Co.*, (1903) 88 L.T. 112, C.A.; *Bourne v. Swan and Edger*, (1903) 1 Ch. 211; *Hubback v. British North Borneo Co.*, (1904) 2 K.B. 473, C.A.; *Harley v. Hunt*, W.N. (1887) 184; *Bourke v. Alexandra Hotel Co.*, (1877) 25 W.R. 782. "When the Court gives part of the costs of the action it may do so in two ways: the one will involve an apportionment of the whole of the general charges; the other will extend only to the excess of expense incurred in consequence of the particular matter

The expression "costs in proportion" means that costs are to be awarded in the proportion that the amount of the claim in respect of which plaintiff succeeds bears to the amount mentioned in the plaint.⁽²⁾

An order decreeing to the plaintiff his costs in proportion must be taken to mean as if costs were given in proportion to the amounts decreed and dismissed.⁽³⁾

Where the decree in a suit directs the payment of costs by the plaintiff and defendants respectively in proportion to the amounts decreed and disallowed, the proper mode of giving effect to such a decree is to calculate the amount of the costs of the suit as laid, and

Costs "in proportion" meaning of.
Costs allowed in proportion to amounts decreed and disallowed—Calculation of.

directed to be excepted." For an instance of the application of both modes in an original and cross suit, see *Begbie v. Fenwick*, 6 Ch. 869. See Seton on Judgments and Orders, 6th Ed., 1901, Vol. I, p. 263.

(2) *Vasudev Pandurang Kale v. Rambhat bin Gangadharbhat Dante*, Unreported Printed Judgments of the High Court of Bombay, Vol. VII, 1889-1891, (Rajkot edition, 1912), p. 598. The Court (C. Sargent and H. Birdwood, JJ.) said :—"The expression "costs in proportion" is a well-known technical expression, and we see no reason for thinking that the High Court intended to use it in a different sense. It was contended by Mr. Shamrao Vithal that the Court meant to give costs in the same proportion as the share awarded to him of the collections bore to the entire collections. But the plaintiff never claimed more than a 13 annas, 4 pies share in the forest, and no question, therefore, as to his being entitled only to proportionate costs could arise out of that claim. Assuming, therefore, as we think we ought, that the expression was used in its ordinary sense, the question arises as to what was the amount of the claim in respect of which the plaintiff succeeded. This, according to practice, would be determined by the amount mentioned in the plaint and cannot include the plaintiff's share in the collections by the Receiver any more than it would the amount of mesne profits during the suit which the Court can award without their being asked for in the plaint. The result is that the darkhast should be admitted to the extent of Rs. 529-15-0 instead of Rs. 1,041-6-4, and as the appellants have substantially succeeded in their objection to the darkhast, they should have their costs here and in the Court below."

(3) *Bykuntath Chowdry v. Moheshsurree and others*, 4 W.R. (Mis.) 9. "The question in this case was whether under the terms of the decree the defendant was entitled to costs on so much of the claim as was dismissed. The Judge held that the costs in the first original suit were meant to be given to the parties in proportion to the amount decreed and dismissed. The order in the present case omitted the words "and dismissed." It had the effect of limiting the amount of costs which the plaintiff was to receive but did not in words provide for the costs due to defendant for so much of the claim as was dismissed. On this appeal from the order of the Judge, the High Court held that according to the recent practice of the Courts, the order should be taken to have been intended to give costs in proportion to the amount decreed and dismissed; except where there is a distinct order restricting costs to the plaintiff, such practice should be followed because the defendant, in such cases, is generally entitled to costs and should be allowed them unless expressly prohibited." See *Bykuntath Chowdry v. Moheshsurree*, 4 W.R. Mis. 9.

then divide the entire sum proportionately between the parties according as they have respectively succeeded or failed.⁽⁴⁾

Where a claim is partly decreed and partly dismissed the usual practice of the Courts is to give proportionate costs.⁽⁵⁾

In cases of partial decree, costs should be awarded to both parties in proportion to the amount decreed and dismissed.⁽⁶⁾

When different demands arise in a cause, the costs should be arranged as the equities between the parties require.⁽⁷⁾

By O. LXV, r. 2 of the Rules of the Supreme Court in England where issues in fact and law are raised upon a claim or counter-claim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event.⁽⁸⁾

But it is not correct in law or justice to say that costs must be invariably awarded in proportion to the amount decreed and dismissed.⁽⁹⁾

Costs in
case of
partial
decree,
rule as to.

(4) *Lackie v. Jyogobind Nath*, 7 C.L.R. 114; *Bamasoondery Debia v. Rogers*, 7 W. R. 127, upheld on review in 8 W.R. 55. See also *Tara Chand v. Jadoonath, Marsh.* 79 = 1 Hay 141 = 1 Ind. Jur. O.S. 102. For a case where there is an indication of the proper mode of taxation of a bill of costs where an apportionment is directed, see *Heighington v. Grant*, 1 Beav. 228; 9 L.J. Ch. 142; and see S.C., 10 L.J. Ch. 12; 11 L.J. Ch. 171; 4 Jur. 1052.

(5) *Tarachand Mockerjee v. Jadoonath Mookerjee*, Marsh. 79.

(6) *Ninhooora v. Heeraram Misser*, 1 Hay 277.

(7) *Shine v. Gough*, 2 Ball. & B. 34.

(8) Seton on Judgments and Orders, 6th Ed., Vol. I, p. 265. See also S. 35 of the Code of Civil Procedure, Act V of 1908. The word "event" occurring in S. 35 of the Code of Civil Procedure, 1908, as well in the rules framed under the English Judicature Acts, may "be read distributively, and where there are distinct causes of action the general costs of the cause follow the judgment, but the costs of the particular issues should be taxed in favour of the party who has succeeded on them. And the same rule is commonly applied in all cases where several issues are raised, and the party fails as to some and is successful as to others." *Myers v. Defries*, 5 Ex. D. 180; *Ellis v. De Silva*, 6 Q.B.D. 521; *Goutard v. Carr*, 13 Q.B.D. 598n.; *Lund v. Campbell*, 14 Q.B.D. 821; *Hawke v. Brear*, ib., 841. See Ameer Ali's Civ. Pro. Code, 2nd Ed., (1916), p. 212. An action and all matters in difference were referred, the costs of the cause, reference, and award to abide the event:—*Held*, that the word "event" must be construed distributively. *Hawke v. Brear*, 54 L.J. Q.B. 315; 14 Q.B.D. 841; 52 L.T. 432; 33 W.R. 613 (Eng.). S. 4 of the Rules regarding pleader's fees does not lay down that, in cases partly decreed and partly dismissed, the portion of the claim as to which judgment is given for the defendant is to be treated as if the defendant had claimed that sum from the plaintiff, and got a decree for it. *Bama Soonduree Debia v. Mr. George Rodgers*, 8 W.R. 55. As to the practice in Chancery regarding apportionment of costs where the plaintiff partly succeeds and partly fails, see *Bankart v. Tennant*, 39 L.J. Ch. 809; L.R. 10 Eq. 141; 23 L.T. 137; 18 W.R. 639 (Eng.).

(9) *Sheo Dyal Tewaree v. Jadoonath Tewaree*, 9 W.R. 61 at 62.

The Court can exercise the largest discretion in the matter ; but this discretion is to be exercised with special reference to all the circumstances of the case, including the conduct of the parties (10).

The general rule is that if a plaintiff recovers a smaller amount than he claimed in the plaint, his costs should be apportioned according to the amount recovered, and not to the sum claimed.⁽¹¹⁾

Examples (i) where plaintiff gets a smaller amount than that claimed by him.

The plaintiff claimed as damages a larger sum, than the appellate Court ordered. No costs were given in the appeal. It was *held* following the practice of the Courts in *India*, that, as the plaintiff recovered a less amount than he laid claim to in his plaint, his costs in the Court below were to be apportioned to the amount recovered, and not to the sum claimed.⁽¹²⁾

If a plaintiff claims in respect of two distinct matters, and succeeds as to one, and fails as to the other, the costs will be apportioned, so as to give to each party the costs applicable to that matter upon which he has succeeded.⁽¹³⁾

(ii) Where plaintiff succeeds on one of two distinct matters.

Where plaintiffs succeeded as to one item of their claim and it was ordered that the rest of the action stand dismissed without cost, the general costs were held to be apportionable.⁽¹⁴⁾

In an English case, of the two objects of a suit, one succeeded and the other failed. The costs not being easily separable, a decree was made without costs on either side.⁽¹⁵⁾

(10) *Sheo Dyal Tewaree v. Judoonath Tewaree*, 9 W. R. 61 at 62.

(11) *Velu Pillai v. Ghose Mahomed*, 17 M. 293=4 M.L.J. 140. Referred to in *Periakaruppan v. Palaniappa*, 18 M.L.J. 210.

(12) *Mohun Doss v. Gokul Doss*, 5 W.R. 91, P.C.=10 M.L.A. 563=2 Sar. 202=1 I.J.N.S. 269=1 Suther. 644.

(13) *Tarachand Mookerjee v. Jadoonath Mookerjee*, Marsh. 79. The Court said in the course of the judgment :—" It is usual, where a claim is partly decreed and partly dismissed, to give proportional costs ; and, as the Judge has found one of the plots, for which special appellant was sued, not to be in his possession, it was in effect declaring that he had been needlessly called into Court on account of this plot. The costs, therefore, ought to have been given in proportion to the amount of the decree. We, therefore, amend the order of the lower Court to this trifling extent."

(14) *Todd v. N. E. Ry. Co.*, (1903) 88 L.T. 112, C.A. See also *Jenkins v. Jackson*, (1891) 1 Ch. 89, C.A. (costs apportioned) ; *Sparrow v. Hill*, (1881) 8 Q.B.D. 479, C.A. (costs not apportioned, but see the following case) : *Harley v. Hunt*, W.N. (1887) 184 cost apportioned : *Sparrow v. Hill*, 8 Q.B.D. 479, C.A. distinguished) ; *Kennedy v. Healey*, (1897) 2 I.R. 258 (costs apportioned).

(15) *Rochdale Canal Co. v. King*, 16 Beav. 690 ; 22 L.J. Ch. 604 ; 17 Jur. 1001. And see *Hardingham v. Thomas*, 2 W.R. 547 (Eng.).

(iii) Costs in case of alternative claims—One succeeding the other failing.

“Where, in an action for damages for the obstruction of a right of way, claimed alternatively as a public and as a private right of way, the Court found that there was a public, but not a private right of way, it was held that the plaintiff was entitled to the general costs of the action, and the defendant only to the costs of the issue on which he had succeeded, namely, as to the private right of way.”⁽¹⁶⁾

An exception to the above rule.

Under the special terms of the Administrator-General's Act (II of 1874) the plaintiff (having succeeded as to part of his claim only) was held not to be entitled to any costs, but was liable to pay costs on the portion of his claim disallowed.⁽¹⁷⁾

Costs where partial relief granted a portion being *sub judice*.

Costs are not consequential upon partial relief being granted in a suit, involving a much larger subject-matter, a portion of which is still *sub judice*, and cannot, therefore, be given by the High Court upon a decree of the Privy Council if not provided for by the decree.⁽¹⁸⁾

(16) *Smyth v. Wilson*, (1904) 2 Ir. R. 40. “In an action the defendants denied all the allegations of the statement of claim, and, as an alternative defence, paid a sum of money into Court in satisfaction of the plaintiff's claim. This sum the plaintiff did not accept. The cause was referred, the costs of the cause, reference, and award to abide the event. The arbitrator found all the issues, except one as to special damage, in favour of the plaintiff; and he also found that the money paid into Court was enough to satisfy the plaintiff's claim in respect of the subject-matters of the action:—*Held*, that the defendants were entitled to the general costs of the action and award, and to the costs of the issues found in their favour; but that the plaintiff was entitled to the costs of the issues on which he had succeeded.” *Goutard v. Carr*, 53 L.J.Q.B. 55; 32 W.R. 242, (Eng.) C.A.

(17) *Harender Kishore v. Administrator-General of Bengal*, 12 C. 357 at p. 375. *Vide* S. 35 of the Administrator-General's Act (II of 1874) which runs as follow:—“If any suit be brought by a creditor against any Administrator-General in his representative character, the plaintiff shall be liable to pay the costs of the suit down to and including the decree, unless upon proof by affidavit or otherwise that not less than one month previous to the institution of the suit he had applied in writing to the Administrator-General, stating the amount and other particulars of the claim, and supporting the same by such evidence as, under the circumstances of the case, the Administrator-General was reasonably entitled to require, and that the Administrator-General had refused or neglected to register the claim according to the practice of his office.

If in any such suit judgment is pronounced in favour of the plaintiff, he shall, nevertheless, be only entitled to payment out of the assets of the deceased equally and rateably with the other creditors.” [*N.B.*—This corresponds to S. 40 of the present Administrator-General's Act (III of 1913).]

(18) *Rajah Leelanund Singh v. The Court of Wards on behalf of the Rajah of Durbhungah*, 14 W.R. 387.

Where a party substantially succeeds he would be entitled to his costs.⁽¹⁹⁾

Costs where a party substantially succeeds.

Where a plaintiff is entitled to some part of his claim, he ought not to be deprived of the benefit of the decree by such an order as to costs as would make him liable to the defendant for more than he would himself recover.⁽²⁰⁾

Where a suit for damages was partially decreed on a finding of nominal damages, and costs on the amount undecreed were awarded to the defendant with interest, it was *held* that there was no good

(19) *Ghanasham Nilakant v. Moroba Ram*, 18 B. 474. See, also, case noted at Ref. (2), *supra*.

(20) *Ram Chunder Chowdhry v. Marriott*, 15 W.R. 465 at p. 467. Their Lordships said in the course of the judgment :—" There remains the question of costs. It has been argued on the part of Government that this suit was brought without the slightest foundation, that it was a monstrously exaggerated suit; that no attempt was made to settle matters without coming into Court; and that the Government were bound to come in and defend their interests, as the plaintiff had made it impossible by his exorbitant demands to come to any settlement. The Senior Government Pleader, therefore, contends that the usual rule in cases in which the decision of the lower Court is partly upheld and partly reversed should be followed, namely, that the costs should be made payable in proportion to the amounts decreed and dismissed. On the other hand, it is contended that the Government, though knowing of the claim made and admitting that a certain portion of it, at all events, was correct, there being no denial on the part of the Commissariat Officer that the Government elephants had been fed on the plaintiff's jheel, made no attempt to settle that portion of the case, and did not even pay into Court the value of the *dul* admitted to have been used for 10 days, but forced the plaintiff to come into Court. We think that, on the whole, the fairest way would be to order that each party should bear their own costs. Had the defendant endeavoured to put a stop to this litigation, and offered to pay into Court the amount due on account of the 10 days forage, we should have had no hesitation in ordering that the costs should be fixed in proportion to the amounts decreed and dismissed on either side; but to do so in this case would be to take away every advantage which the plaintiff will get from this decree, and to give the Government a pecuniary benefit to which it is not entitled; for on a calculation made by us of the costs as they would be on this basis, we find that the Government would be a gainer, although it loses the suit, by some 20 or 30 rupees. Now, the plaintiff is entitled to some part of his claim, it would be manifestly improper to take away from him the entire benefit of the decree, by passing an order for costs which would make him liable to the defendant for a larger sum than that which he will himself recover. We, therefore, modify the order of the Judge as above stated, and direct that each party bear his own costs." *Ramchunder Chowdhry v. Marriott*, 15 W.R. 465. On a reference to arbitration, the costs "to abide the event," the word "event" means the event of the whole action, and "where the plaintiff is substantially successful in the action he is entitled to the general costs of the action, and the defendant only to the costs of those issues on which he has been successful." *Waring v. Pearman*, 50 L.T. 633; 32 W.R. 429 (Eng.). In another case, costs were allowed to plaintiffs, though they failed in a great part of their claim. *Hill v. South Staffordshire Ry.*, 43 L.J. Ch. 556; L.R. 18 Eq. 154.

reason for such a course, and no ground of justice for saddling the plaintiff with defendant's costs.⁽²¹⁾

Costs where a party succeeds, but gets relief not in the precise form in which he asked for it.

If a party substantially succeeds, although not in the precise form in which he sought the relief, he is entitled to his costs.⁽²²⁾

Example—Costs where lower Court grants injunction and appellate Court refuses injunction but awards damages.

In a recent case that came before the Bombay High Court, referring to the question of costs, it was argued for the defendant (appellant) that he should be given his costs of appeal, as he had succeeded in setting aside the injunction granted by the lower Court and should also get his costs of hearing in the lower Court, as the whole contest there had been as to the right to an injunction,

(21) *Mussamat Bibee Moseehun v. Mussamat Bibee Munoorun*, 24 W.R. 69. Phear, J., said :—"The course of this case has been most unhappy, and very little creditable to our Courts. The suit was instituted on the 4th January 1867, and by reason of a series of blunders on the part of the local Courts, a parallel to which we hope is not often to be met with, the final decision has not yet been passed. The question between the parties was a remarkably simple question, and was put in this form on the occasion of the last order of remand: "What was the damage caused to the plaintiff in the year 1274, by the wrongful act of the defendant?" The lower appellate Court has now found that the amount of damage was properly estimated at the amount of Rs. 1 per beegha—that is, Rs. 96-12 in the whole. It is impossible not to perceive that this finding is essentially a finding of nominal damages. The damage was done in the year 1274, and it is now estimated in the year 1281 at Rs. 96-12, inclusive, we suppose of interest on the money originally lost. But although this is so, we find ourselves unable on special appeal to say that this conclusion of the lower appellate Court is wrong in law, or that there has been any such error or perversity in the investigation of the case by the lower appellate Court as would justify us in disturbing this verdict. The decree, however, after providing that the plaintiff shall recover costs proportionate to the damage awarded with interest at 6 per cent. per annum, goes on to say that the defendant will receive her costs on her amount undecreed with interest at 6 per cent. per annum. The effect of this plainly is that the difference between the total amount claimed by the plaintiff in the plaint and the amount of damage finally awarded to him is considered and treated as so much money recovered by the defendant. But it seems to us that there is no good reason why this course should be taken. The plaintiff, after a very long harassing course of litigation, has at last succeeded in recovering something. He is certainly entitled to his costs, and there is no ground of justice, so far as we can see, upon which he ought to be made, not only to pay the costs of the defendant, but to pay those costs upon a very substantial estimate. We therefore think that the decree of the lower appellate Court must be varied in this particular. The order for recovery of costs in favour of the plaintiff must extend to all the Courts, and the order in favour of the defendant must be omitted. The appellant will have his costs of this Court." *Per Phear, J., in Mussamat Bibee v. Mussamat Bibee*, 24 W.R. 69.

(22) *Ghanasham Nilakant v. Moroba Ram Chandra*, 18 B. 474.

which in appeal had been refused. The defendant had paid Rs. 200 into Court when he filed his written statement, and would have paid more if he could have obtained any indication from the plaintiff of the amount that would satisfy him. Nothing, however, would satisfy the plaintiff but an injunction, and he had failed to get it. It was *held*, that the plaintiff should have his costs of hearing in the lower Court and that each party should pay his costs of the appeal and of the proceedings on the rule for an injunction before the trial. The ordinary rule should be observed, and the costs should follow the event. The event in this case was that the plaintiff had proved his case against the defendant, although he had not got the precise form of relief which he wanted. If a party substantially succeeds he is entitled to his costs.⁽²³⁾

In a suit by a brother's widow against his brothers to recover his share of joint ancestral property, the defendants pleaded separation, self-acquisition, &c. The Court *held* that, in the absence of some written record made of the terms of the separation at the time, the plea of separation was most improbable; and that, considering there was a certain nucleus of ancestral property from which a beginning might have been made, while, on the other hand, there was no evidence of self-acquisition by the defendants, the only inference was that the property had been acquired from the ancestral funds. Although the widow was unable to satisfy the Judge below as to each item of property for which she sued, and did not obtain a decree for the full amount claimed, yet she was held entitled to recover the whole of the costs incurred by her in a suit into which she had been forced by the defendants for the recovery of her property.⁽²⁴⁾

(23) *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Patil*, 18 B. 474 at pp. 494, 495.

(24) *Shib Pershad Chuckerbutty v. Gunga Monee*, 16 W.R. 291. His Lordship Jackson, J., said in the course of the judgment:—"Lastly, it is said that the Judge was wrong in giving the plaintiff a decree for her full costs when *the whole amount of the claim was not decreed*. Looking to the whole of the circumstances of the case, we think that the Judge was right to give the plaintiff her costs. There seems to be no doubt upon the evidence that the plaintiff, who, as a widow, is entitled to look to these defendants to support her and maintain her, has been turned out of her house and deprived of her share in the property by them; and even though she has not been able to satisfy the Judge as to each item of property for which she sued, it is right that she should recover the whole of the costs which she has incurred in a suit into which she was forced by the defendants for the recovery of her property." *Shib Pershad Chuckerbutty v. Gunga Monee Debee*, 16 W.R. 291 (298).

Costs,
apportion-
ment of, in
cases where
there are
distinct
issues.

Where the order gave to each party the costs of so much of the action as to which he had succeeded, and the action contained three distinct issues, the Taxing Master was held to be right in holding that the general costs of the action related to all the issues, and were therefore to be apportioned rateably in thirds.⁽²⁵⁾

Where there are several issues, and some are found for plaintiff, and others for defendant, the parties will be allowed costs on issues found in their favour, and must pay in those against them.⁽²⁶⁾

But this rule does not apply to an action of infringement in which the defendant relies on two grounds of defence, *viz.*, invalidity and non-infringement. The claim in such a case raises one issue and one issue only, namely, whether the defendant has infringed the plaintiff's legal right.⁽²⁷⁾

Where a defendant succeeds on a defence which goes to the root of the action he would be entitled to the general costs of the action.⁽²⁸⁾

Thus a defendant who succeeds on a defence of payment into Court with a denial of liability succeeds on an issue going to the whole cause of action, and so is entitled to the general costs of the action.⁽²⁹⁾

If the issues found for the defendant, taken together, form an answer to the whole of the declaration, the defendant is entitled to the general costs of the cause; although some issues may have been found for the plaintiff, and damages assessed on them.⁽³⁰⁾

(25) *Knight v. Purcell*, (1879) 28 W.R. 90 (Eng.); cf. *Sparrow v. Hill*, (1881) 8 Q.B. D. 479, C.A.; see also *Abbott v. Andrews*, (1882) 8 Q.B.D. 648; *Myers v. Defries*, (1880) 5 Ex. D. 180, C.A.; *Hoyes v. Tate (Lady)*, (1907) 1 K.B. 656, C.A.; *Deeley v. Lloyds Bank*, (1912) 57 Sol. J. 158.

(26) *Prevost v. Bennett*, 2 Price. 272.

(27) *Haskell Golf Ball Co. v. Hutchison*, (1906) 1 Ch. 518.

(28) *Wagstaffe v. Bentley*, (1902) 1 K.B. 124, C.A.; and see *Hubback v. British North Borneo Co.*, (1904) 2 K.B. 473, C.A.

(29) (*Ibid.*).

(30) *Probert v. Phillips*, 5 D.P.C. 473; 2 M. & W. 40; 2 Gale. 235; 6 L.J. Ex. 10; *Bayley v. Long*, 5 D.P.C. 616; 3 Bing. (N.C.) 781; 4 Scott. 481; 6 L.J. C.P. 191; 1 Jur. 310, S.P.; *Smith v. Brown*, 5 D.P.C. 736; 3 Hodges 144. "As a general rule when a witness is called by an unsuccessful party to an action to give evidence on two issues, one of which is won and the other lost, the party may not get the costs of that witness. Thus, in an action of libel and slander, where the defendant, having pleaded justification and privilege, failed on the plea of justification and succeeded on the plea of privilege, and the Judge directed that the plaintiff should have such costs as related exclusively to the plea of justification, it was held by the Court of Appeal that the

"A defendant is entitled to fight from every available point of advantage, and, if successful in the action, will not be deprived of costs because he has raised points on which he has not succeeded; but where there is a distinct issue on which the generally successful party has failed, and that issue has really no immediate connection with those upon which the party has succeeded, then he ought not to have the costs of that issue which presumptively ought never to have been raised." (31)

A party entitled to the costs of the pleadings on any issue found for him, is entitled to all other expenses incidental to those pleadings, as briefs, witnesses, &c. (32)

Although an unsuccessful litigant should ordinarily bear the costs of the litigation, yet when the costs of a particular issue can be separated from the costs of the suit, it is usual to allow them to the party who is successful on that issue irrespective of the ultimate result of the suit. (33)

Costs of a particular issue separable from costs of suit.

Where a plaintiff is successful as to the principal object of the action, but fails as to a particular issue, he may be given his costs of the action, except so far as they have been increased by the issue on which he has failed, and the costs of that issue may be given to the party who has succeeded as to it, the one set of costs being set off against the other. (34)

So also, where there are several issues, and some are found for the plaintiff and others for the defendant, the parties may be allowed costs on issues found in their favour and ordered to pay costs on those found against them. (34-a)

Taxing Master was right in disallowing the plaintiff the costs of all his witnesses on the ground that their evidence did not relate exclusively to the plea of justification." *Brown v. Houston*, (1901) 2 K.B. 855, C.A., based on *Harrison v. Bush*, (1855) 5 E. & B. 344. See, also, *Crowther v. Elwell*, (1838) 4 M. & W. 71; *Jones v. Curling*, (1884) 13 Q.B.D. 262, C.A. "Costs of issue" include costs of the trial of them. *Eyre v. Thorpe*, 6 D.P.C. 768.

(31) See judgment of Kekewich, J., in *Blank v. Footman*, (1888) 39 Ch. D. at p. 635.

(32) *Bird or Bond v. Higginson*, 6 N. & M. 799; 5 A. & E. 83; 2 H. & W. 278; 6 L.J.K.B. 262.

(33) *Mohendra Chandra v. Ashutosh*, 20 C. 762.

(34) *Cracknall v. Janson*, 11 C.D. 1; *Cockburn v. Edwards*, 18 C.D. 449; and see *Sparrow v. Hill*, 8 Q.B.D. 479; *Harley v. Hunt*, W.N. (1867) 184; *Jenkins v. Jackson*, (1891) 1 Ch. 89.

(34-a) *Prevost v. Bennett*, 2 Pri. 272.

Costs of separate issues and costs of separate causes of action.

"There is an important distinction to be observed between costs of separate issues and the costs of separate causes of action, which have been joined on one suit."^(34-b)

Where the plaintiff sues on two distinct causes of action, fails on one, and wins on the other, the defendant is entitled to all costs referable solely to the first cause of action, the plaintiff to all his costs referable solely to the second cause of action, and the costs common to both causes of action must be apportioned between them.⁽³⁵⁾

Costs where one of two plaintiffs succeeds and the other fails.

Where two plaintiffs claimed in respect of two different causes of action, and one succeeded and the other failed, the successful plaintiff would be entitled to his general costs, and the other may be ordered to pay to the defendant the costs occasioned by his being joined.⁽³⁶⁾

Costs, apportionment of, as between co-defendants.

Where one of two defendants was ordered to pay to the plaintiffs their costs of the action, the meaning of the order was held to be that the costs included the plaintiffs' costs of action against the other defendant against whom no relief had been given and who had not been awarded any costs.⁽³⁷⁾

Where one of two defendants is allowed to withdraw his defence upon the terms that he "pay to the plaintiffs their costs of the action so far as they were occasioned by the said defence," the Taxing Master will only allow costs specifically caused by such defence, and will not apportion the general costs of the action between the two defendants.⁽³⁸⁾

Where two defendants were jointly represented by the same solicitor, and judgment was given for one and against the other, the plaintiff had to pay to the successful defendant half the costs of the defence.⁽³⁹⁾

Costs apportioned as between different estates.

"Where there are several estates, the costs of administration proceedings, so far as they relate to each estate, are to be borne by

(34-b) *Encyclopædia of Laws of England*, 2nd Ed., Vol. IV, p. 56.

(35) *Todd v. N.-E. Ry. Co.*, (1908) 88 L.T. 112.

(36) *Viscount Gort v. Rowney*, 17 Q.B.D. 625, C.A.

(37) *Kelly's Directories, Limited v. Gavin*, (1901) 2 Ch. 763.

(38) *Real and Personal Advance Co. v. McCarthy*, (1891) 18 Ch. D. 362, C.A.

(39) *Beaumont v. Senior*, (1903) 1 K.B. 282; and see *McGowan v. Hamilton*, (1908) 2 I. R. 311. See, also, Chapter III "Who are entitled to Costs, S. 2—Defendant's Costs," *supra*.

that estate, and so far as such costs cannot be distinguished, they are to be borne rateably according to the values of the estates."⁽⁴⁰⁾

In a case where several defendants were entitled to a fund in equal shares, and where it was also found long enquiries were necessary as to one share only, the costs were apportioned by the Court.⁽⁴¹⁾

In the administration of real and personal estate, the modern rule adopted by the English Courts is that "the costs exclusively occasioned by the administration of the real estate are thrown upon the real estate, and the general costs of suit are borne by the personal estate. The costs should be apportioned between each estate at the hearing."⁽⁴²⁾

"Where a deed, whereby two separate properties were mortgaged, contained separate provisos of redemption and treated each of the properties as distinct from the other, on its being held that no right to consolidate arose, it was further held that the costs of an action of foreclosure should be rateably apportioned between the two mortgages."⁽⁴³⁾

Where a defendant has put himself in the right by a tender or payment into Court, the Court, in the exercise of its discretion in a fit case, allows plaintiff his costs up to time of tender or payment, and gives the defendant the subsequent costs of action.⁽⁴⁴⁾

Costs incurred before tender and after tender—Apportionment of.

Full costs are not allowable where parties are only entitled to costs proportionate to their separate interests in the suit.⁽⁴⁵⁾

Costs where parties have separate interests in suit property.

(40) *Re Allen*, W.N. (1889) 132; and see *Caldwell v. Fellowes*, (1870) 9 Eq., p. 418; *Bizzey v. Flight*, (1876) 3 Ch. D. 269, p. 274. See also Chapter on "Costs out of Estate," *infra*.

(41) *Basevi v. Serra*, 14 Ves. 313; *Patching v. Barnett*, (1881) 51 L.J. Ch. 74, C.A., was a case of apportionment between different funds.

(42) *Per Jessel, M.R.*, in *Packing v. Barnett*, (1881) 51 L.J. Ch. 74, C.A. And see also *Re Middleton*, (1881) 19 Ch.D. 552, C.A.; *Re Roper*, (1890) 45 Ch. D. 126, C.A.; *Re Copland*, (1895) 44 W.R. 94 (Eng.).

(43) *DeCaux v. Skipper*, (1886) 31 Ch. D. 635, C.A.; overruling *Clapham v. Andrews*, (1884) 27 Ch. D. 679.

(44) See *Buckton v. Higgs*, 4 Ex. D. 174; *The William Symington*, 10 P.D.1. And as to the effect of an offer by defendant to settle or compromise, see *Trotter v. Maclean*, 13 Ch. D. 574; *Fennessy v. Day*, 55 L.T. 161; *Birmingham Land Co. v. L. & N.W. Ry. Co.*, 57 L.T. 185; 36 Ch. D. 650; *Jenkins v. Hope*, (1896) 1 Ch. 278; see also Chapter on "Effect of Tender on the Award of Costs."

(45) *Luchmun Chunder Geer Gossain v. Ram Joy Mozoomdar*, 7 W.R. 159.

Costs, apportionment of, in case of claim and counter-claim.

A claim and its counter-claim should, for purposes of taxation, be treated as separate actions, and the costs in each taxed in favour of the successful party ⁽⁴⁶⁾ subject to a deduction in respect of the costs of any issues on which he has not succeeded.⁽⁴⁷⁾

Only costs actually occasioned by an unsuccessful counter-claim can be charged to the defendant, and the general costs of the action must not be apportioned between an unsuccessful plaintiff and the defendant, but must all be paid by the plaintiff.⁽⁴⁸⁾

Where the plaintiff was substantially successful, he was given the general costs of the action, and the defendant the costs of those issues raised by his counter-claim on which the defendant had succeeded.⁽⁴⁹⁾

"Where an action is referred to an arbitrator, "the costs of the said cause, of the reference, and of the award to abide the event," and the plaintiff is successful on his claim, and the defendant on his counter-claim, the amount recovered by the plaintiff exceeding the amount recovered by the defendant on his counter-claim, the defendant is entitled to the costs of the issues on which he is successful, notwithstanding that the subject-matter of the claim and counter-claim is the same.⁽⁵⁰⁾

Where on a trial of certain issues the official referee found for the plaintiff on his claim and for the defendants on their counter-claim for a larger sum, the action being for work done, and the counter-claim being in the nature of a defence on the ground of the inferiority of the work, judgment was given for the defendants with costs, as having substantially succeeded.⁽⁵¹⁾

"In general, costs which have been saved by a counter-claim being brought instead of a cross action are not to be taken into account; and therefore, in the absence of special direction, where there is a counter-claim, costs incurred in the action which have

(46) *Sharpe v. Haggith*, (1912) 106 L.T. 13, C.A.

(47) *Shrapnel v. Laing*, (1888) 20 Q.B.D. 334, C.A.; but see *Re Brown, Ward v. Morse*, (1883) 23 Ch. D. 377, C.A.; see also Chapter on "Costs in Special Cases," *infra*.

(48) *Atlas Metal Co. v. Miller*, (1898) 2 Q. B. 500, C. A.

(49) *Waring v. Pearman*, (1884) 50 L. T. 633.

(50) *Pearson v. Ripley*, 50 L. T. 629; 32 W. R. 463 (Eng.).

(51) *Lowe v. Holme*, 10 Q. B. D. 286.

not been increased by reason of the counter-claim ought not to be apportioned.”(52)

Even when a decree for possession is jointly and equally against three parties, each is liable for such costs only as is proportionate to his interest in the property.(53)

In matters of account the costs are frequently apportioned between the plaintiff and defendant.(54)

“ Thus, where upon taking an account against an executor, an account which he had stated in his answer was found to be correct, the cost of the suit up to the hearing was given to the plaintiff, and the cost of the subsequent proceedings to the defendant; the reason of the distinction, apparently, being that the executor had, before the suit was filed, been applied to for an account, but gave none.”(55)

Where one of several residuary legatees carried on the suit against the wish of the others after correct accounts had been rendered, all the costs subsequent to the hearing were ordered to be borne by his share.(56)

“ In a suit to take the accounts of a partnership a defendant who, not having rendered accounts, had admitted the plaintiff’s

(52) *Atlas Metal Co. v. Miller*, (1898) 2 Q.B. 500, C.A. (explaining previous cases); *Saner v. Billon*, 11 Ch. D. 416; *Mason v. Brentini*, 15 Ch. D. 287, C.A.; although the result on the whole may be in favour of the defendant; *Re Brown, Ward v. Morse*, 23 Ch. D. 327, C.A.; *Baines v. Bromley*, 6 Q.B.D. 691, C.A. “Where a claim was dismissed without costs, and counter-claim with costs, and if costs of counter-claim should not amount to half the entire costs of action, defendant was to pay the difference, the latter direction was, on appeal, held irregular as imposing costs by way of penalty, but the whole order was substantially within the discretion of the Judge as amounting to dismissal of claim and counter-claim with direction for defendant to pay half the costs of action.” *Willmott v. Barber*, 17 Ch. D. 772, C.A.; and see *Mayor of Bradford v. Pickles*, (1894) 3 Ch. 53, n. Where the judgment was that plaintiff should recover against defendant his costs of suit, and the defendant recover costs of counter-claim, the plaintiff was entitled to the general costs. *Baines v. Bromley*, 6 Q.B.D. 691, C.A., and in such a case it is immaterial whether the judgment is drawn up for plaintiff on claim and defendant on counter-claim, or for defendant for balance under O. XXI, r. 17; *Shrapnel v. Laing*, 20 Q.B.D. 384, C.A. On a trial where the claim was admitted subject to the counter-claim, the costs of the claim and counter-claim were to be taxed as if they were separate actions: *Finska Angfartygs Aktiebolaget v. Brown*, W.N. (91) 116.

(53) *Kisto Coomar v. Anund Moyee*, 7 W.R. 300 (301).

(54) And see, as to costs of actions for an account, *Morg. and Wurtz*, 162---164.

(55) *Anon.*, 4 Madd. 273 (Eng.); and see *Beames on Costs*, 7.

(56) *Thompson v. Clive*, 11 Beav. 475, 480.

case and submitted to account, but had not stated that nothing was due from him, was ordered to pay the costs up to the hearing.”(57)

Costs,
apportion-
ment of, in
pauper suit.

The costs of an unsuccessful defendant in a pauper suit are to be dealt with under S. 35 of the Civil Procedure Code, and the Court of the Original or Appellate Jurisdiction has full power to give and apportion costs in any manner it thinks fit.(58)

Costs out of
particular
fund,

Where costs are ordered to be paid out of a particular fund, that does not determine that that fund is ultimately to bear them; and where any question remains, it is proper to add the words “without prejudice to the question as to what fund is primarily liable to bear such costs.”(59)

Costs in case
of partial
alteration of
decree in
appeal.

Where a partial alteration was made by the appellate Court in the decree of the Court below, as to the rate of interest awarded, but in other respects the decree was confirmed, both parties were directed to pay their own costs of appeal.(60)

Costs in
proportion—
Practice of
Privy Coun-
cil.

In the case of *Mudhan Mohun Doss v. Gokul Doss*, (60-a) the Privy Council laid it down that where a plaintiff recovers a smaller amount than that claimed by him, his costs should be apportioned according to the amount recovered and not the sum claimed.(61)

(57) *Norton v. Russel*, 19 Eq. 343; see, also, *Lindley on Partnership*, 519, 569.

(58) *Jetha Mulchand v. Gulraj Jasrup*, 8 B. 577.

(59) *Sheppard v. S.*, 33 Beav. 130; *Dan.* 1009.

(60) *Murtunjoy Chuckerbutty v. Cockrane*, 4 W.R. 1, P.C. = 10 M.I.A. 229 = 2 Sar. 124 = 1 Suther. 592.

(60-a) 10 M.I.A. 563 (575) = 5 W.R.P.C. 91.

(61) *Mudhan Mohun Doss v. Gokul Doss*, 10 M.I.A. 563 (575, 576) = 5 W.R. P.C. 91. In the course of the judgment in that case, the Court said:—“Their Lordships have felt some difficulty about the costs of the Courts below, and those of this appeal. The costs of an action in India, particularly the stamp duties payable on the proceedings, depend a good deal on the value of the thing claimed. It is accordingly the practice of the Courts in India, when a plaintiff has recovered less than he has claimed, to apportion the costs in the proportion which the amount recovered bears to that which was claimed. In the present case there are strong indications of a bad feeling between the parties, which, if it prompted the original attachment, has probably, on the other hand, induced the appellant to swell his demand beyond all reasonable bounds. The evidence affords no grounds for a claim for damages amounting to the appealable sum of Rs. 10,000; and the amount actually recovered falls far short of that sum. Yet, unless the claim had been thus unduly magnified, the appellant could not have appealed to Her Majesty. In these circumstances, their Lordships think they must direct the costs below to be apportioned according to the ordinary course of the Courts below, and that they ought not to give to either party the costs of this appeal. In making the apportionment, the appellant will, of course, receive credit for any costs which he may have paid under the decrees reversed.”—*Per Colvile, J.*, in *Mudhan Mohun Doss v. Gokul Doss*, 10 M.I.A. 563 at (575, 576) = 5 W.R.P.C. 91. Justice Muttusami Ayyar and Justice

In a recent case that went up before the Privy Council, it was stated by their Lordships that "as regards costs, the rule of proportion, observed in India, does not prevail, before the Judicial Committee. On all the important points, if the respondent is held to be wrong, he must pay the costs."⁽⁶²⁾

Where a plaintiff obtains a judgment with costs as to one object of the action, but entirely fails as to another object, and as to that his action is dismissed with costs, the costs are apportioned, and the costs of one part set off against the costs of the other.⁽⁶³⁾

Costs—Apportionment and set off.

It is not the usual practice, when costs of an interlocutory proceeding have been disposed of, to consider that an award of the general costs of the suit interferes with the order as to the partial costs. A prior decree having given the costs incurred on the disposal of a preliminary point to the party successfully raising it, a later decree without expressly referring to the former, gave the costs of the suit, generally, to the opposite side. It was held, that the costs due under the prior decree should be set off against those due under the later.⁽⁶⁴⁾

Where a plaintiff, succeeding as to one only of three items claimed, was to recover against the defendants, costs rightly incurred in recovering the amount, and the defendants to recover from plaintiff costs rightly incurred in defending themselves, plaintiff was held entitled to general costs.⁽⁶⁵⁾

Plaintiff's right.

Where a defendant was allowed to withdraw his defence on paying plaintiff's costs, "so far as they were occasioned" by the

Best said in the case of *Velu Pillai v. Ghose Mahomed*, 17 M. 293=4 M.L.J. 140 :—The general rule is that if a plaintiff recovers a less amount than he claimed in the plaint, his costs should be apportioned according to the amount recovered and not to the sum claimed. (See, also, *Mudhan Mohun Doss v. Gokul Doss*, 10 M.I.A. 568). The Judge has given no reason for departing from this rule. The decree will be modified by awarding costs to plaintiffs only on the amount decreed."

(62) *Grish Chunder Laluri v. Shoshi Shikhareswar Roy*, 27 C. 951, P.C.=27 I.A. 110=4 C.W.N. 631=10 M.L.J. 356=2 Bom. L.R. 709=7 Sar. 687.

(63) *A. G. v. Carrington*, 6 Beav. 456. See Chapter on "Set off of Costs," *infra*.

(64) *Radhapersad Singh v. Ram Parmeswar Singh*, 9 C. 797, P.C.=13 C.L.R. 22=10 I.A. 113=7 Ind. Jur. 216=4 Sar. P.C.J. 421.

(65) *Sparrow v. Hill*, 9 Q.B.D. 675, C.A.; *Harley v. Hunt*, W.N. (87) 184; and see *Jenkins v. Jackson*, 60 L.J. Ch. 45; S.C. in C.A. (1891) 1 Ch. 89, where, the order being in similar terms as to costs relating to separate claims, plaintiff was not entitled to general costs.

defence, the defendant was only liable to pay the increased costs, and not an apportioned part of the general costs.⁽⁶⁶⁾

Defendant's
right.

A defendant being entitled "to fight from every available point of advantage," if he succeeds generally, ought not to be deprived of costs merely because he has failed on some defences.⁽⁶⁷⁾

(66) *Real and Personal Advance Co. v. McCarthy*, 18 Ch. D. 362, C.A. Where, in an action for the recovery of land, the plaintiff has succeeded as to certain definite closes, and the defendant has succeeded as to other closes, although there was only one demise, the verdict is to be entered distributively, and the case treated as if there were separate issues. The plaintiff therefore will get the general costs of the action and the costs of the issues found for him, and the defendant the costs of those issues on which he was successful. *Jones v. Curling*, 53 L.J.Q.B. 373; 13 Q.B.D. 262; 50 L.T. 349; 32 W.R. 651, C.A. (Eng.). In another case, a plaintiff though successful was ordered to pay all costs occasioned by unsustained charges on the bill. *Blest v. Brown*, 4 De G. F. & J. 367; 8 Jur. (N.S.) 302; 6 L.T. 620; 10 W.R. 569 (Eng.). In *Reinhardt v. Mentasti*, (1889) 42 Ch. D. 685, plaintiff was given the costs of the action, but ordered to pay to defendant the costs of certain minor issues on which he had failed. In *Corporation of Bradford v. Pickles*, (1894) 3 Ch. p. 71, the Court ordered that plaintiff's costs shall be taxed, and that the defendant do pay the plaintiff half of the amount so taxed. The general costs of the action will, however, be found, as a rule, to exceed the costs of any number of issues. *Encyclopædia of the Laws of England*, 2nd Ed., Vol. IV, p. 55. A Judge sometimes makes a special order giving one party the costs of the action, except in so far as they have been increased by some particular issue having been raised. R. S.C. (England) O. LXV, r. 2. Or he will, in some cases, direct that the whole costs of the action be taxed, and that the successful party shall receive only a certain proportion of the amount at which they are taxed. See Judgment of Kekewich, J., in *In re Pollard*, (1902) W.N. 42 or he may be awarded a lump sum in lieu of taxed costs. See R. S.C. (England) O. LXV, r. 23. Where a special appellant to the High Court failed as to a portion of his appeal, the costs of that Court were decreed against him. *Heera Ram Bhuttacharjee v. Ashrufali*, 9 W.R. 103.

(67) *Blank v. Footman, Pretty & Co.*, 39 Ch. D. 678. In an injunction suit, where, although no declaration is prayed for, the defendant raises an issue the finding on which operates as a virtual declaration of the plaintiff's right, the principle of S. 379, C.P.C. (1882), ceases to be applicable and the Court has then full discretion under S. 220 of the same Code to apportion the costs so that the appellate Court could not interfere with such discretion. *Luxuman Nana Patil v. Moroba Ramkrishna*, 21 B. 502. Where a person by setting up an exclusive title as his defence, failed in part of it, costs will not be allowed. *Lachmeswar Singh v. Manowar Hossein*, 19 C. 253=19 I.A. 48, P.C.=6 Sar. 331. In *re Sutcliffe*, (1881) 44 L.T. 547, upon an order for further answers to interrogatories being made against the executor defendant in an administration action, the Court declined to apportion the costs of the adjournment into Court, and made them costs in the cause.

CHAPTER VIII.

SET OFF OF COSTS.

Provisions of the Code of Civil Procedure as to set off of costs.

Practice as to set off of costs.

Principle underlying the practice.

English and Indian Law and practice as to set off of costs.

Construction of decree or order in respect of set off.

Set off of costs must be in respect of sums due in the same suit or proceeding ;
though they may be payable under different orders.

Set off of interlocutory costs against each other.

Set off of interlocutory costs against final costs.

Set off of costs of the day against costs payable on rule for new trial.

Set off of simple decree debt against decree charged on estate.

Set off of costs payable out of fund.

Set off of costs not allowed in respect of distinct matters ;

Or in respect of unascertained amounts ;

Or in respect of costs not actually awarded ;

Or where decree is incapable of being enforced.

Set off of probable costs not allowed.

Set off as among plaintiff and defendants—Action of trespass.

Set off in case of bankruptcy.

Set off of costs in mortgage suits.

Set off of costs in pre-emption suits.

Set off of costs in suits for possession and cancellation of document.

Set off of costs in case of trust estate.

Set off of joint debt as against separate debt.

Set off of costs—Right if affected by solicitor's lien.

Set off of costs in case of counter-claim.

Set off and counter-claim in case of alien enemy.

Calculation of interest in case of set off of costs.

Set off of costs—Right not affected by execution of decree or order.

Set off of costs—Right not affected by employing different solicitors at various stages.

Provisions of
the Code of
Civil Procedure
as to set
off of costs.

THE Code of Civil Procedure provides that "the Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter."⁽¹⁾

(1) See the Code of Civil Procedure (Act V of 1908), O. XX, r. 6, cl. (3). On the subject-matter of this chapter, see Seton on Judgments and Orders, 6th Ed., Vol. I, pp. 265—267; Amir Ali's Civil Procedure Code, 2nd Ed., 1916, Notes under S. 35 and O. XX, r. 6, pp. 216, 217; 737, 739; 855—860; Morgan and Wurtz, on Costs, 132—134; Mew's Digest, Vol. IV—Heading "Costs," Cols. 695—699; 720; 835—847; Daniell's Chancery Practice, Chapter on "Costs"; Encyclopædia of the Laws of England, Heading "Costs"; Yearly Practice, 1914, pp. 1122, 1123; 1146, 1147; Halsbury's Laws of England, Vol. XXV, Ss. 949, 950, pp. 518—520. The following provisions of the Code of Civil Procedure (Act V of 1908), O. XXI, rr. 18—20, regarding execution in case of cross-decrees and cross-claims under the same decree may also be noted. O. XXI, r. 18, runs as follows:—"(1) Where applications are made to a Court for the execution of cross-decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such Court, then—(a) if the two sums are equal, satisfaction shall be entered upon both decrees; and (b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum. (2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself. (3) This rule shall not be deemed to apply unless—(a) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits; and (b) the sums due under the decrees are definite. (4) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons." This section is followed by the following illustrations:—(a) A holds a decree against B for Rs. 1,000. B holds a decree against A for the payment of Rs. 1,000 in case A fails to deliver certain goods at a future day. B cannot treat his decree as a cross-decree under this rule. (b) A and B, co-plaintiffs, obtain a decree for Rs. 1,000 against C, and C obtains a decree for Rs. 1,000 against B. C cannot treat his decree as a cross-decree under this rule. (c) A obtains a decree against B for Rs. 1,000. C, who is a trustee for B, obtains a decree on behalf of B against A for Rs. 1,000. B cannot treat C's decree as a cross-decree under this rule. (d) A, B, C, D and E are jointly and severally liable for Rs. 1,000 under a decree obtained by F. A obtains a decree for Rs. 100 against F singly and applies for execution to the Court in which the joint decree is being executed. F may treat his joint decree as a cross-decree under this rule. Rule 19 runs as follows:— "Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then,—(a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and, (b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree." Rule 20 runs as follows:—"The provisions contained in rr. 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge."

It is a common practice of the Court to award to each party a portion of the costs of a cause at the final hearing; and the Court has jurisdiction to direct a set off of costs awarded by the Court itself as between two parties.⁽²⁾

The practice of setting off decrees is a very salutary procedure, for it prevents multiplicity of proceedings and helps the adjustment of the different amounts payable under a decree at one and the same time.⁽³⁾

Questions as to set off will be dealt with in this Court upon the principles of English Courts of Equity or of the Roman Law of Compensation, and no weight will be given to objections derived from the peculiar language of the statutes of set off.⁽⁴⁾

(2) *Magarh v. Magarh*, Ir. R. 10 Eq. 155.

(3) *Mirza Sadik Husain Khan v. Nawab Hashim Ali Khan*, 24 Ind. Cas. 376 (377).

(4) *Ramagopal v. Majeti Mallikarjanudu*, 1 M.H.C.R. 396 (followed in *Gauri Sahai v. Ram Sahai*, 7 N.W.P. 157). As to set off and counter-claim in English law, the following may be noted:—"Common law did not recognise any right of set off. A defendant who had any cross claim could not raise it in the plaintiff's action. He had to bring a cross action. Legal set off is the creation of Statute; that is, to be allowed a set off, it must be shown that there is a statutory right (*Lisheard, etc. Ry. Co. v. Caradon Ry. Co.*, 18 Times Rep. 1.) Successive but limited Statutes were enacted to remove the defect and inconvenience arising from this non-recognition and consequent circuitry of action, and the right to plead a set off was first conferred by 2 Geo. II, c. 22. A set off was allowed in certain cases. (See the note in Ann. Pr., 1905, pp. 292 and 281.) It was a defence proper to the plaintiff's action, defeating or reducing a plaintiff's claim. It was a shield and not a sword, per Cockburn, C.J., in *Stooke v. Taylor*, 5 Q.B.D. 575. It was allowed only in a limited number of cases, and when established its effect was to show that the plaintiff could not recover at all, or was entitled to recover less than what was claimed, and if the debt due from the plaintiff to the defendant exceeded the amount due from the defendant to the plaintiff, the defendant could not before 1875 recover the difference in the plaintiff's action; he could only set off an amount equal to the plaintiff's claim, and had to bring a cross action for the balance. Equity, however, allowed a set off subject to certain restrictions and limitations. Equitable set off was allowed where the party seeking the benefit of it showed some particular equitable ground for being protected against his adversary's demand. The existence of any particular condition was not considered absolutely necessary for allowing the set off, though the mere existence of cross demands was not considered sufficient. Some of the grounds most often shown for equitable set off were the common origin of and connection between the demands; mutual credit; the inability of the defendant otherwise to recover, and in cases of assignments and trusts (see *Hukm Chand*, C.P.C., 759-767). Up to the date of the Judicature Act, 1873, there was thus both the statutory or legal set off and equitable set off, both of which were subject to certain limitations. Though the old law as to set off still remains in force, the Judicature Act created the modern counter-claim. A set off remains precisely what it was before the Act, and every other kind of cross claim is a counter-claim. The difference between the two are very considerable. A set off was allowed only in certain cases. Legal set off was confined to the cases mentioned by the Statutes. Equitable set off applied only when the cross

Lord Mansfield has expressed his views of the subject of set off in equity in the following language: "Natural equity says, that

claim arose out of the same transaction, no set off being allowed unless defendant's claim had some relation to the plaintiff's demand; but every cross claim of whatever kind can now in England be pleaded as a counter-claim. The claim and counter-claim may arise out of entirely different transactions, so long as they can conveniently be tried together. Thus a claim founded on tort may be opposed to one founded on contract, and *vice versa*. Nextly, a counter-claim is not, like a set off, a mere defence; it is substantially a cross action. The effect of this is that if the defendant's claim exceeds that of the plaintiff he will be entitled to a decree for it in the plaintiff's action, and need not bring a separate action for the securing of the excess of his claim over the plaintiff's claim. To sum up, there were thus in English law three varieties of cross claims—(A) *set off*, which might be (a) *legal* where the amount to be set off was a liquidated demand within the Statute, and (b) *equitable* where, though the amount was unliquidated, the cross claim arose out of the same transaction as that sued upon; and (B) *counter-claim*, which goes beyond both, and allows all sorts of cross claims, even those arising out of *different* transactions, subject merely to the convenience of trial. In this country, however, there is no counter-claim in the sense stated above (see *Abdul Hasan v. Zohra Jan*, 5 A. 299 at p. 301). Set off, however, had long been prior to the enactment of S. 121 of the Code of 1859, recognised. A rule of legal set off in India is contained in this rule which is only an amplified version of S. 121 of the Code of 1859, as that section was construed by the Indian Courts. It has, however, been held that that section and the section in the last Code corresponding with the present rule only laid down a rule of procedure in regard to cases of set off, but were not exhaustive of those cases, and that it was not intended to take away any rights of set off, whether legal or equitable, which parties would have independently of it (*Olark v. Ruthnavaleo*, 2 M.H.C.R. 296; *Kistnasamy Pillai v. Municipal Commissioners of Madras*, 4 M.H.C.R. 120; *Kishor Chand Champalal v. Madhooji Vis Ram*, 4 E. 407; *Roekminy Bullus v. Mulk Jamania*, 9 C. 914 (918); *Bhagbat v. Ramdeb*, 11 C. 557; *Pragi Lal v. Maxwell*, 7 A. 284; *Chisholm v. Gopal Chunder*, 16 C. 711; *Gobind Parshad v. Murree Brewery*, 47 P.R. 1885). This view received statutory recognition by the addition in 1898 of the last paragraph in S. 216 of the last Code: (*Subramanian Chettiar v. Muthuswami Aiyengar*, 17 M.L.J. 481; *Kalanand Singh v. Sri Prosad Das*, 19 C.L.J. 152 cited in *Amir Ali's Civ. Pro. Code*, 1908, 2nd Ed., 1916, p. 738). And it is well settled that Indian Courts may allow equitable set off in cases in which Equity Courts in England allow the same, even though such cases do not fall within the language of the Code of Civil Procedure, O. XX, r. 6, *Broiendra Nath Das v. Budge Budge Jute Mill*, 30 C. 527; *Niaz Gul Khan v. Durga Prasad*, 15 A. 9 (followed in *Nand Ram v. Ram Prasad*, 27 A. 145; *Dobson & Barlow v. Bengal Spinning, etc., Co.*, 21 B. 126, 135; *Fakir Chandra Dutta v. Gisborne & Co.*, 8 O.W.N. 174 cited in *Amir Ali's Civ. Pro. Code*, 1908, 2nd Ed., 1916, p. 738) Cross claims are thus in this country limited to cases of set off (as distinguished from counter-claim), whether such set off is legal or equitable. It is, however, to be observed that under this rule a set off is treated as a plaint in a cross action, so that the defendant may get a decree for it, whereas, as already pointed out, set off, prior to the Judicature Act, could only reduce or extinguish the plaintiff's claim, and a separate action would have had to be brought to recover the amount of any excess beyond the plaintiff's claim." See *Amir Ali's Civ. Pro. Code* (1908), 2nd Ed., 1916, p. 738. See *Abdul Hasan v. Gohra Jan*, 5 A. 301, where Straight, J., pointed out that the Indian Law of Procedure did not sanction a set off or counter-claim in all the cases contemplated by the English Supreme Court Rules; and *Secretary of State v. Madams Lal*, 13 A. 226, 299, 300. *Per Mahmood, J.*;

cross-demands should compensate each other, by deducting the less sum from the greater : and that the difference is the only sum which can be justly due." (5)

The Court of Chancery as a Court of equity was in possession of the doctrine of set-off, as grounded upon principles of equity, long before the law interfered. (6)

Courts of equity will extend the doctrine of set-off, and claims in the nature of set-off, beyond the law in all cases, where peculiar equities intervene between the parties. These are so very various as to admit of no comprehensive enumeration. (7)

Similarly in *Ishri v. Gopal Saran*, (7-a) it was laid down that, though there may be no specific provision in the Code of Civil Procedure applicable to any particular case, yet, under the rule of justice, equity and good conscience, the decree-holder may, under certain circumstances, be entitled to an equitable set-off. (8)

The Civil Procedure Code was not intended to take away any right of set-off, whether legal or equitable, which parties would have had independently of its provisions. The right of set-off will be found to exist, not only in cases of mutual debts and credits, but also where the cross-demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit. (9)

Roulet v. Fetterle, 18 B. 717 [under the Civil Procedure Code a cross claim cannot be set up as a defence, except when it arises out of the very transaction sued upon, and it is in the nature of a set-off.] *Fakir Chandra Dutta v. Gisborne*, 8 C.W.N. 174, where a set-off was disallowed as being based upon a separate transaction. S. 128 (c) of the Code of Civil Procedure (Act V of 1908) allows of rules being made in respect of counterclaims.

(5) *Green v. Farmer*, 4 Burr. 2220 (2221).

(6) Lord Eldon in *Ex parte Stephens*, 11 Ves. 27; *Greene v. Darling*, 5 Mason, R. 207, 208; *Ex parte Blagden*, 19 Ves. 467.

(7) See Story's Equity Jurisprudence, Boston, VIII Ed., 1861, Vol. II, Chap. XXXVIII, S. 1487 b, pp. 664 and 665.

(7-a) 6 A. 35.

(8) *Baldeo Parshad v. Baldeo Singh*, 3 O.C. 323.

(9) *Kishorchand Champalal v. Madhowji Visram*, 4 B. 407 (411) referring to *Ciark v. Ruthnavaloo Chetti*, 2 M.H.C. 296. "It would seem, that, independently of the statutes of set-off, Courts of equity, in virtue of their general jurisdiction, are accustomed to grant relief in all cases, where, although there are mutual and independent debts, yet there is a mutual credit between the parties, founded at the time, upon the existence of some debts due by the crediting party to the other. By mutual credit, in

Construction
of decree or
order in res-
pect of set off.

When a decree in favour of an appellant describes a set of costs as due by the appellant to the respondent, it means, not that any sum should be actually paid to the latter, but that the costs in question should be deducted from the gross amount decreed, and the remainder only should be recovered under the decree. Section 209, Code of Civil Procedure,^(9-a) has no application in such a case.⁽¹⁰⁾

Set off of
costs must be
in respect of
sums due in
the same suit
or proceeding.

Whenever, in cases specified, a party entitled to receive costs is liable to pay costs to the other party, the taxing-officer may adjust the costs by way of deduction or set-off; such set-off or deduction is limited to costs due to either party in respect of the same action, and cannot be enforced in respect of the costs of any separate proceeding between the same parties.⁽¹¹⁾

the sense in which the terms are here used, we are to understand, a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on, and trusting to such debt, as a means of discharging it." See *Ex parte Prescott*, 1 Atk. 331.

(9-a) Of the Code of 1859 (Act VIII of 1859).

(10) *Issur Chunder Mookerjee v. Mun Mohun Chowdhry*, 12 W.R. 303. Markby, J., said:—"The suit was originally brought for wassilat, and in the first Court was dismissed altogether. Upon appeal by the plaintiff, the appellate Court made a decree that the decision of the Principal Sudder Ameen should be reversed, and that the plaintiff, out of the Rupees 501 claimed, should get Rupees 270 with interest from the date of the suit up to date of decision, or total Rupees 327, with interest on that sum up to date of realization, and costs of both Courts to be rateably paid. The costs were then calculated, and the costs due to the appellant were fixed at Rupees 168 and Rupees 104, and the costs due to the respondent were fixed at Rupees 58 and Rupees 13. Now, it is contended before us that the party who was respondent in that case may take out execution in respect of the sums of money which are found due to him in respect of costs. I think that this is an entirely mistaken view of that decree. There was but one decree upon which one person alone could execute, namely, the plaintiff, who would be entitled to take out execution for what remained due to him after giving credit to the defendant for the amount of costs awarded in his favour. It appears that the plaintiff has not thought fit to execute that decree, and that it has become barred by limitation, but that in no way affects the rights of the defendant, nor can it create a right in him to execute a decree which did not award any sum to be paid to him. The decree, when it describes a set of costs as due by the appellant to the respondent, means not that any sum should be actually paid to the respondent, but that the appellant should only recover the net sum due under the decree, that is, the sum which would remain after deducting from the gross amount decreed the amount of costs payable by the appellant. I therefore think that there is no decree in existence such as the defendant, who is the respondent before us, now seeks to execute. I think, therefore, that no execution can issue in this case. The order of the lower appellate Court and of the Principal Sudder Ameen (which is unintelligible) will be reversed. The application for issue of execution will be dismissed; and the applicant will pay the costs in this Court and in the Courts below." *Issur Chunder Mookerjee v. Mun Mohun Chowdhry*, 12 W.R. 303 (309).

(11) *Barker v. Hemming*, 5 Q.B.D. 609; 43 L.T. 678—C.A. Affirming, 49 L.J., Q. B. 730; 28 W.R. 764 (Eng.).

Sums of costs incurred in the same suit or proceedings, though payable under different orders, may be set off against each other.⁽¹²⁾ Though they may be payable under different orders.

Thus, where a prior decree having given the costs incurred on the disposal of a preliminary point to the party successfully raising it, a latter decree, without expressly referring to the former, gave the costs of the suit, generally, to the opposite side, it was held, that the costs due under the prior decree should be set-off against those due under the latter.⁽¹³⁾

The rule as to set-off does not apply to costs in independent proceedings,^(13-a) or in separate actions.^(13-b)

Interlocutory costs awarded to several parties on different occasions in respect of several proceedings in the same suit or action, may be set-off against each other, although no express leave is given for the purpose.⁽¹⁴⁾ Set off of interlocutory costs against each other.

It has been held in an English case, that, "where a plaintiff is ordered to pay costs on interlocutory applications, which are partly in respect of matters in the suit itself, and partly in other suits, the defendant has a right to set off those costs against costs which he is ordered to pay, where the plaintiff is alone the applying party; but where he is not, but others join with him as to their interests, there is no such right of set-off."⁽¹⁵⁾

(12) This right of the parties is not affected by the solicitor's lien. See *Roberts v. Buee*, 47 L.J. Ch. 414; 8 Ch. D. 198; 26 W.R. 393 (Eng.). See also the same point dealt with more fully, *infra*.

(13) *Radha Persad Singh v. Ram Parmeswar Singh*, 9 C. 797=13 C.L.R. 22=10 I.A. 113=7 Ind. Jur. 216=4 Sar. P.C.J. 421.

(13-a) *Hassell v. Stanley*, (1896) 1 Ch. 607.

(13-b) *David v. Rees*, (1904) 2 K.B. 435, C.A.; *Bake v. French*, (1907) 1 Ch. 428; *Johnstone v. Mackenzie*, (1911) 2 I.R. 118. The rule as to set-off only applies to costs in the same action or proceeding, and the costs of independent judgment between the same parties cannot be set-off against each other (*David v. Rees*, (1904) 2 K.B. 435 C.A. and even where a consolidation order is made this will not affect the rights of parties under orders already made in one or other of the actions consolidated (*Bake v. French*, (1907) 1 Ch. 428). Thus costs in ordinary case proceedings cannot be set off against costs in bankruptcy proceedings, although between the same parties, (*Re Bassett*, (1896) 1 Q.B. 219). Nor High Court costs against County Court costs, (*Hassell v. Stanley*, (1896) 1 Ch. 607), nor costs of interpleader proceedings against costs of an action in the Q.B.D.; *Baker & Co. v. Hemming*, (1880) 5 Q.B.D. 609 C.A.; *Cf. Re Knapman*, (1880) 18 Ch. D. 300 C.A.

(14) *Levy v. Drew*, 2 B.C. Rep. 142; 5 D. & L. 307; 12 Jur. 119.

(15) *Jenner v. Morris*, 11 W.R. 943 (Eng.); 2 N.R. 479.

Set off of
interlocutory
costs against
final costs.

Interlocutory costs may be set-off against final costs, where the payment of them at the time they are adjudged, is not strictly a condition precedent to ulterior proceedings.⁽¹⁶⁾

Interlocutory costs may be set off against final costs in the same cause, without reference to the attorney's lien.⁽¹⁷⁾

It is not the usual practice, when costs of an interlocutory proceeding have been disposed of, to consider that an award of the general costs of the suit interferes with the order as to the partial costs.⁽¹⁸⁾

Thus, where a decree gave the costs of a suit generally to the successful side, without referring to a prior decree for costs in the same suit, awarded in a preliminary matter to the opposite side, it was *held*, that the costs under the prior decree should be set-off against those under the later.⁽¹⁹⁾

Set off of
costs of the
day against
costs payable
on rule for
new trial.

A plaintiff, after having given notice of trial, withdrew his record, and the defendant obtained a rule for payment of the costs of the day, which were taxed. A new trial was afterwards granted on payment of costs :—*Held*, that the defendant might set-off the costs due to him against those payable on the rule for the new trial.⁽²⁰⁾

Set off of
simple
decree debt
against decree
charged on
estate.

In *Nagar Mal v. Ram Chand*,⁽²¹⁾ it was held that a Court is competent to set-off a simple decree for the recovery of money against a decree for the recovery of money by the enforcement of a mortgage or charge.

Set off of costs
payable out
of fund.

Costs given to the plaintiff out of the fund in question may be directed to be set off against payment out of such fund erroneously made by the trustees to the use of the plaintiff.⁽²²⁾

(16) *Doe d. Hope v. Carter*, 1 M. & Scott, 516; 8 Bing. 330; 1 D.P.C. 269; 1 L.J. C.P. 97. See also *Radhapersad Singh v. Ram Parmeswar Singh*, 9 C. 797=13 C.L.R. 22=10 I.A. 113=7 Ind. Jur. 216=4 Sar. P.C.J. 421.

(17) *Halliday v. Lawes*, 5 D.P.C. 636; 3 Bing. (N.C.) 774; 4 Scott 475; 2 Hodges 130.

(18) *Radhapersad Singh v. Ram Parmeswar Singh*, 9 C. 797 (P.O.)=13 C.L.R. 22=10 I.A. 113=7 Ind. Jur. 216=4 Sar. P.C.J. 421.

(19) *Radhapersad Singh v. Ram Parmeswar Singh*, 9 C. 797=13 C.L.R. 22 (P.C.)=10 I.A. 113=7 Ind. Jur. 216=4 Sar. P.C.J. 421.

(20) *Doe d. Dangerfield v. Ailsop*, 9 B. & C. 760.

(21) 8 Ind. Cas. 835=7 A.L.J. 1179 cited and followed in *Mirza Sadik Husain Khan v. Nawab Hashim Ali Khan*, 24 Ind. Cas. 376 (377).

(22) *Cooper v. Pitcher*, 4 Hare, 485.

The Court will not order costs due from one party to another to be set-off against a sum obtained from the former by the latter to obtain his liberation from an illegal arrest, but ordered by the Court to be repaid.⁽²³⁾

Set off of costs not allowed in respect of distinct matters.

"It may also be noted that there is nothing in S. 247, C.P.C.,⁽²⁴⁾ which limits its application to a case in which the remedy of each party against the other is of precisely the same nature. The object of the section is to prevent each side executing a decree in respect of amounts due, whether for costs or otherwise, under the same decree, and it makes no difference that one of the parties to the decree is obliged to recover from the other the money due, by proceeding against the hypothecated property of that other, whilst his opponent is only entitled to recover the money decreed for costs, personally from the other side."⁽²⁵⁾

In a recent case that came before the Calcutta High Court, the facts were as follows :—"The decree under execution was for the declaration of the right of the plaintiff to a share in the immoveable property claimed in the suit and the decree directed "that possession for the share in question be delivered to the plaintiff on his depositing Rs. 352 with interest thereon at the rate of 6 per cent. per annum" from certain date. The decree further directed that "the plaintiff should recover costs from the defendants 1 to 10 and also mesne profits."

There were various proceedings, an appeal and a second appeal, and a remand and a further appeal to the High Court with reference to the decree, but no objection was taken to the form of the decree. The Court might have decreed that on failure of the plaintiff to deposit the sum of Rs. 352 within a time to be limited for the purpose, the suit would be dismissed, and the Court could have given on such a contingency the costs to the party or the other. The decree was silent in this respect.

In the meantime and before the present execution was applied for, the share covered by the litigation was sold for the latches of the judgment-debtors for non-payment of Government revenue.

(23) *Pitt v. Coombes*, 1 H. & W. 13; 2 A. & E. 459; 4 N. & M. 535; 4 L.J. K.B. 83.

(24) Of the Civil Procedure Code of 1882 corresponding to O. XXI, r. 19 of the present Code (Act V of 1909).

(25) *Bhagwan Singh v. Ratan*, 16 A. 395=14 A.W.N. 133, followed in *Sankara Menon v. Gopala Pattar*, 23 M. 121 (123), referred to in *Chhogmal v. Govind Prasad Gouri Shankar*, 16 C.P.L.R. 73.

On the present application for execution the defendants objected to the recovery of costs by the plaintiff on the ground that they were entitled to a set-off of the sum of Rs. 352. The Courts below allowed this contention of the defendants and directed a set-off.

It was *held* that the direction as to costs is separate and distinct from the direction as to delivery of possession ; the defendants are not therefore entitled to a set-off of the sum which they might have if the plaintiff had applied for possession.⁽²⁶⁾

Or in respect
of unascertained
amounts.

Costs will not be set-off against sums due on an unascertained account.⁽²⁷⁾

Under the provisions of the C.P.C. (Act X of 1877), claims for unliquidated damages are not capable of being set off, but neither that Code nor the Code of 1859 was intended to take away any right of set-off, whether legal or equitable, that the parties would have independently of its provisions. Where the amount claimed by the plaintiff, as damages for a breach of contract, by the defendant, was reduced on the defendant having successfully pleaded a set-off, plaintiff was yet allowed his costs, the provisions of S. 9 of Act XXVI of 1864 not being applicable to such a case.⁽²⁸⁾

Or in respect
of costs not
actually
awarded.

A set-off cannot be allowed for costs not actually awarded, as where a decree of the High Court gave the successful appellant costs of that Court and of the lower appellate Court, but omitted to award the costs of the first Court.⁽²⁹⁾

Or where
decree is in-
capable of
being enforced.

A decree which is incapable of being enforced cannot be set off against a decree which is alive.⁽³⁰⁾

(26) *Doe Saran Sahu v. Moti Rai*, 11 C.W.N. (Journal Portion) lxiv. It was further held that, in a case like this, "no Court will insist on plaintiff's depositing Rs. 352 for obtaining possession of a property of which possession cannot be delivered, the property having passed to a third person." *Deo Saran Sahu v. Moti Rai*, 11 C.W.N. (Journal Portion) lxiv ; (*Sankara Menon v. Gopal Pattar*, 23 M. 121, distinguished and doubted).

(27) *Whalley v. Ramage*, 8 L.T. 499.

(28) *Kishorchand Champalal v. Madhowji Visram*, 4 B. 407. (Followed in *Bhagbat Panda v. Bamdeb Panda*, 11 C. 557 ; *Pragi Lal v. Maxwell*, 7 A. 284 and referred to in *Ramjiwan Mal v. Chand Mal*, 10 A. 587 (599) ; *Niaz Gul Khan v. Durga Prasad*, 15 A. 9 ; *Roulet v. Fetterle*, 18 B. 717 ; *Dobson & Barlow, Limited v. The Bengal Spinning and Weaving Company*, 21 B. 126 (135) ; *Panchanada Velan v. Vaithinatha Sastrial*, 29 M. 333 = 16 M.L.J. 63.

(29) *Huro Pershad Roy Chowdhry v. Fool Kishoree Dossee*, 16 W.R. 308.

(30) *Ibid.*

The Court of Appeal in England declined to set-off probable costs in a cross-action against the costs of an action between the same parties already dismissed.^(30-a)

Set off of probable costs not allowed.

In an action of trespass, "four defendants pleaded separate pleas by the same attorney; one, the general issue and a justification, upon both of which he was found guilty; another, similar pleas, but was only found guilty on the general issue; and the two others, the general issue only, upon which they were acquitted:—*Held*, that the costs payable to the three last might be set-off against the costs which the plaintiff was entitled to recover from the first."⁽³¹⁾

Set off as among plaintiff and defendants—Action of trespass.

Where, in trespass, there were three defendants, who appeared by the same attorney, and pleaded jointly, and at the trial one of them was acquitted:—*Held*, that the defendant's attorney was entitled to have one-third of his general bill of costs against the three set-off against the amount of the plaintiff's bill: and unless there were some special circumstances in the case, the master was bound to adopt this principle of taxation.⁽³²⁾

As a general rule, the costs of bankruptcy proceedings cannot be set-off against the costs of proceedings not in bankruptcy.⁽³³⁾

Set off in case of bankruptcy.

But costs to be paid to a party, ordered after his bankruptcy, may be set-off against costs ordered to be paid by the same party before his bankruptcy.⁽³⁴⁾

So also costs ordered against a bankrupt may be set-off against those ordered in his favour.⁽³⁵⁾

Under r. 19, read with r. 20, of O. XXI, Civil Procedure Code, the costs awarded to the judgment-debtor in a decree for sale of the mortgaged property can be set off against the mortgage-money recoverable by the decree-holder from that property. Rule 19 is not in terms limited in application to cases in which the

Set off of costs in mortgage suits.

(30-a) *Automatic, etc. Co. v. Combined Weighing, etc. Co.*, (1889) 58 L.J. Ch. 647.

(31) *Lee v. Kendall*, 5 N. & M. 340; 3 A. & E. 707; 1 H. & W. 316; 5 L.J. K.B. 19.

(32) *Norman v. Climensohn*, 1 D. (N.S.) 718; 4 Scott (N.R.) 735; 4 Mann & G. 243; 11 L.J. C.P. 191.

(33) *Bassett In re, Lewis, Ex parte*, 65 L.J., Q.B. 144; (1896) 1 Q.B. 219; 73 L.T. 736; 44 W.R. 240 (Eng.)

(34) *Lee v. Pain*, 4 Hare, 225.

(35) *Hawley, Ex parte, Richards, In re*, 4 Deac. & C. 572; 2 Mont. & Ayr. 59; 4 L.J., Bk. 17.

remedy of each party against the others is of precisely the same nature or where the parties fill the same character.⁽³⁶⁾

The mortgagor is entitled to set-off or deduct the amount of the costs payable to him under the decree in the redemption suit against or from the mortgage-debt payable by him. If the costs are of larger amount than the mortgage-debt, the mortgagor is entitled to obtain possession at once of the mortgaged property and to recover the balance of the costs from the defendant.⁽³⁷⁾

Where the decree in a redemption suit directed the mortgagor to pay the mortgage-money with interest to the mortgagee, and the mortgagee to pay the mortgagor the costs of the suit, it was held that the mortgagor could set-off his costs against what he was liable to pay under the decree notwithstanding any claim of the mortgagee's attorney against his client in respect of his costs of suit. Section 221 of the Civil Procedure Code ^(37-a) seems to assume that it is usual for a decree to make costs payable to the pleader, instead of to the party ; which practice, if it existed, would, of itself, negative the right of set-off ; and it does not define the word "lien." But to decide that the provision applies in the above case, would be to give to the solicitor of an unsuccessful litigant priority over the successful litigant.⁽³⁸⁾

When a plaintiff has obtained a foreclosure decree under S. 86 of the Transfer of Property Act and a defendant is entitled to recover under the same decree costs against the plaintiff personally, S. 247 of the Code of Civil Procedure ^(38-a) does not operate to bar the defendant from executing his decree.⁽³⁹⁾

(36) *Mirza Sadik Husain Khan v. Nawab Hashim Ali Khan*, 24 Ind. Cas. 376. (Referring to *Bhagwan Singh v. Ratan*, 16 A. 395 = A.W.N. (1894) 133 ; *Sankara Menon v. Gopala Patilar*, 23 M. 121 ; *Nagar Mal v. Ram Chand*, 8 Ind. Cas. 835 = 7 A.L.J. 1179).

(37) *Sidu v. Bali*, 17 B. 32 (approving *Brijnath Dass v. Juggernath Dass*, 4 C. 742 = 4 C.L.R. 122 and referred to in *Chhogmal v. Govind Prasad Gouri Shankar*, 16 C.P. L.R. 73 (74).

(37-a) Of the Code of 1877 (Act X of 1877).

(38) *Brijnath Dass v. Juggernath Dass*, 4 C. 742 = 4 C.L.R. 122.

[Followed in *Sidu v. Bali*, 17 B. 32. Distinguished in *Chhogmal v. Govind Prasad Gouri Shankar*, 16 C.P.L.R. 73 (76). Applied in *Ishri v. Gopal Saran*, 6 A. 351 (357) = 4 A.W.N. 125. *Ram Nidhi v. Tulshi Ram*, 6 O.C. 23 (24).] See also *Baldeo Parshad v. Baldeo Singh*, 3 O.C. 323.

(38-a) Of the Code of 1882 corresponding to O. XXI, r. 19 of the present Civ. Pro. Code, Act V of 1908.

(39) *Chhogmal v. Govind Prasad Gouri Shankar*, 16 C.P.L.R. 73. In *Kalka Prasad v. Ram Din*, 5 A. 272, it was ruled that where a decree for money directed that

A plaintiff obtained a decree for the surrender to him of certain mortgaged property on his paying the defendants the mortgage amount within three months together with the value of improvements, and for the payment by defendants to him of the costs of suit. He applied to recover the said costs by the arrest of the defendants. It was *held*, that the defendants were entitled under S. 247 of the Code of Civil Procedure ^(39-a) to set off the amount payable by them to plaintiff by way of costs against the mortgage amount and the value of improvements payable by plaintiff to them.⁽⁴⁰⁾

Where a conditional decree in a pre-emption suit directed that the plaintiff should obtain possession with costs of suit on payment of the purchase-money within a fixed time, and that, on default of such payment, the suit should stand dismissed, the plaintiff could set off the costs awarded to him, and claim possession on payment of the purchase-money less such costs.⁽⁴¹⁾

Set off of
costs in pre-
emption
suits.

the money should be realizable from certain specific property of the defendant and exempted his person and other property, the plaintiff could not claim that costs payable by him should be set off against the amount due to him by the defendant. Mr. Justice Straight said :—‘ To make section 247 applicable we think that the parties entitled under one decree to recover from each other must hold the same character and possess identical rights of enforcing execution.’ This view was dissented from in *Bhagwan Singh v. Ratan*, 16 A. 395. There it was held that ‘where one party is entitled to recover the amount of a mortgage-debt due by the other side by sale of the other side’s property and the other side is entitled to recover under the same decree costs against the plaintiff personally, section 247 applies, for the reason that there are two parties who are entitled under the same decree to recover from each other sums of different or the same amounts. It makes no difference that one of those parties is obliged to recover from the other the amount due by executing a decree against the hypothecated property of the other whilst his opponent is only entitled to recover the money decreed for costs personally from the other side.’ See the above and other case-law cited and discussed in *Ohhogmal v. Govind Prasad Gouri Shankar*, 16 C.P.L.R. 73 (74, 75).

(39-a) Of the Code of 1882 (Act XIV of 1882) corresponding to O. XXI, r. 19 of the present Code (Act V of 1908).

(40) *Sankara Menon v. Gopala Pattar*, 28 M. 121 (approving *Bhagwan Singh v. Ratan*, 16 A. 395), and distinguished in *Ohhogmal v. Govind Prasad Gouri Shankar*, 16 C.P.L.R. 73; and distinguished and doubted in *Deo Saran Sahu v. Moti Rai and others*, 11 C.W.N. Journal portion LXIV.

(41) *Ishri v. Gopal Saran*, 6 A. 351=4 A.W. N. 125. [Referring to *Degumburee Dabes v. Eshan Chunder Sein*, 9 W.R. 220; *Jugo Monun Bukshee v. Soorendronath Roy Chowdry*, 13 W.R. 106, and *Brijnath Dass v. Juggernath Dass*, 4 C. 742. Followed in *Baldeo Parshad v. Baldeo Singh*, 3 O.C. 323 (324); *Ram Nidh v. Tulshi Ram*,

In a suit for pre-emption where the pre-emptor, obtaining a decree conditional on payment of a certain sum within a certain time, paid the amount within that period, but attached a part of the amount on account of costs due to him under that decree, *held*, that there is no specific provision in the Code of Civil Procedure applicable to the case, but that under the rule of justice, equity and good conscience, the decree-holder was entitled to an equitable set off.⁽⁴²⁾

The appellants obtained a decree for foreclosure on a mortgage. The respondents brought a suit and obtained a decree for pre-emption on payment of Rs. 2,100 "together with costs of the purchaser in the foreclosure case," which amounted to Rs. 25-12-0. The costs of the suit (amounting to Rs. 117) were, however, awarded to the plaintiffs. They deposited Rs. 2,100 within time, but failed to deposit Rs. 25-12-0. *Held* that as the decree awarded the costs of the suit to the respondents they were entitled to set off that sum from the amount which they were ordered to pay and therefore Rs. 2,100 were in excess of the sum which they had to pay after deducting their costs.⁽⁴³⁾

Set o of
costs in suits
for possession
and cancella-
tion of docu-
ment.

The respondent obtained a decree for possession of certain immoveable property on payment to the appellants of a sum of Rs. 37-8-0 within two months. The decree also awarded to him Rs. 57-2-4 on account of costs. The respondent presented an application for execution in which he recited the facts as above stated and prayed that the sum of Rs. 37-8-0 might be set off against the sum of Rs. 57-2-4, and that he might be placed in possession and be allowed to recover the balance due to him afterwards. The appellants objected that as the decree did not direct that the costs payable by them should be set off against the sum payable by the respondent the latter was not entitled to possession until he paid into Court the sum of Rs. 37-8-0. *Held*, that the

6 O.C. 23 (24); *Parmanand Raot v. Gobarāhan Sahai*, 28 A. 676 (677) = 3 A.L.J. 804 = A.W.N. (1906) 198. Approved in *Sankara Menon v. Gopala Pattar*, 23 M. 121 (123). Referred to in *Kassa Mal v. Gopi*, 10 A. 389 (394); *Fateh Chand v. Panna Lall Bania*, 10 C.P.L.R. 83 (85); *Baiju Singh v. Madho Singh*, 8 O.C. 57 (58); *Chhogmal v. Govind Prasad Gouri Shankar*, 16 C.P.L.R. 73 (75).

(42) *Baldeo Parshad v. Baldeo Singh*, 3 O.C. 323.

(43) *Permanand Raot v. Gobarāhan Sahai*, 3 A.L.J. 804 = 28 A. 676 = A.W.N. (1906) 198, referring to *Ishri v. Gopal*, 6 A. 851.

respondent was entitled to set off the amount awarded to him as costs against the sum payable by him to the appellants.⁽⁴⁴⁾

Where a person, at the time of an order being made for the payment of his costs by trustees, on a petition in the matter of a trust, is indebted to the trust estate, although the amount is not then ascertained, he cannot get any of such costs until he has paid the Set off of costs in case of trust estate.

(44) *Ram Nidh v. Tulshi Ram*, 6 O.C. 23. Chamier, A.J.C., said in the course of the judgment:—"This is an appeal in execution of decree. The respondent obtained from this Court a decree for possession of property on payment of a sum of Rs. 37-8-0 within two months. The decree also awarded to him Rs. 57-2-0 on account of costs. The decree-holder presented an application for execution in which he recited the facts as above stated and prayed that the sum of Rs. 37-8-0 might be set off against the sum of Rs. 57-2-4 and that he might be placed in possession and be allowed to recover the balance due to him afterwards. The judgment-debtors objected that as the decree did not direct that the costs payable by the judgment-debtors should be set off against the sum payable by the decree-holder the latter was not entitled to possession until he paid into Court the sum of Rs. 37-8-0. Both the Courts below have decided in favour of the decree-holder. Hence this appeal by the judgment-debtor. In *Ishri v. Gopal Saran* (6 A. 351) a pre-emption case in which a decree for possession had been passed in favour of the plaintiff on payment of the price and also for costs of the suit it was held that, although Ss. 221 and 247 of the Code of Civil Procedure did not apply, the decree-holder was entitled to deduct the amount awarded to him as costs from the sum payable by him and take possession on payment into Court of the balance. That case was followed by a Judge of this Court in *Baldeo Pershad v. Baldeo Singh* (3 O.C. 323) which was also a pre-emption case. In the case of *Brij Nath Dass v. Juggernath Dass* (4 C. 742) where a decree had been passed in favour of the plaintiff for redemption and for costs it was held that the decree-holder was entitled to set off his taxed costs against the mortgage-money payable by him and to take possession on payment of the balance. That case was followed by the Bombay High Court in *Sidu v. Bali* (17 B. 32) in which it was observed that if the costs exceeded the amount of the mortgage-money the decree-holder might take possession at once and recover the balance of his costs afterwards. The case before me is neither a redemption nor a pre-emption case. The decree under execution was passed in a suit for possession of property and cancellation of a document. It was decided that the plaintiff must pay the sum of Rs. 37-8-0 as a condition of obtaining relief. It seems to me that there is no difference in principle between the present case and the reported cases to which I have referred. It would be absurd to compel the decree-holder in a case like this to pay the money into Court when he would be entitled to take it out again immediately afterwards. An attempt is made by the appellant to distinguish the cases cited above upon the ground that the decree-holder was not entitled to costs unless and until he paid in the sum of Rs. 37-8-0. It was also contended that the two amounts should not be set off against each other because the amount payable by the decree-holder was payable to only one of the judgment-debtors whereas the costs awarded to the plaintiff were payable by all the judgment-debtors. I find that both these matters were dealt with fully in the case in the Allahabad High Court above-mentioned and I need add nothing to what was said by the learned Judges in that case with which I entirely agree. I dismiss this appeal with costs." *Ram Nidh v. Tulshi Ram*, 6 O.C. 23 (24, 25). See also, on this point, *Doe Saran Sahu v. Moti Rai*, 11 C.W.N. (Journal portion) LXIV, noted *supra*.

amount due from him to the trust, and the trustees therefore, can set off the costs payable by them against the amount due from him.^(44-a)

His solicitor cannot be in a better position than he is himself, and has no lien on such costs.⁽⁴⁵⁾

Set off of
joint debt as
against sepa-
rate debt.

Courts of equity, following the law, will not generally allow a set off of a joint debt against a separate debt, or conversely, of a separate debt against a joint debt; or, to state the proposition more generally, they will not allow a set off of debts accruing in different rights. But special circumstances may occur, creating an equity, which will justify even such an interposition.⁽⁴⁶⁾

Set off of costs
—Right, if
affected by
solicitor's
lien.

In equity, the solicitor's lien is only upon the balance of costs arranged according to the equities of the parties.⁽⁴⁷⁾

(44-a) *Harrauld, In re; Wilde v. Walford*, 33 L.J. Ch. 505; 51 L.T. 441, C.A. [reversing 31 W.R. 318 (Eng.)].

(45) *Harrauld, In re, Wilde v. Walford*, 53 L.J. Ch. 505; 51 L.T. 441, C.A., reversing 31 W.R. 318 (Eng.). As to the costs of the trustees incurred in recovering such amount, see the same case *Harrauld, In re; Wilde v. Walford*, 53 L.J. Ch. 505; 51 L.T. 441, C. A., reversing 31 W.R. 318 (Eng.).

(46) Story's Equity Jurisprudence, 8th Ed. (Boston) 1861, Vol. II, S. 1437, p. 663. "Thus for example a joint creditor fraudulently conducts himself in relation to the separate property of one of the debtors, and misapplies it, so that the latter is drawn in to act differently from what he would if he knew the facts, that will constitute, in a case of bankruptcy, a sufficient equity for a set off of the separate debt, created by such misapplication against the joint debt. So, if one of the joint debtors is only a surety for the other, he may, in equity, set off the separate debt due to his principal from the creditor; for in such a case, the joint debt is nothing more than a security for the separate debt of the principal; and, upon equitable considerations, a creditor who has a joint security for a separate debt, cannot resort to that security without allowing what he has received on the separate account for which the other was a security. Indeed, it may be generally stated, that a joint debt may, in equity, be set off against a separate debt, where there is a clear series of transactions, establishing that there was a joint credit given on account of the separate debt. The authorities upon this question are considerably examined, and the following results arrived at, in a late case. The general rule, in equity as well as at law, is, that joint and separate debts cannot be set off against each other. But while at law the rule admits of no exceptions, and the parties to the record only will be regarded, a Court of equity will, in a case of insolvency, regard the real parties—those ultimately to be affected by the decrees—and allow a set off of demands in reality mutual, although prosecuted in the name of others nominally interested. Courts of equity exercised a jurisdiction over the subject of set off previous to the enactment of the statutes upon the subject; and their jurisdiction does not in any manner depend upon these statutes." See Story's Equity Jurisprudence (Boston), 8th Ed., 1861, Vol. II, Ch. XXXVIII, Ss. 1437 and 1437-a, pp. 663, 664; *Blake v. Langdon*, 19 Vt. R. 485.

(47) *Taylor v. Popham*, 15 Ves. 72.

Hence, costs receivable and payable by two parties may be ordered to be mutually set-off without regard to the lien of the solicitors.⁽⁴⁸⁾

Where a decree directs mutual payments between the parties to the cause, the lien of the solicitor does not extend to all sums coming to the credit of his client, but only to the ultimate balance to be paid to him in the suit.⁽⁴⁹⁾

"By an arbitrator's award in an action, the plaintiff was ordered to pay a sum of money to the defendant, and the defendant was ordered to pay the plaintiff a part of his costs when taxed:—*Held*, that the defendant was entitled to have the debt set-off against the taxed costs, and that the right of set-off in such a case was not interfered with by the ordinary solicitor's lien for costs.⁽⁵⁰⁾

Where a party in a suit has a right of set-off it has priority over the lien of the solicitor, which is always subject to the equities between the parties.⁽⁵¹⁾

It has however been held that O. LXV, r. 14, of the Rules of the Supreme Court in England allowing a set-off for costs notwithstanding the solicitor's lien, applies only to costs in the same proceeding.⁽⁵²⁾

A successful defendant's costs will be set-off against the costs of the plaintiff, without regard to the lien of such plaintiff's solicitor, if it be shown that the solicitor is substantially the plaintiff in the cause.⁽⁵³⁾

(48) *Cattell v. Simons*, 6 Beav. 304.

(49) *Bawtree v. Watson*, 2 Keen 713 and *Verity v. Wylde*, 4 Drewry 427 cited in *Brijo Nath Dass v. Juggernath Dass*, 4 C.L.R. 122 (123)=4 C. 742. See *Ex parte Cleland*, L.R., 2 Ch. App. 808 and *In re Bank of Hindustan*, L.R. 3 Ch. App. 125 cited in *Brijo Nath Dass v. Juggernath*, 4 C. 742=4 C.L.R. 122 at p. 123 as to whether the lien of a solicitor on a sum due or payable to his client prevents a set-off against a sum due from his client. Costs incurred in the same suit or proceedings, though payable under different orders, may be set-off against each other; and this right of the parties is not affected by the solicitor's lien. *Roberts v. Buee*, 47 L.J. Ch. 414; 8 Ch. D. 198. It has however been held that, "the lien of the plaintiff's solicitor upon the debt and costs recovered in the cause must be satisfied before the defendant is entitled to set-off the costs recovered by him in another cause against the plaintiff." *Randle v. Fuller*, 6 Term. Rep. 456; 3 R.R. 230; and see *Glaister v. Hewer*, 8 Term. Rep. 69.

(50) *Pringle v. Gloag*, 48 L.J. Ch. 380; 10 Ch. D. 676; 40 L.T. 512; 27 W.R. 574 (Eng.).

(51) *Jenner v. Morris*, 11 W.R. 943 (Eng.).

(52) *Hassell v. Stanley*, 65 L.J. Ch. 494; (1896) 1 Ch. 607; 74 L.T. 375; 44 W.R. 405.

(53) *Pocock v. O'Shaunessy*, 6 A. & E. 807.

A liquidator is not entitled to make any payment to his solicitor without the sanction of the Court; nor may such solicitor set-off his costs against funds recovered through his own exertions. All such moneys must, in the first instance, be paid into Court.⁽⁵⁴⁾

It is in the discretion of the Court to allow a set-off of damages against a balance of costs due to a defendant who has succeeded on a counter-claim.^(54-a)

Set-off and counter-claim in case of alien enemy.

A defendant-alien enemy cannot during hostilities prosecute a counter-claim or claim the benefit of set-off.⁽⁵⁵⁾

Calculation of interest in case of set-off of costs.

If there is a set-off on account of costs, interest should only run after the set-off has been deducted.⁽⁵⁶⁾

Set off of costs—Right, not affected by execution of decree or order.

The execution of a decree or order for costs by way of attachment or otherwise does not deprive the party applying for such execution of any lien or right of set-off he may possess for the payment of such costs.⁽⁵⁷⁾

Set off of costs—Right not affected by employing different solicitors at various stages.

The right to set-off costs is unaffected by the fact that the party against whom it is claimed has employed different solicitors at various stages of the litigation in respect of which the costs have been incurred.⁽⁵⁸⁾

(54) *In re Union Cement and Brick Co.*, 26 L.T. 240; 20 W.R. 361 (Eng.).

(54-a) *Meynell v. Morris*, (1911) 104 L.T. 667.

(55) *Robinson & Co. v. Continental Insurance Co., etc.*, [1915] 1 K.B. 155.

(56) *Amanut Ali v. Mt. Bindhoo*, 13 W.R. 138.

(57) *Bawtree v. Watson*, 2 Keen, 713; 7 L.J. Ch. 183.

(58) *Roberts v. Buee*, (1878) 8 Ch. D. 198; *Cattell v. Simons*, (1843) 6 Beav. 304; *Westacott v. Bevan*, (1891) 1 Q.B. 774; *Hassell v. Stanley*, (1896) 1 Ch. 607; *Cf.*, however, *Russell v. Russell*, (1898) A.C. 307. On the subject-matter of this chapter see generally Story's Equity Jurisprudence, 8th Ed. (Boston), Chapter XXXVIII, Ss. 1430—1444, pp. 655—669. American Cyclopædia of Law and Procedure, Vol. XI, pp. 143—146,

CHAPTER IX.

EFFECT OF TENDER ON THE AWARD OF COSTS.

Effect of tender—Desire of Courts to discourage unnecessary litigation.

Legal tender, what is.

Principle of the plea of tender.

Proof of tender.

Essentials of valid tender.

Tender must be such as to bind the party tendering.

Tender must extend to all that the plaintiff can demand as of right.

Tender, when made after commencement of action, must also include costs incurred till then.

Tender must be of the whole sum due—Inclusive of costs.

Tender must be specific.

Tender must not be clogged with improper conditions.

Tender coupled with demand of receipt not improper condition.

Tender with a demand for a receipt in full of all demands—If proper.

Tender must be legal.

Tender to be made to the creditor or a duly authorized person.

Tendered money should be produced—Mere notice not sufficient.

Tender must be such that the creditor can have reasonable opportunity of seeing that it is good and complete.

Tender must be made in the current coin of the realm.

Tender by cheque—Waiver of objection.

Tender must be a continuing one.

Subsequent demand, effect of.

Tender by post.

Tender by letter of mortgage money, not good tender.

Tender of part of debt.

Tender of one of several distinct debts.

Tender of larger amount than what is due.

Tender under protest.

Tender in case of debt due under an account.

Tender through Court—Deposit.

Tender and deposit—Difference between.

Tender of decree amount into Court—Time of tender.

Tender before suit must be followed by payment into Court after suit.

Tender also stops interest.

Tender, when refused, person tendering may retain the money in his own hands.

Tender, defence of, cannot be pleaded in an action for unliquidated damages.

Effect of
tender—
Desire of
Courts to
discourage
unnecessary
litigation.

As has already been seen "in coming to a decision on the question of costs, the Court is frequently governed by its wish to discourage unnecessary litigation"⁽¹⁾.

Thus, if a plaintiff proceeds with a cause after he has received a complete offer or tender of all that he is entitled to, the Court, in the exercise of its discretion respecting costs, will, as a punishment for the unnecessary litigation, refuse him the whole or a portion of the costs of the action;⁽²⁾ so also, if a defendant has, by improperly refusing an offer made by the plaintiff, caused the litigation, he may be ordered to pay the costs of the action.⁽³⁾

Legal tender,
what is.

A "tender" is an offer by a debtor, or other person who is under an obligation, to pay such debt or perform such obligation, the actual payment or performance being prevented by the refusal of the creditor or person entitled to performance to accept the same. The tender of a debt does not operate to extinguish the debt. The debtor remains liable to pay whenever he is called upon to do so. But the tender operates as a bar to any claim for subsequent interest and costs, and constitutes a good defence to an action for

(1) See Daniell's Chancery Practice, 7th Ed., pp. 971-973, Vol. I, 1901. As to the subject-matter of this chapter, see Bac. Abr. "Tender;" Morg. and Wurtz on Costs 161-164; Seton on Judgments and Orders; Encyclopædia of the Laws of England, 2nd Ed., Vol. XIV—"Tender;" Halsbury's Laws of England—"Tender;" Bullen and Leake's Precedents on Pleadings, 3rd Ed., p. 693; Wait on Actions and Damages, Vol. VII, p. 592, etc.; Yearly Practice, Notes under O. LXV; Annual Practice, Notes under O. LXV; American Cyclopædia of Law and Procedure, Vol. XI, pp. 76, 77.

(2) *Millington v. Fox*, 3 M. & C. 338, 353, 354; *Meder v. M'Cready*, 1 Moll. 119; *Macarney v. Graham*, 2 R. & M. 353; *Holden v. Kynaston*, 2 Beav. 204, 206; *Williams v. Thomas*, 2 Dr. & Sm. 29, 37; *M'Andrew v. Bassett*, 10 Jur. N.S. 492; *Moet v. Bouston*, 33 Beav. 578; *Chester v. Metropolitan Ry. Co.*, 11 Jur. N.S. 214; *Hosken v. Sincock*, 11 Jur. N.S. 477; *Harmer v. Priestly*, 16 Beav. 569; and see Morg. and Wurtz, 102, 103; and see observations of Ld. Westbury, L.C. in *Edelsten v. E.*, 1 De. G. J. & S. 185; but see *Wainwright v. Sewell*, 11 W.R. 560 (Eng.); and *Colburn v. Simms*, 2 Ha. 543, 561, where plaintiffs were only refused the costs incurred after the tender; and see *Williams v. Sorrell*, 4 Ves. 389.

(3) *Torrance v. Bolton*, 8 Ch. 118. See Daniell's Chancery Practice, 7th Ed., Vol. I, (1901), p. 971.

the debt; the debtor being entitled to be put in the same position as if the tender had been accepted.⁽⁴⁾

The principle of the plea of tender is, to use the language of Principle of Justice Clifford in *Colby v. Reed*,⁽⁵⁾ that the defendant has always been ready to perform the contract, and that he did perform it as far as he was able, by tendering the requisite money, the plaintiff himself having prevented a complete performance by his refusal to accept the tender.⁽⁶⁾ That principle is substantially embodied in S. 38 of the Indian Contract Act, and was recognized by the Judicial Committee in *Buta v. Municipal Committee of Lahore*.⁽⁷⁾

A tender, like any other allegation of fact, must be proved by the party relying upon it for exemption from costs, by adducing proper evidence thereof. But, the Court may sometimes look into certain matters for the purpose of finding whether the tender was validly made or not which it may not generally look into for the purpose of deciding on the merits of the case.⁽⁸⁾ Thus, letters written "without prejudice" have, in some cases, been looked into by the Court for the purpose of deciding the question of the validity of an alleged tender.⁽⁹⁾

The offer or tender, whether made by the plaintiff or defendant must be such, as, if accepted by the other party, will become binding on the party offering.⁽¹⁰⁾ Thus, where the defendant's solicitor wrote to the plaintiff's solicitor stating that he was prepared to

Essentials of valid tender—Tender must be such as to bind the party tendering.

(4) *Manning v. Burgess*, (1663) 1 Ch. Cas. 29; 22 E.R. 678; *Dixon v. Clark*, (1848) 5 C.B. 365, 377; 75 R.R. 747. Any costs subsequently incurred would be decreed to be costs unnecessarily incurred, and to which the party incurring the same would not be entitled. "So where a party to a contract does all that is necessary on his part to perform his obligations thereunder, and the complete performance is prevented by the other contracting party, such tendered performance is equivalent to actual performance for the purpose of maintaining or defending an action for the specific performance of the contract, or for damages for breach thereof." *Encyclopædia of the Laws of England*, Vol. XIV, p. 50.

(5) (1878) 9 Otto. U.S. 560.

(6) See, also, Bullen and Leake on Precedents of Pleadings, 3rd Ed., p. 693.

(7) 29 C. 854 at pp. 862 & 870. See, also, *Encyclopædia of the Laws of England*, 2nd Ed., Vol. XIV, p. 50. N.B.—The application of the above principle to the case of landlords and tenants, has not been abrogated by the Bengal Tenancy Act. *Jagat Tarini Dasi v. Nabagopal Chaki*, 5 C.L.J. 270 (285) = 34 C. 305.

(8) See Daniell's Chancery Practice, 7th Ed., Vol. I, p. 972.

(9) *Thomas v. Williams*, 2 Dr. & Sm. 29 (37); *Woodward v. East Coast Railway Co.*, 1 Jur. N.S. 899.

(10) *Trotter v. Maclean*, 13 C.D. 574; and see *Fennessy v. Day*, 55 L.T. 161; *Birmingham Land Co. v. L. & N. W. Rly. Co.*, 36 C.D. 650; 40 C.D. 268.

advise the defendant to settle on certain terms, it was held that the letter was not such an offer as would be binding on the defendant, because he might have declined to follow the advise of his solicitors. Consequently such a letter was held not to constitute a valid tender.⁽¹¹⁾

Tender must extend to all that the plaintiff can demand as of right.

The tender by a defendant, in order to constitute a valid tender, must extend to all that the plaintiff can demand as of right. Unless this is done, the tender would be of no effect. Where a tender falls short of this, whether in the nature of the relief sought or in not offering the costs of the plaintiff incurred by the plaintiff up to the time of the tender, the Court will not deprive the plaintiff of his costs for not accepting such an insufficient tender.⁽¹²⁾

Tender when made after commencement of action, must also include costs incurred till then.

Where a tender is made by the defendant after the commencement of an action by the plaintiff, and the plaintiff had actually incurred some expenditure before the tender is made, and if it also appears that such expenditure was proper and necessary under the circumstances, the tender to be valid must also extend to the costs so incurred.⁽¹³⁾

The defendant is bound to tender only so much of the costs as have been actually expended by the plaintiff. Hence a plaintiff, in refusing to accept a tender of the amount due, because the costs do not form part of the tender, must be careful to ascertain that costs have been actually incurred by him; otherwise, he will subject himself to the payment of any future costs which he may occasion to the defendant.⁽¹⁴⁾

Tender must be of the whole sum due—Inclusive of costs.

The tender in order to be valid and effective must include the whole sum due. It must also include the costs properly incurred up to the time of tender. Where the Court finds that the amount

(11) *Trotter v. Maclean*, 13 C.D. 574; and see *Fennessy v. Day*, 55 L.T. 161; *Birmingham Land Co. v. L. & N. W. Ry. Co.*, 36 C.D. 650; 40 C.D. 268. *Daniell's Chancery Practice*, 7th Ed., Vol. I, p. 971.

(12) *Kelly v. Hooper*, 1 Y & C.C.C. 197 (200); *Geary v. Norton*, 1 De. G & S. 9 (12); *Jameeson v. Teague*, 3 Jur. N.S. 1206; *Trotter v. Maclean*, 13 C.D. 574.

(13) *Daniell's Chancery Practice*, (1901), 7th Ed. Vol. I, p. 971. *Worral v. Miller*, 3 Anst. 632; *Collins Co. v. Walker*, 7 W.R. 222 (Eng.); *Burgess v. Hills*, 26 Beav. 244; *Burgess v. Hatley*, 26 Beav. 249; *Wallis v. W.*, 4 Drew. 458; *M'Andrew v. Bassett*, 10 Jur. N.S. 492; *Hudson v. Bennett*, 12 Jur. N.S. 519; but see *Ld. Kensington v. Metropolitan Ry. Co.*, 14 W.R. 754 (Eng.); *Heatley v. Newton*, 19 C.D. 326.

(14) *Henning v. Willis*, 2 Gwill. 898; *Beames on Costs*, 43. See *Daniell's Chancery Practice*, 7th Ed. (1901), Vol. I, p. 971.

actually tendered is less than the amount found due, the party relying upon the tender will not be exempted from the payment of costs.⁽¹⁵⁾

It is also another essential condition of a valid tender that it must be specific both as regards the amount and as regards the admission of the extent of the liability of the party tendering.⁽¹⁶⁾ Tender must be specific.

Thus where the defendant tendered a larger sum than what was actually due from him, but coupled it with a direction that the plaintiff should take out of it such a sum as was actually due to him, it was held that the tender was not good.⁽¹⁷⁾

A tender, in order to exonerate the party tendering from liability to the costs of the action, must not be clogged with any improper conditions (*i.e.*) conditions which the party tendering has no right to impose.⁽¹⁸⁾ Tender must not be clogged with improper conditions. Thus where an executor, although he had offered to pay a legacy, given in trust for the testator's daughter for life, and afterwards to her children, had qualified his offer by insisting that it should be laid out in such security as he should approve of, the Court ordered the costs to be paid out of the testator's general estate to which the executor was entitled as residuary legatee; the order of the Court being based on the ground that the executor had no right to add such a stipulation to his offer.⁽¹⁹⁾

Thus a tender of the mortgage debt by a person who has entered into a contract for purchasing the equity of redemption is not valid if conditional on the delivery to him of the title deeds.⁽²⁰⁾ A condition attached to a tender that certain documents to which the debtor is not entitled should be returned to him vitiates the tender.⁽²¹⁾ The following extract from the judgment of Mookerjee and Beachcroft, JJ., in the course of the judgment in *Rup Chand v. Narendra*,^(21-a) may well be noted not only as containing a clear statement of the law on the subject, but also as being a comprehensive review of the previous case law relating to the point.

(15) *Taylor v. Hall*, 2 Gwill. 594.

(16) See *Drake v. Brooking*, 2 Gwill. 594; *Rumney v. Willis*, 2 Gwill. 775.

(17) *Ibid.*

(18) See *Walter v. Patey*, 1 Russ. 375.

(19) *Walter v. Patey*, 1 Russ. 375. See Daniell's Chancery Practice, 7th Ed. (1901), Vol. I, p. 972.

(20) *Varadarajulu Chetty v. Dhanalakshmi Ammal*, 16 M.L.T. 365.

(21) *In re Achath Sankaran*, 29 Ind. Cas. 586.

(21-a) 19 C.W.N. 112 at pp. 115, 116.

"In *Huxham v. Smith*,⁽²²⁾ a tender of payment was made upon the condition that a particular document should be given up. It was held that it was not a legal tender. In *Griffith v. Hodges*,⁽²³⁾ Abbott, C.J., said, "No man can insist on a receipt in full of all demands, and if a man makes a tender of money, insisting at the same time on a receipt in full of all demands, I have no doubt that such a tender is bad." In *Cheminant v. Thornton*,⁽²⁴⁾ a person called upon his creditor, tendered him ten sovereigns in full of his demand. It was ruled by Abbott, C.J., that the tender "was not good, being made in full of the demand." In *Peacock v. Dickerson*,⁽²⁵⁾ the debtor offered the creditor three pounds, three shillings and eight pence in cash, which the creditor was willing to take in part, but the debtor said that he owed him no more and took up the money again and would not let the creditor take it in part. Abbott, C. J., said, "this tender is not good; a party tendering money should tender it without making any terms and should leave it still open to the one party to say that more was due, and to the other that the sum tendered was sufficient." In *Mitchell v. King*,⁽²⁶⁾ Vaughan, B., said, "a tender, to be legal, must be unconditional. If the money is put down only on condition that a party would take it as a settlement, that is not a good tender. A tender clogged with the terms that the money is to be taken as a settlement is not good." To the same effect are the decisions in *Jennings v. Major*,⁽²⁷⁾ *Sutton v. Hawkins*,⁽²⁸⁾ *Hastings v. Thorley*,⁽²⁹⁾ and *Robinson v. Ferreday*.⁽³⁰⁾ It may be observed, however, with regard to the case of *Hastings v. Thorley*,⁽³¹⁾ that it was subsequently doubted by Lopes, J., in *Jones v. Bridgman*,⁽³²⁾ and a more liberal view has sometimes been taken. In *Bowen v. Owen*,⁽³³⁾ a tenant sent a person to his landlord with a letter saying "I have

(22) 2 Camp. 19 (21); 11 R.R. 651 (1809).

(23) 1 C. & P. 419 (1824).

(24) 2 C. & P. 50 (1825).

(25) 2 C. & P. 51 (1825).

(26) 6 C. & P. 237 (1833).

(27) 8 C. & P. 61, 64 (1837).

(28) 8 C. & P. 259 (1838).

(29) 8 C. & P. 573 (1838).

(30) 8 C. & P. 753 (1839).

(31) 8 C. & P. 573 (1838).

(32) 39 L.T. 500 (1878).

(33) 11 A. & E. 130 (N.S.) (1847).]

sent with the bearer a sum of twenty-five pounds, five shillings and seven pence to settle one year's rent of Nautypain" and the bearer informed the landlord that he had the money with him to pay; but the latter refused, saying that there was more than that due. The bearer left, but afterwards returned and said that he had a few pounds in his pocket in addition to the sum named in the letter; but the landlord again refused, saying there was more due. It was argued on the landlord's behalf that these offers, coupled with the letter, amounted only to a conditional tender and the learned Judge who tried the case ruled that that was so. But the King's Bench held differently, Erle, J., saying, "the person making a tender has the right to exclude presumption against himself by saying 'I pay this as the whole that is due to you;' but if he requires the other party to accept it as all that is due, that is imposing a condition, and when the offer is so made, the creditor may refuse to consider it as a tender." *The cases of Strong v. Harvey*,⁽³⁴⁾ and *Forrd v. Noll*,⁽³⁵⁾ support the same view. The fundamental principle which underlies them is that the debtor who made the tender sought to impose a condition on which, it was held, he was not entitled to insist under the Law. We need not consider whether the view taken in these cases should be applied in similar cases in this country as embodying a rule of justice, equity and good conscience. In so far as this Court is concerned, it was ruled in the case of *Jagat Tarini Dasi v. Naba Gopal Chaki*,⁽³⁶⁾ that a tender is not vitiated because a receipt is asked. This is in accordance with the decision in *Jones v. Arthur*,⁽³⁷⁾ and *Richardson v. Jackson*,⁽³⁸⁾ though a different view has sometimes been taken.⁽³⁹⁾

A tender is not vitiated because a receipt is asked for.⁽⁴⁰⁾

Tender coupled with a demand of receipt, not improper condition.

(34) 3 Bingham 304 (1825).

(35) 2 D. (N.S.) 617 = 12 L.J.C.P. 2 (1842).

(36) 5 C.L.J. 270 = 34 C. 305.

(37) 8 Dowl. 442; 59 R.R. 583 (1840).

(38) 8 M. & W. 291 (1841).

(39) 1 C. & P. 257 (1824); Peake 179 (1793). See the above cases cited and discussed by Mookerjee and Beachcroft, JJ., in *Rup Chand v. Narendra*, 19 C.W.N. 112 (115-116).

(40) See *Jones v. Arthur*, (1840) 8 Dowl. 442; 59 R.R. 833; *Richardson v. Jackson*, (1838) 5 Yerger (Tennessee) 99; 26 Am. Sec. 263 cited and followed by Mookerjee, J., in *Jagat Tarini Dasi v. Nabagopal Chaki*, 5 C.L.J. 270 (283) = 34 C. 305. See, also, *Rup Chand v. Narendra*, 19 C.W.N. 112. A tenant who tenders rent with a request for a receipt in the statutory form, does not seek to impose on the landlord any condition on which he is not entitled to insist, and when the landlord refuses to give such a receipt and offers to grant a receipt in a form which would compromise the position of the transferee, there is an improper refusal of a valid tender, *Rup Chand v. Narendra*, 19 C.W.N. 112 at p. 113.

Tender with
a demand for
a receipt in
full of all
demands, if
proper.

A tender is not valid if it is made upon a condition. Thus, if a debtor offers to pay a certain sum provided the creditor will give him a receipt in full of all demands, that is not a valid tender of the sum offered.⁽⁴¹⁾

Tender must
be legal.

"If a tender is not legal the Court will not support it; nor will it supply a defect in a tender against a rule of law, unless, perhaps, where fraud is used to prevent its operation."⁽⁴²⁾

Tender to be
made to the
creditor or a
duly authori-
zed person.

A tender of payment to be valid must be made to the creditor or to a person duly authorized to receive payment on behalf of the creditor.⁽⁴³⁾

A tender to an agent who is authorised, or held out by the principal as having authority, to receive payment of the debt, operates as a tender to the principal.⁽⁴⁴⁾

Tendered
money
should be
produced—
Mere notice
not sufficient.

The law requires for a valid tender that the money due should be produced to the creditor. A mere notice to the creditor of the

(41) *Foord v. Noll*, 1842, 2 Dowl. N.S. 614; *Griffith v. Hodges*, 1824, 1 Car. & P. 419; *Glasscott v. Day*, 1803, 5 Esp. 48; 8 R.R. 828; *Higham v. Baddely*, 1820, Gow. 213. "In *Finch v. Miller*, 1848, 5 C.B. 428; 75 R.R. 774, a tender of a quarter's rent, coupled with a demand of a receipt to a particular day, there being a contest between the parties as to whether there was one or two quarters' rent due, was held invalid. So, where a tenant in tendering a sum of money said, "I tender you £21 in payment of the half year's rent due at Lady Day last," it was held that it was not a good tender, because by accepting the money, the landlord would admit that the sum amounted to half a year's rent (*Hastings v. Thorley*, 1838, 3 Car. & P. 573). So, an offer to a creditor of a certain sum "in settlement," or "in full of his demand," or "to be accepted as the whole balance due," or otherwise made in such terms that the creditor, by accepting it, is required to make an admission, is not a legal tender (*Cheminant v. Thornton*, 1825, 2 Car. & P. 50; *Strong v. Harvey*, 1825, 3 Bing. 304; *Evans v. Judkins*, 1815, 4 Camp. N.P. 156; *Mitchell v. King*, 1833, 6 Car. & P. 237; *Peacock v. Dickerson*, 1825, 2 Car. & P. 51n; *Sutton v. Hawkins*, 1838, 8 Car. & P. 259). But this principle does not apply unless the terms in which the offer is made require the creditor to admit that no more is due. Thus, a tender is not vitiated by the person making it saying that "it is more than is due, but you may have it," or that it is all he admits to be due, if he does not require the other party to accept it as the full amount due." *Robinson v. Ferreday*, 1839, 8 Car. & P. 752; *Bowen v. Owen*, 1847, 11 Ad. & E.N.S. 130; 76 R.R. 306; *Henwood v. Oliver*, 1841, 1 Ad. & E.N.S. 409; 55 R.R. 290; *Thorpe v. Burgess*, 1840, 8 Dowl. P.C. 603; *Encyclopædia of the Laws of England*, Vol. XIV, p. 52 (53).

(42) *Per* Ld. Hardwicke, in *Gammon v. Stone*, 1 Ves. S. 339. *Daniell's Chancery Practice*, Vol. I, 7th Ed. (1901) p. 972.

(43) *Ishan Chandra Roy v. Khaja Assanulla*, 8 B.L.R. 537, Note.

(44) *Moffat v. Parsons*, (1814), 5 Taun. 307; 15 R.R. 506. *Encyclopædia of the Laws of England*, 2nd Ed., Vol. XIV, p. 54.

payment of the principal to a third party is not sufficient for the purpose of exonerating the debtor from the costs of the action.⁽⁴⁵⁾

Thus, when money due on a prior mortgage was deposited by the mortgagor with a puisne mortgagee, who sent a notice to the prior mortgagee to receive payment of the amount deposited with him, but no money was actually tendered for payment, nor was it deposited in Court when the prior mortgagee filed his suit, it was held, that the tender was not sufficient, to exonerate the defendant from liability for costs, and that the interest on the prior mortgage did not cease to run from the date of the notice.⁽⁴⁶⁾ The money must be actually produced, in order to constitute a legal tender, except where such production is expressly or impliedly dispensed with.⁽⁴⁷⁾

An offer or tender to be valid under S. 38 of the Contract Act must be such that the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.⁽⁴⁸⁾

Tender must be such that the creditor can have reasonable opportunity of seeing that it is good and complete.

(45) *Mulchand v. Babaji*, 1 Bom. L.R. 841.

(46) *Bura Ram v. Nur Bukhsh*, 115 P.L.R. 1902.

(47) *Thomas v. Evans*, (1808), 10 East. 101; 10 R.R. 229; *Dickinson v. Shee*, (1801), 4 Esp. 68; "where a debtor told his creditor that he would pay him so much, and put his hand into his pocket to take out the money, but, before he was able to produce it, the creditor left the room, it was held that there had been no tender, (*Leatherdale v. Sweepstone*, (1828), 3 Car. & P. 342; 33 R.R. 678; and see *Glasscott v. Day*, (1803), 5 Esp. 48; 8 R.R. 828; *Huxham v. Smith*, (1809), 2 Camp. N.P. 22; 11 R.R. 651; *Kraus v. Arnold*, (1832), 7 Moo. K.B. 59). So, if a debtor goes with money in hand to pay the debt, and upon asking if the creditor has a receipt stamp, receives an answer in the negative, but does not actually offer the money, that is not a tender (*Ryder v. Townsend*, (1825), 7 Dow. & Ry. 119). But, where the debtor actually produces some money, and offers it to the creditor, telling him the amount which he so offers, that is a sufficient tender, though the money consists of coins twisted up in Bank notes, which are not opened in the presence of the creditor (*Alexander v. Brown*, (1824), 1 Car. & P. 288). And if a debtor tells his creditor that he has come to pay him so much money, mentioning the amount, and the creditor says that it is of no use offering it, because he cannot take it, the actual production of the money is dispensed with (*Ex parte Danks*, (1852), 2 De. G. M. & G. 936; 42 E.R. 1838; *Finch v. Brook*, (1834), 1 Sco. 70; 41 R. R. 595; *Black v. Smith*, (1796), 1 Pea. 88; 3 R.R. 661; *Harding v. Davis*, (1825), 2 Car. & P. 77; 31 R.R. 654; *Douglas v. Patrick*, (1790), 3 T.R. 683; 1 R.R. 793). So where, in an action for the non-delivery of a cargo, it was proved that the shipmaster demanded a larger sum for freight than was due, and intimated that it was useless to tender a smaller sum, as it would be refused, it was held that those facts amounted to a constructive waiver of a tender." *The Norway*, (1865), 3 Moo. P.C.N.S. 245; 16 E.R. 92. *Encyclopædia of the Laws of England*, Vol. XIV, p. 51.

(48) *Sabapathi Pillai v. Vanmahalinga Pillai*, 26 M.L.J. 331 (341) = (1914) M.W. N. 256 = 23 Ind. Cas. 581.

Tender must
be made in
the current
coin of the
realm.

It is also necessary to observe that a tender, to be valid, must be made in the current coin of the realm.⁽⁴⁹⁾

In this country, under the Indian Coinage Act,^(49-a) the Indian Paper Currency Act,^(49-b) and the Indian Coinage and Paper Currency Act ^(49-c) what constitutes legal tender is defined; it includes coins and currency notes.

Tender by
cheque—Wai-
ver of objec-
tion.

It is clear, that a tender by cheque is not a legal tender. It is well settled, however, that, when a tender is actually made, but in a currency different from that required by the law, for instance by a cheque on a banker, the objection to the form of the tender may be expressly or impliedly waived by the creditor; and he will be deemed to have waived the objection, if he rejects the tender on the ground of the insufficiency in amount or on some other ground, without making any objection to the legality of the tender in point of quality. This was laid down in *Polglass v. Oliver*,⁽⁵⁰⁾ in which the earlier authorities were reviewed. Mr. Baron Bayley observed that "if he objects to accept the sum tendered because it is in paper, what he is not bound to receive, he gives the party tendering an opportunity to make his tender in coin; but if he puts his refusal upon a different ground, he waives the objection as to the quality of the tender. There is reason and good faith in this decision; for if he objected expressly on the ground of the quality of the tender, it would have given the party the opportunity of getting other money, and making a good and valid tender; but, by not doing so, and claiming a larger sum, you delude him."⁽⁵¹⁾

(49) *Wade's Case*, (1601) 5 Co. Rep. 114a; *Polglass v. Oliver*, (1831), 2 Cr. & Jer. 15; 37 R.R. 623; *Know v. Lee*, (1870) 12 Wallace (U.S.) 457.

(49-a) Act XXIII of 1870, Ss. 12—15.

(49-b) Act XX of 1883, S. 16.

(49-c) Act XXII of 1899, Ss. 2 & 3.

(50) *Polglass v. Oliver*, (1831), 2 Cr. & Jer. 15; 37 R.R. 623.

(51) *Jagat Tarini Dasi v. Nabagopal Chaki*, 5 C.L.J. 270 (282). These observations may be appropriately applied to the case of *Jagat Tarini Dasi v. Nabagopal Chaki*, 5 C.L.J. 270; there the defendant offered to pay in cash or by cheque, whichever might be acceptable to the plaintiff, and it was also proved, that, on previous occasions of payment of rent for this property, payments by cheque had been uniformly accepted. To the same effect are the cases of *Jones v. Arthur*, (1840), 8 Dowl. 442; 59 R.R. 833, and *Bail v. Stanley*, (1833) 5 Yerger (Tennessee), 99; 26 A. Sec. 263, where the tender was by a cheque, and *Caine v. Coullon*, (1863) 1 H. & C. 764, where the tender was by banker's bill payable at sight. (See also *Ward v. Smith*, (1863) 7 Wallace U.S. 447). The same view has been impliedly adopted in Calcutta High Court in the case of *Bolye Chand v. Moulard*, (1878) 4 C. 572.

The tender or offer, in order to be effective and to exonerate the party tendering from his liability to costs which he would otherwise incur, must be a continuing one.⁽⁵²⁾ Tender must be a continuing one.

Thus, where a creditor after first refusing to accept a proper tender, subsequently demands payment of the sum tendered before payment, a debtor who makes default in payment at the time of the subsequent demand cannot rely on his original tender as a ground for exemption from liability to costs.⁽⁵³⁾ But, in such a case, the subsequent demand, in order to do away with the effect of a tender, must be made by the creditor himself, or by some person who is authorised to receive payment and give the debtor a discharge; and an unauthorised demand cannot be ratified by the creditor so as to defeat a plea of tender urged as a ground for exemption from costs.⁽⁵⁴⁾ Subsequent demand, effect of.

An offer by post to pay the expenses of executing a sale-deed is not a legal tender of those expenses.⁽⁵⁵⁾ The English and Indian Cases have established that a mere offer by registered post letter to deliver something or rather, or the expression by a letter of willingness or readiness to deliver, is not a proper offer. As Shepherd, J., says in his Commentaries on the Indian Contract Act, "A sufficient tender of money is not made if the money is locked up in a box, nor of goods if they are enclosed in a cask, which the other party is not allowed to open."^(55-a) Following that analogy, a mere offer by posted letter that the defendant is ready to execute a release without having a document of release ready to be delivered is not a proper offer.⁽⁵⁶⁾ Tender by post.

An offer by letter of the amount due on a mortgage is not a good tender within the meaning of S. 84 of the Transfer of Tender by letter of mortgage money, not good tender.

(52) See *Sabapathi Pillai v. Vanmahalinga Pillai*, 26 M.L.J. 331 (342)=15 M.L.T. 206=(1914) M.W.N. 256=23 Ind. Cas. 581.

(53) See *Hayward v. Hagne*, (18 2) 4 Esp. 93; *Dixon v. Clark*, (1848) 5 C.B. 365; 75 R.R. 747.

(54) *Coles v. Bell*, (1808), 1 Camp. N.P. 478n; 10 R.R. 731n; *Coore v. Callaway*, (1794), 1 Esp. 115. An application to one of two joint-debtors for payment of the debt is, however, sufficient to render a previous tender unavailable in an action against them jointly. *Peirse v. Bowles*, (1816), 1 Stark. N.P. 323; 18 R.R. 775.

(55) *Veerayya v. Sivayya*, 27 M.L.J. 482.

(55-a) See *Sabapathi Pillai v. Vanmahalinga Pillai*, 26 M.L.J. 331 at p. 341.

(56) *Sabapathi Pillai v. Vanmahalinga Pillai*, 26 M.L.J. 331 at p. 341=15 M.L.T. 206=(1914) M.W.N. 256=23 Ind. Cas. 581.

Property Act. It is necessary that the money should be actually produced, unless it could be shown that the person entitled to receive the money has waived this condition.⁽⁵⁷⁾

Tender of
part of debt.

A tender of only a part of what is due is bad and ineffectual.⁽⁵⁸⁾

(57) *Chetan Das v. Gobind Saran*, 12 A.L.J. 111. The following observations of His Lordship Chief Justice Richards, in the course of the judgment in the above case may also be noted :—"We are clearly of opinion that the offer by letter was not a good tender within the meaning of S. 84 of the Transfer of Property Act. It is necessary that the money should have been actually produced unless it could be shown that the person entitled to receive the money had waived this condition (See Wharton's Law Lexicon, 10th Ed., p. 747, and Fisher on Mortgages, 6th Ed., para. 1506). The same view has been taken by the Bombay High Court in the case of *Kamaya Naik v. Devapa Rudra Naik*, 22 B. 440. It is thus clear that the letter cannot be regarded as a tender within the meaning of S. 84 of the Transfer of Property Act. The appellant is, therefore, not entitled to claim relief from the interest after the date of the letter. With regard to the costs in the suit something might be said if the appellant had taken steps to redeem the property immediately after he made the offer to pay it. He did not do so and the plaintiff had to bring the present suit. We accordingly dismiss the appeal with costs." *Chetan Das v. Gobind Saran*, 12 A.L.J. 111 at p. 112. As to tender of mortgage debt see *Venkatasvaradu v. Bala Tripurasundari*, (1915) M.W.N. 763; *Maia Din v. Ahmad Ali*, 24 Ind. Cas. 874; *Mahomed Mozafer Ali v. Asraf Ali*, 25 Ind. Cas. 93, *In re Achuth Sankaran*, 29 Ind. Cas. 586; *Varadarajulu Chetty v. Dhanalakshmi Ammal*, 16 M.L.T. 365; *Thegaraya Reddy v. Venkatachala Pandithan*, 31 M.L.J. 548.

(58) *Haji Abdul Rahman v. Haji Noor Mahomed*, 16 B. 141 referring to *Dixon v. Clark*, 5 C.B. 365; 16 L.J.C.P. 237; see also *Digambar Das v. Harendra Narain Panday*, 11 C.L.J. 226 at p. 234=14 C.W.N. 617=5 Ind. Cas. 165. Under a mortgage-deed taken to secure the re-payment within three years of a sum of Rs. 16,000 advanced by the plaintiff, with interest at 15 per cent. from the 2nd July 1874, the date of the mortgage, it was stipulated that interest should be paid every six months, but that if a year's interest should be unpaid, then the whole amount due for principal and interest should become payable at once; and also that the mortgagor might, after payment of interest, pay towards satisfaction of the principal any sum not less than Rs. 1,000. The first year's interest was allowed to get into arrear, but in September 1875, the defendant went to the plaintiff with Rs. 19,000, a greater sum than was due for principal and interest and told him to repay himself from that sum. The offer was refused and the plaintiff thereupon brought a suit on the 9th July 1877 for Rs. 16,000 with interest from the date of the mortgage to the date of the suit and subsequent interest. Held that the tender made by the defendant, although not valid according to English Law was valid under S. 38 of the Indian Contract Act. *Per Wilson, J.*—S. 38 of the Indian Contract Act substantially requires that there should be a genuine and unconditional offer, in case of payment, to pay unconditionally at a proper place, made by a person in a position to pay. *Kanye Lall Khan v. Khetter Money Dossee*, 5 C.L.R. 105. Where the defendant tendered, before suit, only a part of the amount claimed by the plaintiff, in satisfaction of the entire debt, it would not be a legal tender, so that the amount of the entire claim, and not the difference between the sums claimed and tendered, would decide the *forum* in which the plaintiff could sue and the costs to which, in consequence he would be entitled. *Chunder Caunt Mookerjee v. Jodoo Nath Khan*, 3 C. 468=1 C. L.R. 470 referred to in *Bromhomoyee v. Kashi Chunder Sen*, 10 C.L.J. 91.

A tender of one of several distinct debts is valid with regard to that debt.⁽⁵⁹⁾ Tender of one of several distinct debts.

A tender of a larger amount than is due is a valid tender of what is due, if no change be required;⁽⁶⁰⁾ but a tender of a larger sum, out of which the tenderer requires change, is not a legal tender of a smaller sum; because a creditor is not bound to give change.⁽⁶¹⁾ Tender of larger amount than what is due.

It is open to a party to make a tender under protest, especially if it does not impose any conditions.⁽⁶²⁾ Tender under protest.

The words "under protest" merely import that the debtor does not acquiesce in the creditor's demand, and does not mean to preclude himself from recovering the money back again if he can.⁽⁶³⁾

(59) See Encyclopædia of the Laws of England, 2nd Ed., Vol. XIV, p. 52. Where a person is indebted to another in several distinct sums arising in respect of separate matters, a tender of any one or more of those sums is a valid tender, provided the debtor states upon what account the tender is made (Bac. Abr., "Tender").

(60) *Dean v. James*, (1833) = 4 Barn. & Adol. 547.

(61) *Robinson v. Cook*, 1815, 6 Taun. 336; 16 R.R. 624; *Betterbee v. Davis*, (1811) 3 Camp.N.P. 70; 13 R.R. 755; *Brady v. Jones*, (1823), 2 Dow. & Ry. 305. If, however, the creditor does not make any objection to the tender on the ground of his being required to give change, but refuses to receive it because he claims to be entitled to a larger sum, he will be deemed to have waived the objection (*Saunders v. Graham*, 1819 Gow. 121; *Cadman v. Lubbock*, (1824), 5 Dow. & Ry. 289. In *Bevans v. Rees*, (1839), 5 Mee & W. 306; 52 R.R. 727, where the defendant, who owed the plaintiff £108, sent a person to the plaintiff's solicitor, who was authorized to receive payment of the debt, and that person told the solicitor that he had come to settle the amount due, and laid down 150 sovereigns, out of which he desired the solicitor to take what was due, and the solicitor refused to do so unless a certain account, due from the plaintiff to the defendant, was fixed at a certain amount, it was held that that was a good tender of £108.

(62) *Greenwood v. Sutcliffe*, (1892) 1 Ch. 1; *Scott v. Uxbridge, etc. Railway Co.*, 1 C.P. 596.

(63) *Manning v. Lunn*, (1845), 2 Car. & Kir. 13; 80 R.R. 822; *Scott v. Uxbridge and Rickmansworth Rly. Co.*, (1866), L.R. 1 C.P. 596; *Sweeney v. Smith*, (1869), L.R. 7 Eq. 324. So, where a mortgagor tendered a sum less than that claimed by the mortgagee, stating that he did not admit the correctness of the mortgagee's accounts, and that he intended to take steps to dispute them, it was held that the tender was valid, and that the mortgagor was entitled to have accounts taken in order to ascertain if the amount tendered was sufficient. (*Greenwood v. Sutcliffe*, (1892) 1 Ch. 1).....Payment of the mortgage money into Court by the occupant of the mortgaged property accompanied with a protest and a threat of legal proceedings to recover the amount paid into Court, is not a good tender or such a tender as is contemplated by the Ben. Reg. XVII of 1806, Ss. 7 and 8. S. 7 of Beng. Reg. XVII of 1806 provides for the equitable right of redemption "to the mortgagor and the owner of such property, or his legal representative." *Quære*—Whether a tender of the mortgage money and interest by a stranger, though in possession of the mortgaged property, is a good tender? See *Prannath Roy Chowdry v. Rookea Begum*, 7 M.I.A. 328 = 4 W.R.P.C. 37 = 1 Suther 367 = 1 Sar. 692.

Tender in
case of debt
due under an
account.

In the case of a debt due on an account, it sometimes happens that the accounting party is not able to make tender of any specific amount as being due from him. This is often due to the fact that the state of accounts between the parties is not always certain. In such cases, if the accounting party shows his willingness to render an account and his ability to pay the amount that may be found due on taking accounts, the Court may at the time of the final adjudication take such willingness and readiness into consideration and may exonerate him from the payment of costs incurred by the other party, although as a matter of fact some amount may be found due from him.⁽⁶⁴⁾

Tender
through
Court—
Deposit.

A tender through Court consists of at least a deposit into Court with notice to the persons entitled to withdraw the money.⁽⁶⁵⁾ "A plea of tender is incomplete as an answer to an action, and by analogy, as an answer to a defence, unless accompanied by a tender in Court."⁽⁶⁶⁾

Tender and
deposit—
Difference
between.

The Legislature has drawn a distinction between the case of a tender and a deposit. A tender in order to be valid must be made to the person entitled to receive the money. But when only a deposit is made the mortgagor must do something more. He must do all that has to be done in order to enable the person entitled to the money to receive it.⁽⁶⁷⁾

Where the mortgagee is dead, and the mortgagor, not being sure as to who are the persons entitled to succession and thus unable to make a valid tender, deposit the money in Court, but withdraws it before the rightful heirs are ascertained, he cannot be said to have done all that he could do to enable them to receive the money. In such cases the mortgagor cannot claim the benefit

(64) See *Morgan and Wurtzburg on the Law of Costs*, pp. 162-164; *Daniell's Chancery Practice*, 7th Ed., Vol. I, p. 973; see *Parrott v. Treby*, Prec. in Ch. 254; see, also, *Bennett v. Atkins*, 1 Y. & C. Ex. 247, 249; *Ashburnham v. Thompson*, 13 Ves. 402; *A.G. v. Brewers' Co.*, 1 P. Wms. 376; *Turner v. Hancock*, 20 C.D. 303; *Re Beddoe*, (1893) 1 Ch., p. 555. Where, however, a suit was instituted against an *elegit* creditor for an account, who, knowing that the balance was against him, contested the mode of taking the account and failed, he was ordered to pay such part of the expense of taking the account as was incurred after his debt was paid off. *Skirrett v. Atky*, 1 B. & B. 430.

(65) *Venkatesvaradu v. Bala Tripurasundari*, (1915) M.W.N. 763, (following *Krishnasami v. Ramasami*, 35 M. 44).

(66) *Per Sadasiva Aiyar, J.*, in *Sabapathi Pillai v. Vanmahalinga Pillai*, 26 M.L.J. 331 at p. 341=15 M.L.T. 206=(1914) M.W.N. 256=23 Ind. Cas. 581. See also cases noted under reference (68), *infra*.

(67) *Thegaraya Reddy v. Venkatachela Pandithan*, 31 M.L.J. 548 (following *Krishnasami v. Ramasami*, 35 M. 44).

of S. 84, of the Transfer of Property Act, for the money having been withdrawn before the persons entitled to it have established their right, it must be taken that so far as they are concerned the deposit has never been made. The deposit in order to be effective under S. 84 must remain in Court until the mortgagee or his successor in interest has been enabled or is in a position to draw it. (67-a)

"There is no analogy between tender and deposit. When a debtor tenders money, he must do it only to the person legally entitled thereto. He takes the risk of deciding for himself whether the offer he is making is to the proper person in the case of the person to whom the tender is made, the latter can have no claim for interest and can have no grievance if it is refused, as he had the option and right of claiming payment at once and had not availed himself of them. On the other hand, a deposit is ordinarily made when the debtor is in doubt as to who is the rightful claimant. He wants to absolve himself from future liability by leaving it to the Court to hand the money over to the true owner. Nobody may be in a position to apply for payment immediately as in the case of a tender. Consequently the money must be in deposit to be drawn out as soon as the legal rights of the parties are determined." (67-b)

Where after the suit was instituted the mortgagor again deposit the amount in Court, in calculating interest from that date the amount deposited should be deducted from the principal, and interest allowed only on the balance. (67-c)

Where a tender of a sum required by a decree to be paid is made during the hours the Court is open, the money must be received, or if not received the tender is yet a valid tender, for it is the Court which has not received the money tendered. (67-d)

Tender of
decree
amount into
Court—Time
of tender.

(67-a) *Thegaraya Reddy v. Venkatachela Pandithan*, 31 M.L.J. 548 (following *Krishnasami v. Ramasami*, 35 M. 44).

(67-b) *Per Seshagiri Aiyar, J.*, in *Ibid.*

(67-c) *Ibid.*

(67-d) *Paikan Patel v. Doma Powar*, 5 C.P.L.R. 100. In this case the appellant had obtained a decree against respondent for ejectment because the defendant would not agree to an enhancement of rent of Rs. 10. According to the law the plaintiff was obliged to pay Rs. 70 compensation for disturbance and 20 compensation for improvements within 15 days into Court upon which the decree would become absolute. The plaintiff paid in Rs. 70 and on the last day of the fifteen put in a petition paying in Rs. 20. According to the petition the money was tendered. It would appear however that though tendered to the Court the money was not at once taken by the Court, but the appellant was left to pay the money to the Nazir which was done next day. This however was for the convenience of the Court not of the appellant. Accordingly

Tender before
suit must be
followed by
payment into
Court after
suit.

"A plea of tender before action brought must be accompanied by a payment into Court after action; otherwise the tender would be ineffectual." (68)

"Though a mere unaccepted tender not followed by payment into Court, would not entitle the defendant to costs, yet, where the tender was made in such a way as to amount to payment the defendant may be given his costs from the plaintiff." (68 a)

Effect of
tender—
Tender also
stops interest.

A valid tender which is kept good not only exonerates the party tendering from liability for the costs of a suit that may subsequently

in October respondent appealed to have the decree set aside on the ground that the whole sum of Rs. 90 had not been paid within 15 days of the passing of the decree and the Court allowed this argument to prevail. On appeal the order of the Court of first instance was upheld by the Judge of the Court of second instance. "The only question for determination" it was said, 'is whether the filing of an application for permission to deposit operates as a deposit or not. I think it cannot be held to do so. Unless the application is filed at the beginning of the official day (11 A. M.) it is practically impossible for the necessary orders to be passed so as to admit of the money being received and credited in the civil deposits before the Treasury closes (2 P.M.). The ordinary procedure is for the money to be deposited on the following day. I therefore find that the payment required by the decree of the lower Court was not within time.' This decision seems to be quite incorrect. Parties to civil suits have nothing to do with the time the Treasury closes. So long as a tender of a sum required by a decree to be paid is made during the hours the Court is open, the money must be received or if not received the tender is yet a valid tender, for it is the Court which has not received the money tendered. No permission to pay in money required to be paid in is necessary. In the present case, the terms of the decree were complied with and the decree might have been made absolute. Before this Court however the respondent professes his willingness to pay the enhancement demanded by the appellant. His consent is therefore recorded and he will in addition pay costs throughout."

(68) *Per Mookerjee, J., in Jagat Tarini Dasi v. Nabagopalchaki*, 5 C.L.J. 270 (286 = 34 C. 305 citing *Dixon v. Clark*, (1848) 5 C.B. 365. See also *Haji Abdul Rahaman v. Haji Noor Mahomed*, 16 B. 141 (Diss. in *Maung Shan v. Nyo Win*, 4 L.B.R. 108; Appr. in *Digambar Das v. Harendra Narain*, 11 C.L.J. 226 = 14 C.W. N. 617 = 5 Ind. Cas. 165; Ref. to in *Jagat Tarini v. Nabagopal*, 5 C.L.J. 270 = 34 C. 305; *Administrator General of Madras v. Jaghirdar of Arni*, 4 M.L.T. 335; and Dist. in *Bhikari v. Thagon*, 5 C.L.J. 78, Note). A person cannot be mulcted in interest after he has offered the amount due on a certain debt, if the amount has been wrongfully refused by the creditor. But, when the creditor brings his suit, it is the duty of the debtor on receiving intimation of the suit, to at once pay the money into Court. Thus, where the debtor made a tender of the debt to the creditor which was wrongfully refused by him, and the creditor subsequently instituted a suit against the debtor, who, however, failed to pay, the amount at once into Court, it was held that the debtor should not be liable for interest from the date of his tender until the date of the suit, but that interest from the date of the suit up to the date of realisation was to be awarded to the creditor. This interest need not be at the contracted rate. *Maung Shan v. Nyo Win*, 4 L.B.R. 108. See also case noted in reference (66), *supra*.

(68-a) *Bolje Chund Singh v. Moulard*, 4 C. 572 referred to in *Jagat Tarini Dasi v. Nabagopalchaki*, 5 C.L.J. 270.

be instituted against him but also stops the running of subsequent interest.⁽⁶⁹⁾

It is well settled that the debtor whose tender has been refused, may retain the money in his own possession. "The identical money need not be kept in hand, since the money tendered does not become the property of the creditor; the debtor may use it as his own without destroying the effect of the tender, if he is ready at all times to pay the debt in correct money when requested; if, however, by making use of the money, he is not ready to pay the debt at any time, when he may be required to do so, the effect of the tender is destroyed."⁽⁷⁰⁾

Tender when refused, person tendering may retain the money in his own hands.

The defence of tender cannot be pleaded in an action for unliquidated damages; the reason of the rule being that it would be impossible from the nature of the case for the parties to determine the specific amount due, or for the defendant to tender the same.⁽⁷¹⁾

Tender, defence of, cannot be pleaded in an action for unliquidated damages.

(69) See the judgment of Wilde, C.J. in *Dixon v. Clark*, (1848) 5 C.B. 365; 75 R. 747 cited with approval by Mookerjee, J. in *Jagat Tarini Dasi v. Nabagopal Chaki*, 5 C.L.J. 270 at p. 285=34 C. 305.

(70) See Wait on Actions and Defences, Vol. 7, p. 592, and *Cheney v. Bilby*, (1896) 20 C.C.A. 291, and *Beatty v. Mutual Life Assurance*, (1896) 21 C.C.A. 227. *Jagat Tarini Dasi v. Nabagopal Chaki*, 5 C.L.J. 270 (286)=34 C. 305. As to the difference in this respect between a tender and a deposit see *Thegaraya Reddy v. Venkatachala Pandithan*, 31 M.L.J. 548, noted *supra*.

(71) *Davys v. Richardson*, (1888) 21 Q.B.D. 202; *Dearle v. Barrett*, (1835), 2 Ad. & E. 82; Encyclopædia of the Laws of England, 2nd Ed., Vol. XIV, p. 50.

CHAPTER X.

COSTS IN SPECIAL CASES.

Sec. I. Abated Suit or Appeal.

Provisions of the Code of Civil Procedure regarding the abatement of suits.
Grounds of abatement :—

(1) DEATH OF THE PARTIES.

Procedure where one of several plaintiffs or defendants dies and right to sue survives.
Procedure in case of death of one of several plaintiffs or sole plaintiff.
Procedure in case of death of one of several defendants or of sole defendant.
Determination of question as to legal representative.
No abatement by reason of death after hearing.

(2) MARRIAGE OF A FEMALE PARTY.

(3) INSOLVENCY OF THE PARTY.

(4) GENERAL PROVISIONS.

Effect of abatement or dismissal of suit.
Procedure in case of assignment before the final order in the suit.
Application of the above rules,—

(i) to appeals.

(ii) to execution proceedings.

Costs of interlocutory order in abated suit.

Costs of abated appeal.

Costs to heirs of deceased defendant against plaintiff, if Court can award.

Costs of abated suit, order as to payment of—Appeal.

Costs in suit instituted in name and on behalf of deceased person.

Appeal by two defendants—Death of one pending appeal—Legal representative not brought on record—Appeal decided and judgment reversed—Effect.

Sec. I. Abated Suit or Appeal.

Provisions of
the Code of
Civil
Procedure
regarding the
abatement of
suits.
(1) *Death of
the parties.*

WHENEVER a suit is filed or appeal preferred it is liable to abate by one or more of several causes. O. XXII of the Code of Civil Procedure (1) makes provision for such cases of abatement (2). At first, the general rule is laid down that "the death of the plaintiff or defendant shall not cause the suit to abate if the right to sue

(1) Act V of 1908 (Code of Civil Procedure).

(2) The first 6 rules deal with the subject of abatement by the death of the party ; rule 7 deals with the effect of marriage and r. 9 provides for the case of the insolvency of the parties. On the subject-matter of this chapter see *Yearly Practice and Annual Practice*, O. XVII and notes thereunder ; *Amir Ali's Civil Procedure Code*, 2nd Ed., 1916, notes under O. XXII, pp. 1045—1046 ; *Daniell's Chancery Practice*, 7th Ed., 1901, Vol. I, pp. 252—253 ; *Seton's Judgments and Orders*, 5th Ed., 1901, Vol. I, pp. 815—816.

survives.⁽³⁾ Provision is next made for the case where one of several plaintiffs or defendants dies and the right to sue survives. The law on this point is declared as follows:—"Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants."⁽⁴⁾ The next rule deals with the case of the death of one of several plaintiffs or sole plaintiff. It declares that "where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, *the Court may award to him the costs* ^(4 a) which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff."⁽⁵⁾ Rule 4 lays down the procedure to be followed in case of the death of one of several defendants or of the sole defendant. "Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendants dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. Any person so made a party may take any defence appropriate to his character as legal representative of the deceased defendant. Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant."⁽⁶⁾

Rule 5 declares that "where a question arises as to whether any person is or is not the legal representative of the deceased

(3) See O. XXII, r. 1; Act XIV of 1882, S. 261.

(4) See Act V of 1908 (Code of Civil Procedure), O. XXII, r. 2.

(4-a) The italics are ours.

(5) See Act V of 1908 (Code of Civil Procedure), O. XXII, r. 3.

(6) See Act V of 1908 (Code of Civil Procedure), O. XXII, r. 4.

plaintiff or a deceased defendant, such question shall be determined by the Court.”⁽⁷⁾

No abatement
by reason of
death after
hearing.

Rule 6 declares that there should be no abatement by reason of the death of a party after hearing. It declares the law as follows :—“ Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and *shall have the same force and effect as if it had been pronounced before the death took place.*”⁽⁸⁾

(2) Marriage
of a female
party.

Rule 7 declares that a suit is not to abate by reason of the marriage of a female party. It says :—“ The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone. Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also ; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.”⁽⁹⁾

(3) Insolvency
of the party.

Rule 8 declares when the plaintiffs' insolvency operates as a bar to the suit. “ The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct. Where the assignee or receiver neglects or refuses to continue the suit and to

(7) See Act V of 1908 (Code of Civil Procedure), O. XXII, r. 5.

(8) See Act V of 1908, (Code of Civil Procedure), O. XXII, r. 6. This rule is new ; it has been framed to set at rest the previous conflict of decisions. It was held under the older Code that where a party to a suit died after argument and before delivery of judgment, the decree passed in the suit or appeal is a valid decree, and can be executed against the heirs of the deceased defendant under S. 234, Civ. Pro. Code, 1882 (S. 80).—*Ramacharya v. Anantacharya*, 21 B. 314. See, also, *Narna v. Anant*, 19 B. 807 ; *Chetan Charan v. Balbhadra Das*, 21 A. 314 ; *Surendro v. Doorga*, 19 C. 513, P.C., and *Raghunatha v. Venkatesa*, 26 M. 101. But where he died before hearing, the decree is a nullity.—*Janardhan v. Ram Chandra*, 26 B. 317. See the Report of the Select Committee.

(9) See Act V of 1908 (Code of Civil Procedure), O. XXII, r. 7.

give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and *awarding to the defendant the costs* ^(9-a) which he has incurred in defending the same to be proved as a debt against the plaintiff's estate."⁽¹⁰⁾

Rule 9 declares the effect of abatement or dismissal of suits :— ^{(4) General. Effect of abatement or dismissal of suit.}
 "Where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action. The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal *upon such terms as to costs* ⁽¹¹⁾ or otherwise as it thinks fit."⁽¹²⁾

(9-a) The italics are ours.

(10) See Act V of 1908 (Code of Civil Procedure), O. XXII, r. 8.

(11) The italics are ours.

(12) See Act V of 1908 (Code of Civil Procedure), O. XXII, r. 9, paras 1 and 2. The provisions of S. 5 of the Indian Limitation Act, 1877 (XV of 1877), shall apply to an application under sub-rule (2). See Civ. Pro. Code (Act V of 1908), O. XXII, r. 9 (3). This rule does not apply to a case where there has been only an application to declare the plaintiff to a suit an insolvent and vesting order made, but the proceedings are subsequently annulled, and the party is not declared either a bankrupt or an insolvent; therefore in such a case, where a suit has been dismissed for the non appearance of the plaintiff or the Official Assignee on the date fixed for hearing, S. 108, Civ. Pro. Code, 1882 (O. IX, r. 9) applies. *Amrita Lal v. Rakhali Dass*, 27 C. 217=4 C.W.N. 294. Section 107 of Act VIII of 1859 (this section) means that a suit abates by the insolvency of the plaintiff, but that the defendant shall not plead the abatement without giving the Official Assignee an opportunity of prosecuting the suit. Where, therefore, the plaintiff after the institution of a suit, became insolvent, and the defendant thereupon obtained an order that the Official Assignee should give security for his costs within 14 days, and should be made party to the suit within one month, and that in default, the suit should be set down for dismissal within 8 days after the expiration of the time so limited. *Held*, that such an order was irregular.—*Ibrahim bin Mahasin v. Abdur Rahiman*, 12 B.H.C. 257. If an assignee who has been substituted for the plaintiff under S. 106, Act VIII of 1859 (this section), declines to furnish security within such reasonable time as the Court may order, the defendant may, within 8 days after such neglect or refusal, plead the bankruptcy or insolvency of the plaintiff as a reason for abating the suit.—*Heera Lal v. Carapiet*, 13 W.R. 481. After the institution of a suit, the plaintiff was declared insolvent, and, on the date fixed for hearing, the Official Assignee appearing applied for a postponement. The Court

Procedure in case of assignment before the final order in the suit.

Rule 10 lays down the procedure to be followed in the case of an assignment of any interest during the pendency of the suit:—
 “In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved. The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).”⁽¹³⁾

Application of the above rules to appeals.

The rules stated above also apply to appeals. What has been stated above with regard to the plaintiff applies also to the appellant and what has been stated above with regard to the defendant applies also to the respondent.⁽¹⁴⁾

Accordingly made the following Order:—“It is ordered that the suit be dismissed under this section, unless the Official Assignee elects within two months to continue the suit and give security for the defendant's costs.” The time for complying with the order was subsequently extended, and the plaintiff in the mean time obtained an order allowing the insolvency proceedings to be withdrawn. The defendant now applied for dismissal of the suit in pursuant to the terms of the above order, and the plaintiff objected as he was no longer insolvent and now ready to prosecute the suit. *Held*, that the order had been made in an improper form, inasmuch as this section gives the Court no power to order the dismissal of the suit, and that the Court could now rectify it by cancelling that portion of the order.—*Lekhraj Chuni Lal v. Sham Lal*, 16 B. 404. After the institution of a suit the plaintiff was declared an insolvent, and thereupon the defendants obtained an order under this section directing the Official Assignee to elect within the time fixed by the order, whether he would proceed with the suit, and, if so, to give security for costs. Subsequently a creditor of the insolvent obtained an order from the Insolvent Court for the examination of the defendants with reference to the estate and effects of the said insolvent. *Held*, that the defendants who have filed written statements in the suit, and who have in that suit given inspection of the documents in their possession ought not to be examined until that case is heard.—*In re Bhagwan Das*, 22 B. 447. *This rule does not apply to execution proceedings. See r. 12 of O. XXII, Civ. Pro. Code, 1908.*

(13) See Act V of 1908 (Code of Civil Procedure), O. XXII, r. 10.

(14) See Civ. Pro. Code (Act V of 1908), O. XXII, r. 11. The rule runs as follows:—“In the application of this order to appeals, so far as may be, the word ‘plaintiff’ shall be held to include an appellant, the word ‘defendant’ a respondent, and the word ‘suit’ an appeal.” *N.B.*—This rule corresponds to the latter part of S. 582 of the Code of Civil Procedure, 1882, with some alterations. This rule gives effect to *Soshi Bhusan v. Grish Chunder*, 11 C. 694; *Chajmal Das v. Jagadamba Prasad*, 10 A. 260; *Debi Din v. Chunna Lal*, 10 A. 264; *Rajmonee v. Chunder Kant*, 8 C. 440=10 C.L.R. 437; *Chajmal Das v. Jagdamba Prasad*, 11 A. 408 and *Hem Kunwar v. Amba Prasad*, 22 A. 430. In these cases it has been held that the word “plaintiff” or “defendant” must be held to include “appellant” or “respondent” respectively. The cases in which the contrary view was taken have been overridden by this rule.

Order XXII, rule 12 of the Code of Civil Procedure enacts that nothing in rules 3, 4 and 8 of the said Order shall apply to proceedings in execution of a decree or order.⁽¹⁵⁾

Application of the above rules to execution proceedings.

It was decided under the Code of Civil Procedure, 1859, that the representative of the deceased plaintiff in an abated suit is liable for costs of interlocutory orders in the suit.⁽¹⁶⁾

Costs of interlocutory order in abated suit.

It was decided under the Older Codes of Civil Procedure that "Even in the absence of an express direction in S. 582 of the Civ. Pro. Code to the effect that 'plaintiff' in S. 366 shall include 'appellant' the power conferred by the latter section, on the Court of original jurisdiction, to award costs against the estate of a deceased plaintiff, may be taken to be conferred also on the appellate Court."⁽¹⁷⁾

Costs of abated appeal.

(15) See Act V of 1908 (Code of Civil Procedure), O. XXII, r. 12. Rule 3 deals with the procedure in case of death of one of several plaintiffs or of sole plaintiff; rule 4 deals with the procedure in case of death of one of several defendants or of sole defendant; and rule 8 deals with the procedure in case of plaintiff's insolvency. O. XXII, r. 12 of the present Civ. Pro. Code, is enacted for the first time in the Civ. Pro. Code, 1908, in order to set at rest the conflict of rulings under the older Code the most important of which are cited below :—Ss. 365, 366, Civ. Pro. Code, 1882 (O. XXII, r. 3), did not apply to execution proceedings.—*Alagirisamy v. Venkatachellapathy*, 31 M. 77. The provisions of this chapter do not apply to execution proceedings. Therefore an attachment made before the death of the judgment-debtor does not abate on his death. Property under attachment must be considered as in the custody of the Court.—*Dulari v. Mohan Singh*, 3 A. 759; *Stowell v. Ajudhia Nath*, 6 A. 255; *Sheo Prasad v. Hira Lal*, 12 A. 440; *Net Lal v. Sheikh Karcem Bux*, 23 C. 686; *Gulab Das v. Lakshman*, 3 B. 221; and *Aba v. Dhondu*, 19 B. 276. But see *Ramasami v. Bhagirathi*, 6 M. 180 and *Krishnayya v. Unnissa*, 15 M. 299. Section 372, Civ. Pro. Code, 1882 (O. XXII, r. 10), cannot be applied to the assignment, creation or devolution of an interest subsequent to the decree in suit. This section has no application to proceedings in execution of decree; and a Court has no jurisdiction, reading S. 372, and S. 647, Civ. Pro. Code, 1882, to bring in a party after decree and make him a judgment-debtor for the purpose of execution.—*Goodall v. Mussoorie Bank*, 10 A. 97. See, however, *Norendro Nath v. Bhupendro Narain*, 23 C. 374 (391). It is doubtful whether S. 372, Civ. Pro. Code, applies to execution proceedings.—*Harish Chandra v. Chandpore Co., Ltd.*, 30 C. 961. Held, that a creditor of a decree-holder who had attached the decree pending an appeal against it was not entitled to be made a party respondent to the appeal under Ss. 372 and 582, Civ. Pro. Code, 1882.—*Chail Behari v. Rahmal Das*, 20 A. 38. The provisions of Chapter XX, Civ. Pro. Code, 1882, apply to Insolvency proceedings.—*Rameshar Singh v. Bisheshar Singh*, 7 A. 734. (*Narain Das v. Lajja Ram*, 7 A. 693, distinguished).

(16) *Mahuddee Allee Khan v. Raheemooddeen*, Bourke O.C. 154.

(17) *Rajmonee Dabee v. Chunder Kant Sandle*, 8 C. 440=10 C.L.R. 437, following *Lakshmi Bai v. Ballerishna*, 4 B. 654. There is no difficulty under the present Civ. Pro. Code, O. XXII, r. 11, specially confers this power on appellate Courts. See *Josiam Thiruvengada v. Sami Iyengar*, 7 M.L.T. 195 (196).

Costs to heirs
of deceased
defendant
against
plaintiff, if
Court can
award.

It has been laid down in a recent case by the Madras High Court that "A Court cannot award in a suit which has abated, costs to the heirs of the deceased defendant against the plaintiff."⁽¹⁸⁾

His Lordship Justice Sundara Iyer stated the law as follows :—
"If a suit abates on the ground that no representative of a deceased defendant is brought on record, there is as far as I am aware no provision, entitling the representatives of the deceased defendant to come to Court and ask for the costs of the suit. When the abatement of the suit is in consequence of the death of the plaintiff, there is provision made in the Code for ordering the costs of the defendant to be paid out of the estate of the deceased plaintiff. But there is no similar provision for directing the plaintiff to pay to the heirs of the deceased defendant the costs incurred by such deceased defendant, when the suit abates in consequence of his death. What remedy, if any, would be open to the heirs in such a case, does not arise for decision in this petition. It may be that they might be entitled to institute a suit for the purpose. At any rate, my attention is not drawn to any authority for holding that the Court can award in the suit which has abated costs to the heirs of the deceased defendant against the plaintiff." ⁽¹⁹⁾

Costs of
abated suit—
Order as to
payment of
—Appeal.

A personal action would not survive the death of the parties sued or suing, and a party mulcted in costs in such an action dismissed and incompetent to prosecute his appeal for damages is not entitled to maintain an appeal for the setting aside of a decree for costs, which was consequent on the dismissal of the action. If an action fails what is incidental to it must fail also.⁽²⁰⁾

After discussing the several cases relating to the subject, their Lordships Justice Benson and Krishnaswamy Iyer stated the law

(18) See *Sivaprakasam v. Palaniappa Mudaliar*, 11 M.L.T. 202.

(19) See *Sivaprakasam v. Palaniappa Mudaliar*, 11 M.L.T. 202 (*Per* Sundara Iyer, J.)

(20) *Josiam Tiruvangadachariar v. Sami Aiyangar alias Verkatachariar*, 7 M.L.T. 195. (*Gopal v. Ramachandra*, 26 B. 597; *Phillips v. Homfray*, 24 Ch. D. 439; *Muhammed Hussain v. Khushoho*, 9 A. 131 (134); *Pulling v. Great Eastern Railway Co.*, 9 Q.B.D. 110; *Krishna Behari Sen v. Corporation of Calcutta*, 31 C. 406, referred to.)

as follows :—"Applying the principle of the previous decided cases which we take to be that if the action fails what is incidental to it must fail also, it appears to us that, if the appeal abates because the appellant can no longer claim the injunction he prayed for against the deceased 2nd defendant, the costs he was made liable to pay as a consequence of the dismissal of his suit could not form the subject-matter of a continuing appeal. It was said that an appeal might be preferred for costs alone. But this is not as of course, for, no such appeal on a mere question of costs is ever entertained unless there is a legal principle involved. And if the appellant cannot prosecute his appeal for the injunction he cannot be allowed to show that the decree refusing the injunction was wrong for the mere purpose of getting rid of the direction as to costs. We must therefore hold that the appeal abates. The representative of the 2nd defendant is entitled to her costs against the appellant."⁽²¹⁾

Although, where a discretion is vested in a Court as to costs, the Privy Council will not allow any appeal against the exercise of that discretion, because no appeal lies against a mere decree as to costs, yet, where a Court has no discretion to exercise in the matter (as where a suit was instituted by parties who had no right to institute it, as a person on whose name and on whose behalf they instituted it was dead at the time), costs must follow the decree, according to S. 7, Reg. II, 1800, of the Bombay Code.⁽²²⁾

A decree was passed against two defendants and both of them preferred an appeal. The first defendant died during the pendency of the appeal, and without his legal representatives being brought on the record, the appeal was heard and decided on behalf of the surviving appellant and the suit dismissed with costs, and it was expressly stated in the decree that the appeal was prosecuted only on behalf of the surviving defendant. *Held* that it would be unreasonable to construe the decree as being intended to enure for the interest of the first defendant also, and to consider that the decree appealed against was reversed in favour of his representative; and that, therefore, the decree of the lower Court must be regarded as still in force as against the first defendant, and so his heir was not

(21) *Josiam Thiruvengadachariar v. Sami Iyengar*, 7 M.L.T. 195 (197).

(22) *Mussumat Keemes Bae v. Luchmun Das Narain Das*, 5 W.R. P.C. 59= 10 M.I.A. 470.

entitled to restitution of the costs levied from his father under that decree until he successfully prosecutes the appeal.⁽²³⁾

(23) *Natesa Aiyar v. Annasami Ayyar*, 25 M. 426. The following observations of their Lordships Davies and Bhashyam Ayyangar, JJ., may also be noted :—" It is contended by the petitioner, the appellant before us, who is the son and legal representative of the deceased first defendant, that in the appeal prosecuted by the second defendant alone, the whole decree was reversed and the suit as against both the defendants was dismissed and that consequently the petitioner, as the legal representative of the first defendant, is entitled to restitution of the amount of costs realized by the plaintiffs against the first defendant only in execution of the original decree that was reversed in appeal. We are unable to accept the construction placed by the petitioner's vakil on the decree of this Court. It is expressly recited in that decree that the appeal was prosecuted only on behalf of the surviving defendant and we must therefore construe the decree as limited to his interests only. It would be unreasonable to construe the decree as being intended to enure for the benefit of the first defendant also, and to consider that the decree appealed against was reversed in favour of his representative. According to our construction of the appellate decree the decree of the original Court must be regarded as still in force as against the first defendant and his heir, the petitioner, is therefore not entitled to restitution of the costs levied from his father under that decree until he successfully prosecutes the still pending appeal of his father. The petitioner being a minor, the law of limitation will be no bar to his taking the necessary steps towards that end. These appeals are therefore dismissed, but in the circumstances of the case we make no order as to the costs of the appeals." See *Natesa Aiyar v. Annasami Ayyar*, 25 M. 426 (428).

Sec. 2. Account Suits.

Duty of agent to account—Similar duty of other accounting parties (as) Trustee, Receiver, Executor, etc.

General rule—Costs follow the event of the account.

Costs where accounts involve intricate and doubtful questions.

Costs where plaintiff succeeds in the substantial matters in litigation.

Costs where the agent neglects to render account.

Costs where agent denies his fiduciary relation.

Costs of taking accounts of trust—Old and new practice—English law.

Costs of furnishing accounts and information to *cestuis que trust*.

Costs where executor refuses to give accounts—But submits one in his answer in Court—Such account being found to be correct.

Costs in case of account as between several mortgagees.

Costs, apportionment of, in account suits.

Costs of subsequent accounts and inquiries.

Costs, Reservation of, till after the report—Practice.

Costs of suit pending reference for account.

Costs in case of tender of debt due under an account.

Costs of employing accountant.

It is the duty of an agent, where the business in which he is employed admits of it, or requires it, to keep regular accounts of all his transactions on behalf of his principal, not only of his payments and disbursements, but also of his receipts, and to render such accounts to his principal at all reasonable times, without any suppression, concealment, or overcharge”⁽¹⁾. “This duty is strictly enforced : and if, by the neglect or omission of this duty, the principal suffers a loss, that loss must be ultimately borne by the agent.”⁽²⁾ “It is the first duty”, said Sir T. Plumer, “of an accounting party, whether an agent, a trustee, a receiver or an executor (for in this respect as was remarked by the Lord Chancellor

Duty of agent to account—Similar duty of other accounting parties (as) Trustee, Receiver, Executor, etc.

(1) Paley on Agency by Lloyd, 48, 49; *White v. Lady Lincoln*, 8 Ves. 369, 370; 3 Chitty on Com. & Manuf. Ch. 3, p. 219; Smith on Merc. Law, 47—49 (2nd Ed.); 1 Livers. on Agency, Ch. 8, 7, pp. 434—436; 1 Storey on Eq. Jurisp., Ss. 468, 623. See also S. 219 of the Indian Contract Act (IX of 1872). On the subject-matter of this chapter see *Hurrinath Rai v. Krishna Kumar Bakshi*, 14 C. 147=13 I.A. 123 (P.C.); Yearly Practice, 1914, p. 1055; Mew's Digest, Vol. I, cols. 86, 87; 125, 127; Annual Practice, notes under O. LXV, r. 1; Seton's Judgments and Orders, 6th Ed., 1901, Vol. II, pp. 1385, 1386. Daniell's Chancery Practice 486—488; Storey's Equity Jurisprudence, 8th Ed. (Boston), Vol. I, Chapter VIII, Ss. 441—529, pp. 418—519; Encyclopædia of the Laws of England, 2nd Ed., Vol. I, pp. 110—112; Pearson's Law of Agency, Tagore Law Lectures, 1889—1890, pp. 298—300; Morgan and Wurtzburg pp. 162—164.

(2) Storey on Agency, 7th Ed., 1869, S. 204, p. 236.

in *Lord Hardwicke v. Vernon* (3), they all stand in the same situation), to be constantly ready with his accounts".(4) He must further be ready to explain them and produce vouchers.(5) The agent must explain the accounts and produce the vouchers by which the items of disbursements are supported.(6)

General rule
—Costs follow
the event of
the account.

In a suit for accounts, as in all other cases, the rule is that costs generally follow the event of an account.(7)

(3) 14 Ves. 510; 9 R.E. 329.

(4) Storey on Agency, 7th Ed., 1869, S. 204, p. 286.

(5) *Anoda Persad Roy v. Dwarkanath*, 6 C. 754=8 C.L.R. 321; *Lawless v. Calcutta Landing & Shipping Co.*, 7 C. 627.

(6) (*Ibid.*). An agent is bound to render proper accounts to his principal, even though there is no contract to that effect, and he does not discharge the duty by simply delivering to his employer a set of written accounts without attempting to explain them and producing the vouchers, by which the items of disbursements are supported. (*Anoda Persad Roy v. Dwarkanath*, 6 C. 754.) So, where a plaintiff alleges a continued agency in the defendant for the purpose of drawing and spending plaintiff's money and prays for relief on the ground that the agent has drawn more than what he has expended for his principal, such a suit is one for account, and the agent is *prima facie* liable for what he has received and is bound to discharge himself by producing sufficient evidence. (*Hurrinath v. Krishna*, 14 C. 147.)

In virtue of a general jurisdiction in matters of account, Courts of equity exercise a very ample authority over matters apparently not very closely connected with it, but which naturally, if not necessarily, attach to such a jurisdiction. Mr. Justice Blackstone has said: "As incident to accounts, they take a concurrent cognizance of the administration of personal assets; consequently, of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. As incident to accounts, they also take the concurrent jurisdiction of tithes, and all questions relating thereto; of all dealings in partnership, and many other mercantile transactions; and so of bailiffs, factors, and receivers. It would be endless to point out all the several avenues in human affairs, and in this commercial age, which lead to or end in accounts." (3 Black. Com. 437.) But it is far from being admitted, that the sole origin of equity jurisdiction on these subjects, arises from this source. It is one, but not the sole source. In many of these cases, as well as in others, which will hereafter be considered, in which accounts may be taken, as incidents to the relief granted, there are other distinct if not independent sources of jurisdiction; and especially one source which is the peculiar attribute of Courts of equity, the jurisdiction over trusts not merely express, but implied and constructive. Jeremy on Equity Jurisd. B. 3, Pt. 2, Ch. 5, p. 522, 523, 543; 1 Fonbl. Eq. B. 1, ch. 1, 3 note (f); 2 Fonbl. Eq. B. 2, ch. 7, 6, and notes.

(7) *Pitt v. Page*, 1 Pro. P.C. 1. And see *Lyre v. Parnel*, 6 Vin. Abr. 367, pl. 23; and *East India Co. v. Elkins*, 6 Vin. Abr. 365, pl. 18; 2 Bro. P.C. 282. As Sir J. Romilly, M.R., said. "It is generally true, that if a suit is instituted for an account between two persons, one alleging that nothing is due from him, and a balance is found to be due from him, that person will have to pay the costs of the suit and of the account. But the case would be wholly varied if the case were that one party admitted a given sum to be due from him, and the other had claimed a much larger sum, and the suit proceeded only for the purpose of ascertaining whether such contested balance were really due or not. In this case the costs would depend upon the substantial result, that is, if the balance claimed, or a substantial part of it, were

But where the settlement of accounts involves intricate and rather doubtful questions, the Court may make no order as to costs.⁽⁸⁾

Costs where accounts involve intricate and doubtful questions.

In an English case, which was a suit for an account, the costs were given to the plaintiff, although a large balance was found due from him to the defendant, the plaintiff having succeeded in the substantial matters of litigation.⁽⁹⁾

Costs where plaintiff succeeds in the substantial matters in litigation.

If an agent does not render his accounts within a reasonable time, he must bear the costs of a suit instituted to have the accounts taken, and it will not be any excuse for him that he offered to pay on account a gross sum, which may turn out to be sufficient to cover all that was due from him.⁽¹⁰⁾

Costs where the agent neglects to render account.

Where, in a suit for an account by a principal against his agent, the defendant falsely denied his fiduciary position, he was ordered to pay the whole costs of the suit up to and including the costs of an appeal to the Privy Council without regard to the result of the account.⁽¹¹⁾

Costs where agent denies his fiduciary relation.

“Under the old practice of Courts in England every one interested in the estate had a right to have the accounts taken in Court, the order for an account in an administration action going as a matter of course, and the costs of taking it coming out of the estate. But that is no longer the case now, and where the neglect of the trustees to furnish accounts on request was very gross and their refusal wholly indefensible, they were ordered to pay the costs of taking and vouching the accounts, and also the cost of action down to and including the hearing.”⁽¹²⁾

Costs of taking account of trust—
Old and new practice—
English Law.

shown to be due, the claimant would obtain the cost of the suit; if no part of it were due, he would have to pay them; and if only a small portion of it were due, the Court would probably give no costs on either side. But in all these cases the Court endeavours to see what were the substantial questions and causes of litigation between the parties.” (*Per* Sir J. Romilly, M. R., *May v. Biggenden*, 24 Beav. 207, 214).

(8) (*Ibid*).

(9) As to the principles on which the costs of a suit for an account are regulated see *May v. Biggenden*, 24 Beav. 207.

(10) *Collyer v. Dudley*, Turn & R. 421.

(11) *Hurvinath Rai v. Krishna Kumar Bakshi*, 14 C. 147 = 13 I.A. 123, P.C.

(12) *Re Skinner*, (1904) 1 Ch. 289; and see *Re Bell's Estate*, (1878) 39 L.T. 422; *Re Radcliffe*, (1881) 29 W.R. 420 (Eng.); *Re Hayee*, (1883) 32 W.R. 26 (Eng.); *Re Watson*, (1904) 48 Sol. J. 54. A defendant who wrongfully resisted the rendering of accounts was ordered to pay the costs of the hearing. *Sellar v. Griffin*, 32 Beav. 542; *Yearly Practice* (1914), p. 1055.

Costs of
furnishing
accounts and
information
to *cestuis
que trust*.

On being asked to furnish accounts and information to persons claiming to be *cestuis que trust*, trustees are entitled to require that the costs of furnishing such accounts and information shall be guaranteed beforehand.⁽¹³⁾

Costs where
executor
refuses to give
accounts—
But submits
one in his
answer in
Court—Such
account being
found to be
correct.

Where an executor had refused an account, but on suit being filed gave one in his answer, and the plaintiff took decree for account, and on the Master's report the account proved to be correct, the Court gave the plaintiff costs up to the decree, and the defendant those of subsequent proceedings.⁽¹⁴⁾

Costs in case
of account as
between
several
mortgagees.

A first mortgagee of a ship, with the sanction and authority of the second mortgagee, sold it and received the proceeds, which exceeded the amount due to him:—It was held that the first mortgagee was accountable to the second mortgagee in the character of trustee. In this case the first mortgagee having insisted that there was a deficiency, and having neglected to account, and a balance having been found against him in a suit by the second mortgagee, it was held that the first mortgagee ought to pay the costs of the suit.⁽¹⁵⁾

Costs, appor-
tionment
of, in account
suits.

In matters of account the Courts are frequently in the habit of apportioning costs between the plaintiff and the defendant.⁽¹⁶⁾

"Thus, where upon taking an account against an executor, an account which he had stated in his answer was found to be correct, the cost of the suit up to the hearing was given to the plaintiff, and the cost of the subsequent proceedings to the defendant; the reason of the distinction, apparently, being that the executor had, before the suit was filed, been applied to for an account, but gave none."⁽¹⁷⁾

Where one of several residuary legatees carried on the suit against the wish of the others after correct accounts had been rendered, all the costs subsequent to the hearing were ordered to be borne by his share.⁽¹⁸⁾

(13) *Re Bosworth*, (1889) 58 L.J. Ch. 432.

(14) *Anon.*, 4 Madd. 273 (Eng.).

(15) But as the second mortgagee in this case made charges in which he failed, the Court gave neither party costs. *Tanner v. Heard*, 23 Beav. 555.

(16) As to apportionment of costs in actions for an account, see *Morg. & Wurtz*. 162-164; see, also, p. 241, *supra*.

(17) *Anon.*, 4 Madd. 273 (Eng.); and see *Beames on Costs*, p. 7.

(18) *Thompson v. Clive*, 11 Beav. 475 (480).

"In a suit to take the accounts of a partnership a defendant who, not having rendered accounts, had admitted the plaintiff's case and submitted to account, but had not stated that nothing was due from him, was ordered to pay the costs up to the hearing." (19)

In a suit for an account of tithes the Court, in decreeing in favour of the plaintiff for an account and payment, may apportion the costs where the defendants have several defences: but where there is a common defence the costs must be paid by the defendants generally. (20)

When, by a decree, the costs of the suit are given to one party, but further consideration is not reserved, the costs of all subsequent accounts and inquiries necessary to the working out of the decree are included, whatever may be the result of the accounts and inquiries (21). Costs of subsequent accounts and inquiries.

Where, however, the party to whom the costs are given by the decree brings in under such an inquiry irrelevant matters not coming within its terms, he will be ordered to pay his opponent's costs of the inquiry, so far as it relates to the irrelevant matters. (22)

It is the constant course of the Court to reserve costs till after the report (23). Costs, reservation of, till after the report—Practice.

Thus, where, in an action to restrain the defendant from polluting a stream and for damages, judgment was given for the plaintiff with costs, and an inquiry as to damages ordered, the costs of such inquiry were reserved in order that the Court might exercise control over the manner in which the inquiry was conducted, and prevent the costs being unduly increased by the plaintiff. (24)

In a suit for accounts where the defendant resisted plaintiffs' claim for an account, costs were awarded to the plaintiffs up to and Costs of suit pending reference for account.

(19) *Norton v. Russell*, 19 Eq. 343; see, also, *Lindley on Partnership*, 519, 569.

(20) *Esdaile v. Peacock*, 1 John 216.

(21) *Krehl v. Park*, 44 L. J. Ch. 286; L.R. 10 Ch. 334; 33 L.T. 33; 23 W. R. 475 (Eng.). An application for such an order may be made by motion under the liberty to apply to the Court reserved by the decree. (*Ibid.*)

(22) *Krehl v. Park*, 44 L. J. Ch. 286; L.R. 10 Ch. 334; 33 L.T. 33; 23 W.R. 475 (Eng.).

(23) *Rider v. Bayley*, 6 Vin. Abr. 332, pl. 32. See also *Mew's Digest*, Vol. I, col. 88.

(24) It is the usual practice to send such an inquiry to the chief clerk and note to a referee. *Slach v. Midland Ry.*, 50 L. J. Ch. 196; 16 Ch. D. 81; 43 L.T. 434; 29 W. R. 302 (Eng.). Order for payment of costs "incidental to or consequent on" an inquiry refused. *Fellows' Settlement, In re*, 2 Jur. (N.S.) 62; *Mew's Digest*, Vol. I, col. 126.

including the hearing by the decree directing reference for an account⁽²⁵⁾.

Costs in case
of tender of
debt due
under an
account.

"In the case of a debt due on an account, it sometimes happens that the accounting party is not able to make tender of any specific amount as being due from him. This is often due to the fact that the state of accounts between the parties is not always certain. In such cases, if the accounting party shows his willingness to render an account and his ability to pay the amount that may be found due on taking accounts, the Court may at the time of the final adjudication take such willingness and readiness into consideration, and may exonerate him from the payment of costs incurred by the other party, although as a matter of fact some amount may be found due from him".⁽²⁶⁾

Costs of
employing
accountant.

When, in an action involving questions of account, it becomes necessary for one party to employ an accountant to examine the

(25) *J.I.J. Hyam v. The Bengal Stone Co. Ltd.*, 20 C.W.N. 368. In *Sellar v. Giffin*, 11 W.R. 583 (1863) (Eng.) defendant denied plaintiff's right to an account, and, an account being directed, costs up to and including the hearing were given to the plaintiff by the decree ordering the reference. In *Hurrinath Rai v. Krishna Kumar Bakshi*, 14 C. 147 at p. 159, Lord Hobhouse in the Privy Council stated the principle as to costs in such cases as follows: "And inasmuch as the defendant has taken the course of denying.....his accountability *in toto*, he should have been ordered to pay the whole costs of the suit. If he had been truthful, he should have submitted at once to an account and thus saved great expense," and the same principle is illustrated in *Boynston v. Richardson*, 31 Beav. 340 (1862). *Collyer v. Dudley*, 1 T. & R. 421 (1823) and *Jefferys v. Marshall*, 19 W.R. 94 (1870) (Eng.); see these cases cited in argument in *J.I.J. Hyam v. The Bengal Stone Co., Ltd.* 20 C.W.N. 368 (369). In *Jellicoe v. Price*, 1 Y. & C. Ch. Ca. 74 (1841) costs were reserved pending the reference for an account. This is the general rule. In *Huxley v. West London Extension Ry. Co.*, 14 A.C. 26 at p. 32 (1889), Lord Halsbury laid down the principle in such cases as follows:—"Every thing which increases the litigation and the costs, and which places upon the defendant a burden which he ought not to bear in the course of that litigation, is perfectly good cause for depriving the plaintiff of his costs." Similarly Lord Watson says in the same case at p. 33 "good cause in my opinion embraces every thing for which the party is responsible, connected with the institution or conduct of the suit, and calculated to occasion unnecessary litigation and expense". See these and other cases cited in argument in *J.I.J. Hyam v. The Bengal Stone Co., Ltd.*, 20 C.W.N. 368.

(26) See Morgan & Wurtzburg on the Law of Costs, pp. 162—164; Daniell's Chancery Practice, 7th Ed., Vol. I, p. 973; see *Barrott v. Treby*, Prec. in Ch. 254; see, also, *Bennett v. Atkins*, 1 Y. & C. Ex. 247—249; *Ashburnham v. Thompson*, 13 Ves. 402; *A. G. v. Brewers' Co.*, 1 P. Wms. 376; *Turner v. Hancock*, 20 C. D. 303; *Re Beddoe*, (1893) 1 Ch. p. 555. Where, however, a suit was instituted against an *elegit* creditor for an account, who, knowing that the balance was against him, contested the mode of taking the account and failed, he was ordered to pay such part of the expense of taking the account as was incurred after his debt was paid off. *Shirrell v. Athy*, 1 B. & B. 430.

books of his opponent for the purposes of his case, although he is afterwards successful in the action, yet he will not be allowed the costs in respect of the accountant's charges for such examination. Such costs fall within the general rule by which the expenses of qualifying a witness to give evidence are costs of the party whose witness he is. And it makes no difference that the accountant is to be appointed by an indifferent person, instead of by the party on whose behalf he is employed⁽²⁷⁾.

Sec. 3. Admiralty and Vice-Admiralty Actions.

Principle as to award of costs in Admiralty and Vice-Admiralty actions.

General rule—Costs to follow event.

Items allowed or disallowed as costs in collision cases :—

- (i) Costs of bail.
- (ii) Costs of excessive bail.
- (iii) Costs of appraisement.
- (iv) Costs of witnesses.
- (v) Costs of detaining necessary witnesses.
- (vi) Costs of paying freight into Court.
- (vii) Costs attending claim for freight disallowed.
- (viii) Costs on higher scale in Admiralty actions.
- (ix) Costs in case of tender in salvage suit.
- (x) Costs against the Crown.
- (xi) Costs, security for, in Admiralty action.
- (xii) Costs of transcript of shorthand writer's notes.

Certain points considered in the awarding or withholding of costs in Admiralty actions :—

Plaintiff negligently arresting wrong ship.

Discontinuance of action by plaintiff.

Successful party complicating case by false allegations.

Defendant succeeding on a plea of compulsory pilotage.

(27) *Nolan v. Copeman*, 42 L.J.Q.B. 44; L.R. 8 Q.B. 84; 27 L.T. 789; 21 W.R. 263 (Eng.). The expense of an accountant, employed with reference to and pending the suit, does not come under the general denomination of costs, and will not be allowed on taxation. *Small v. Attwood*, 1 Y. & Coll. 53; 4 L.J. Ex. Eq. 1. O. LV, r. 19 of the Rules of the Supreme Court in England declares that "The Judge in Chambers may, in such way as he thinks fit, obtain the assistance of accountants, merchants, engineers, actuaries, and other scientific persons the better to enable any matter at once to be determined, and he may act upon the certificate of any such person." "An accountant employed as a skilled witness to give evidence in support of the claim, though entitled to a reasonable allowance for his time and expenses in preparing his evidence by an examination of the books, is not entitled, upon party and party taxation, to his charges for balancing and putting the books into shape for the purpose of supporting the claim." *Laffitte & Co., In re Laffitte's Claim*, 44 L.J. Ch. 638; L.R. 20 Eq. 650; 33 L.T. 91; 24 W.R. 7 (Eng.).

Defendant succeeding on a plea of inevitable accident.

Decree for costs against defendant personally.

Unsuccessful defendant made liable for costs both of plaintiff and co-defendant.

Points to be considered in collision cases.

Responsibility of co-plaintiffs in collision cases.

Cross actions in respect of collision.

Collision—Both ships at fault.

Collision caused by the fault of third ship.

Misconduct after collision punished by costs.

Costs in salvage actions.

Consolidation of salvage claims—Separate costs.

Increase of salvage award.

Action of salvage—Arrest of ship—Costs of excessive bail.

Costs of appeal in Admiralty actions.

Interference by Court with Registrar's discretion as to costs.

Principle as to award of costs in Admiralty and Vice-Admiralty actions.

REFERRING to the costs of Admiralty and Vice-Admiralty actions Esher, M.R., said in the case of *the Monkseaton* ⁽¹⁾ that "there should be a uniform practice in all the Divisions of the Court on the subject of costs." The uniform practice both of the Courts in England and the Courts in this country have been that costs in Admiralty and Vice-Admiralty actions are given or refused much on the same principles as govern the award of costs in other cases. Thus, in the case of *the Decca* ⁽²⁾ decided by Phear, J., in 1875, and which has been followed in several subsequent Admiralty actions in this country, it was laid down that costs in such actions will be given on the ordinary scale, provided for in the rules framed in accordance with the Civil Procedure Code.⁽³⁾ So also Sale, J., in

(1) (1889) 14 P.D. 51, C.A.

(2) Unreported, but cited in *In re Steamship Drachenfels*, 27 C. 860 at p. 889.

(3) Under certain circumstances the practice of the Courts of Admiralty in England ought to be followed, so far as such practice can be applied to India by analogy. *Falls of Ettrick*, 22 C. 511. Cl. 32 of the Letters Patent Madras declares as follows:—"And we do further ordain that the said High Court of Judicature at Madras, shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice-Admiralty, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India, as may now be exercised by the said High Court." N.B. This corresponds to cl. (32) of the Letters Patent, Calcutta, and to cl. (32) of the Letters Patent, Bombay and to cl. (24) of the Letters Patent, Patna. This clause has no corresponding section in the Allahabad Letters Patent as the High Court of Allahabad has no Admiralty or Vice-Admiralty jurisdiction. As no procedure is prescribed by the Civil Procedure Code, the procedure to be followed is the practice of the Court of Admiralty in England so far as that practice is applicable to this country by analogy. So where an application was made by an impugnant for consolidating three different salvage claims

the Falls of Ettrick ⁽⁴⁾ gave costs in an Admiralty action on the ordinary scale.⁽⁵⁾

The costs of an Admiralty action, both in the Court of appeal and in the Court below, follow the event in the absence of special circumstances.⁽⁶⁾

General rule—Costs to follow event.

Money paid to sureties on a bail bond in consideration of their suretyship in an Admiralty action is not allowed as costs.⁽⁷⁾ The expenses of procuring bail for the release of a ship cannot be recovered as costs against a plaintiff who has discontinued his action, though in certain circumstances they may be recovered as damages.⁽⁸⁾

Items allowed or disallowed as costs in collision cases
(i) Costs of bail.

In another case where a ship was arrested, and bail was required for an exorbitant sum:—It was held, that the plaintiffs must

(ii) Costs of excessive bail.

made by three different promovents, it was held that the claims should not be consolidated against the will of the latter but should be heard one after the other successively subject only to one set of costs being allowed if the Court were to find that the application was resisted on insufficient grounds, see *In the matter of the Falls of Ettrick*, 22 C. 511.

(4) 22 C. 511 cited and followed in *In re Steamship Drachenfels*, 27 C. 860 at p. 889.

(5) Regarding the subject-matter of this section, see *In re Steamship Drachenfels*, 27 C. 860; *In the matter of the Ship "Champion"*, 17 C. 84; *Falls of Ettrick*, 22 C. 511; Yearly Practice, 1914, pp. 1070, 1071; Mew's Digest, 1911, Vol. XIII, Heading "Shipping," cols. 1017—1025; Williams & Bruce's Admiralty Practice, 3rd Ed., pp. 464—484; Annual Practice, Notes under O. LXV, r. 1; Roscoe's Admiralty Practice; Halsbury's Laws of England, Vol. I, ss. 216—219 and 270, pp. 103—105; 124, 125; Encyclopædia of the Laws of England, 2nd Ed., Vol. I, pp. 186—189; Vol. IV, pp. 79—83. Practice of the Court followed, and costs given on the ordinary scale provided for in the rules under the Civil Procedure Code, and not under the schedule relating to Vice-Admiralty actions, see *In re Steamship "Drachenfels"*, 27 C. 860. The following observations of Amir Ali, J., in the course of the judgment may also be noted:—"I have been addressed on the question of costs by counsel for the Hughli and the Retriever on the one side and Mr. O'Kinealy on the other. The plaintiff's counsel applied that I should give costs under the schedule relating to Vice-admiralty actions, but it is clear upon the practice of this Court since the case of the *Decca*, unreported, decided by PHEAR, J., in 1875 and which has been consistently followed in all subsequent Admiralty actions that costs will be given on the ordinary scale provided for in the rules in accordance with the Civil Procedure Code. SALE, J., in the *Falls of Ettrick*, 22 C. 511, gave costs on the ordinary scale and I propose to follow the same course." *Per* Amir Ali, J. *In re Steamship "Drachenfels"*, 27 C. 860 at p. 889.

(6) *The Batavier*, 59 L.J., Adm. 54; 15 P.D. 37; 62 L.T. 406; 38 W.R. 522 (Eng.); 6 Asp. M.C. 500—C.A. S.P., *The Swansea and the Condor*, 48 L.J., Adm. 83; 4 P.D. 115; 40 L.T. 442; 27 W.R. 748 (Eng.); 4 Asp. M.C. 115—C.A.

(7) *The Numida, The Collingrove*, 54 L.J., Adm. 78; 10 P.D. 158; 53 L.T. 681; 34 W.R. 156 (Eng.); 5 Asp. M.C. 489.

(8) (*Ibid*).

pay the costs and expenses incurred by the defendants in giving this excessive bail.⁽⁹⁾

(iii) Costs of appraisal.

Costs of appraisement, where it does not shew a greater value than that stated by the owners, are to be borne by the salvors.⁽¹⁰⁾

(iv) Costs of witnesses.

The expenses of detaining a witness will not be allowed, unless it can be shewn that his detention was absolutely necessary to insure his attendance as a witness, and was not for any other purpose, *e.g.*, merely to watch the proceedings in a suit.⁽¹¹⁾ A party in a cause is not bound to examine any of his witnesses before the hearing and if judgment is given in his favour with costs, he is in general entitled, with respect to seamen who are reasonably detained by him as necessary witnesses, to the expenses of maintaining them to the time of the hearing.⁽¹²⁾ The expenses of material and necessary witnesses may be allowed, though they may not have been called at the trial.⁽¹³⁾

(v) Costs of detaining necessary witnesses.

The expense of detaining necessary witnesses until the trial is allowed as costs.⁽¹⁴⁾

(vi) Costs of paying freight into Court.

The owner of a cargo arrested for freight may deduct the costs of paying it into Court.⁽¹⁵⁾

(vii) Costs attending claim for freight disallowed.

Where a shipowner claimed as damages for the collision, freight which his ship might have earned under a charter-party entered into before the collision for a voyage to be performed after the collision:—It was *held*, that he must pay the costs attending the claim for freight at the reference.⁽¹⁶⁾

(9) *The George Gordon*, 53 L.J., Adm. 28; 9 P.D. 46; 50 L.T. 371; 32 W.R. 596 (Eng.); 5 Asp. M.C. 216; and see *The Earl Grey*, 1 Spinks, 180. "Bail is exorbitant when it is more than what the salvors can expect to realise." Costs incurred in giving exorbitant bail have been allowed in some cases—See *The George Gordon*, L.R. 9 P.D. 46 and *the City of Berlin*, L.R. 2 P.D. 187 cited in argument *In re "Champion"*, 17 C. 84 at p. 100.

(10) *The Persian*, 1 Notes of Cas. 304.

(11) *The Bahia*, L.R. 1 A. & E. 15; 11 Jur. (N.S.) 1008; 14 W.R. 411 (Eng.).

(12) *The Karla*, Br. & Lush. 367; 13 W.R. 295 (Eng.). In the case of the witnesses being foreign seamen, a reasonable charge incurred for agency or interpretation may be allowed.

(13) *The Biddick*, 38 L.J., Adm. 24; 19 L.T. 705. In estimating the allowance and compensation for loss of time in the case of a seaman detained to give evidence, the rate of wages is a fair criterion. *The Olive*, Swabey, 292.

(14) *The Karla*, Br. & Lush. 367; 13 W.R. 295 (Eng.). See also cases noted under Refs. 12 and 13, *supra*.

(15) *The Leo*, Lush. 414; 31 L.J., Adm. 78; 6 L.T. 58. See Mew's Digest, Vol. XIII, Col. 856.

(16) *The South Sea*, Swabey, 141.

In Admiralty actions costs on the higher scale will only be allowed under exceptional circumstances. ^(16 a) Costs on the higher scale will only be granted when special grounds of urgency or importance are shown, as it is intended that the lower scale should be the ordinary scale. ⁽¹⁷⁾

Where a tender in a salvage suit is pronounced for, the usual practice is to condemn the plaintiffs in the costs incurred since the time of tender; but this practice is not invariable, and where the Court is of opinion that the tender is not a liberal one, it will, in its discretion, make no order with regard to such costs. ⁽¹⁸⁾ A tender which does not contain an offer to pay costs incurred up to the time of tender in such salvage suit is not good tender. ⁽¹⁹⁾ A plea of tender must, as a general rule, specify the grounds upon which the defendant contends that the plaintiff is not entitled to costs. ^(19-a)

Costs may be given against the Crown where the Lords of the Admiralty appear to contest a collision suit. ⁽²⁰⁾

Where the plaintiff in a collision suit is resident out of the jurisdiction, the Admiralty Court may require him to give security for costs. ⁽²¹⁾ A defendant in a collision cause making a counter-claim for the damage sustained by his own vessel, must, if he is resident out of the jurisdiction, give security for the costs, not merely of his counterclaim, but of the whole action. ⁽²²⁾ If he makes default in giving security for costs pursuant to order, he will have his counterclaim dismissed. ⁽²³⁾

(16-a) See *The Decca*, unreported but cited in *In re Steamship Drachenfels*, 27 C. 860 (889); *The Falls of Eitrick*, 22 C. 511.

(17) *The Raisby or Cardiff Steamship Co. v. Barwick*, 54 L.J., Adm. 65; 10 P.D. 114; 53 L.T. 56; 33 W.R. 938 (Eng.); 5 Asp. M.C. 473.

(18) *The Lotus*, 7 P.D. 199; 47 L.T. 447; 30 W.R. 892 (Eng.); 4 Asp. M.C. 595. See also *Mews Digest*, Vol. XIII, Col. 669.

(19) *The Thracian*, 41 L.J., Adm. 71; L.R. 3 A. & E. 504; 25 L.T. 889; 20 W.R. 380 (Eng.); 1 Asp. M.C. 207.

(19-a) (*Ibid.*).

(20) *The Swallow*, Swabey, 30.

(21) *The Sophie*, 1 W. Rob. 326; *The Volant*, 1 W. Rob. 383; *The Johanna Frederick*, 1 W. Rob. 39; *The Lord Cochrane*, 1 W. Rob. 312; *The Constantine*, 4 P. D. 156; 27 W.R. 747 (Eng.), C. A.; *The Newbattle*, 54 L.J., Adm. 16; 10 P. D. 33, 52 L.T. 15; 33 W.R. 318 (Eng.); 5 Asp. M.C. 356.

(22) *The Julia Fisher*, 2 P.D. 115; 36 L.T. 257; 25 W.R. 756 (Eng.); 3 Asp. M.C. 380, C.A.

(23) (*Ibid.*).

(xii) Costs of transcript of short-hand writer's notes.

Costs of transcript of shorthand writer's notes would not be included in a general order awarding the costs of an Admiralty action. It would require a special direction of the Court for the inclusion of such peculiar expenses.⁽²⁴⁾

Certain points considered in the awarding or withholding of costs in Admiralty actions :—
Plaintiff negligently arresting wrong ship.

In the reports of Admiralty cases, there are several decisions, which, though they cannot be said to lay down any definite and invariable rule, may be of importance as showing some of the important points which Admiralty Courts are generally in the habit of considering in awarding or withholding costs.⁽²⁵⁾ Thus if the plaintiff negligently arrests and sues a wrong ship he will have to pay costs.⁽²⁶⁾

Discontinuance of action by plaintiff.

On discontinuance of an Admiralty or Vice-Admiralty action the plaintiff will be ordered to pay the costs of the action.⁽²⁷⁾

(24) *The Turret Court*, 5 C.W.N. (Journal Portion), p. clxxix. This was a collision case between two steamships, in which the President held the "Turret Court" alone to blame. The action involved questions of an extremely technical character. For the plaintiffs in that original action, who were the owners of a vessel called the *Ramellies*, a shorthand writer was employed who took down the evidence of experts, who dealt on the operation of steam-reducing valves and other such matters. Those costs were disallowed by the Registrar to plaintiff who had recovered judgment in that action with costs. The Registrar had refused them on the ground that such costs were only allowed when the successful party had applied for them at the hearing. The owners of the *Ramellies* appealed. The learned President accepted the view of the Registrar; general costs do not include the costs of a shorthand writer's notes, these require a special direction. An application should be made at a time before the order is drawn up and he therefore directed that the taxation should stand. *The Turret Court*, 5 C.W.N. (Journal Portion), p. clxxix.

(25) These principles will be found to be very similar to the general principles which govern ordinary Courts in the matter of the award of costs, except in those cases in which the peculiarity of Admiralty Courts requires a deviation from the ordinary rule. Rule 506. Of the Original Side Rules of the Madras High Court says :—"In cases of damage, unless the Court otherwise directs, each party shall, on or before the first hearing, bring into Court a written statement containing the following particulars :— (a) the names of the two vessels which came into collision, and the names of their respective masters; (b) the time of the collision, as nearly as can be stated; (c) the place of the collision; (d) the direction of the wind; (e) the state of the weather; (f) the courses of the respective vessels on first sighting each other; (g) the distance at which the other vessel was first seen; (h) the steps taken to avoid the collision; (i) the parts of each vessel which first came in contact."

(26) *The Ecangelismos*, Swabey, 378; 12 Moore, P. C. 352. S. P.; *The Active*, 5 L. T. 773; *The Strathnaver*, 1 App. Cas. 58; 34 L. T. 148; 3 Asp. M. C. 113; and see *The Peri*, 32 L. J., Adm. 46; 8 Jur (N.S.) 1230; 11 W. R. 44 (Eng.).

(27) *The J. H. Henkes*, (1887) 12 P.D. 106; and see *The St. Olaf*, (1877) 3 Asp. M.C. 341. "Immunity of a co-plaintiff from costs does not create a like immunity for the remaining co-plaintiffs. In the Admiralty Court each co-plaintiff is severally

In one case, the successful appellants who were held to have complicated the case by a series of outrageous falsehoods, were allowed costs of appeal only, each party paying his costs in the Court below.⁽²⁸⁾

Successful party complicating case by false allegations.

In an English case, on the defendants succeeding on a plea of compulsory pilotage the action was dismissed with costs.⁽²⁹⁾

Defendant succeeding on a plea of compulsory pilotage.

It is a rule in the Admiralty Court, where a collision is found to be the result of an inevitable accident, to make no order as to costs, unless it can be shewn that the suit was brought unreasonably and without sufficient grounds.⁽³⁰⁾ It is the practice of the Admiralty Court in case of inevitable accident that each party should pay his or her own costs. Where, from the circumstances of the collision, it must have been obvious that the collision was an inevitable accident, the Court will use its discretion as to dismissing the suit with costs.⁽³¹⁾ Although, where the Court finds inevitable accident, the general rule is, that each party pays his own costs, yet the Court still holds, and will on occasion exercise, a discretionary power to condemn the plaintiff in costs.⁽³²⁾ The plaintiffs in an action for damage by collision admitted on the pleadings that the collision was the result of an inevitable accident:—Held, that defendants were entitled to judgment with costs.⁽³³⁾ It has been laid down that, unless there are special circumstances to induce the Court to depart from this rule, costs will be given against the plaintiffs in an action of damage, whenever the defendants prove that the collision was the result of an inevitable accident.⁽³⁴⁾ The general rule that can be deduced from the

Defendant succeeding on a plea of inevitable accident.

liable for the whole of the costs." *The Leda*, Br. and Lush. 19; 32 L.J. Adm. 58; 9 Jur. (N.S.) 208; 7 L.T. 864; 11 W.R. 302 (Eng.).

(28) *The Batavier*, (1889) 15 P.D. 37, Q.A.

(29) *The Burma*, (1909) 8 Asp. M.C. 547; but see *The Carl XV.*, (1892) P. 132, where each party was ordered to bear his own costs of the action; *The Schwann*, (1874) L.R. 4 A. and E. 187; and *The Ophelia*, (1913) 29 T.L.R. 656. Uncertainty of the law as to compulsory pilotage assigned as a reason for not giving successful party his costs. *The Hankow*, 48 L.J. Adm. 29; 4 P.D. 197; 40 L.T. 335; 4 Asp. M.C. 97.

(30) *The Marpesia*, 8 Moore P.C. (N.S.) 468; L.R. 4 P.C. 212; 26 L.T. 333; 1 Asp. M.C. 261.

(31) *The Innisfail*, *The Secret*, 35 L.T. 819; 3 Asp. M.C. 337.

(32) *The London*, Br. and Lush. 82; 9 Jur. (N.S.) 1330; 9 L.T. 348; *The Itinerant*, 2 W. Rob. 236.

(33) *The Naples*, 55 L.J. Adm. 64; 11 P.D. 124; 55 L.T. 584; 35 W.R. 59 (Eng.) 6 Asp. M.C. 30.

(34) (*Ibid*).

authorities bearing on this point has been stated in the following terms: "Where the defence of inevitable accident is sustained, the plaintiff will not be ordered to pay the costs, unless he might or ought to have known that there was, apart from the merits, a good legal defence."⁽³⁵⁾

Decree for
costs against
defendant
personally.

The Admiralty Court has jurisdiction to pass a decree against a defendant personally to pay costs, though the ship was arrested and bail given.⁽³⁶⁾

Unsuccessful
defendant
made liable
for costs
both of
plaintiff and
co-defendant

Where, in an Admiralty action, the real contention in the case was as to which of two defendants was to blame, and the plaintiff acted reasonably in adding both defendants, the unsuccessful defendant was ordered to pay both the costs of the plaintiffs, and of the successful co-defendant.⁽³⁷⁾

(35) *The Virgo*, 35 L.T. 519; 25 W.R. 397 (Eng.); 3 Asp. M.C. 285. Costs given against the claimant in a case of collision which was an inevitable accident. (*The Thornley*, 7 Jur. 659.) Inevitable accident found by Court of Appeal; decision below reversed. The modern rule is that costs follow the event in case of collision by inevitable accident, unless there are special circumstances. *The Monkseaton*, 58 L.J., Adm. 52; 14 P.D. 51; 60 L.T. 662; 37 W.R. 523 (Eng.); 6 Asp. M.C. 383, S.P. *The Batavier*, 59 L.J., Adm. 546; 15 P.D. 37; 62 L.T. 406; 38 W.R. 522 (Eng.); 6 Asp. M.C. 500, C.A. For earlier decisions, see *The Corinna*, 35 L.T. 781; 3 Asp. M.C. 307; *The Agra and the Elizabeth Jenkins*, 4 Moore P.C. (N.S.) 435; 36 L.J., Adm. 16; L.R. 1 P.C. 501; 16 L.T. 755; 16 W.R. 735 (Eng.). Both ships found in fault in Court below; one appeals; appeal dismissed, with costs. *The Milanese*, 45 L.T. 151; 4 Asp. M.C. 438—(H.L.) E. A., held alone in fault in Court below; B, alone in fault in Court of Appeal; A. gets costs of Appeal and below. *The Glannibanta and the Transil*, 1 P.D. 233; 34 L.T. 934; 24 W.R. 1033 (Eng.); 3 Asp. M.C. 389, C.A.

(36) *The Volant*, 1 W. Rob. 383.

(37) *The River Lagan*, (1888) 6 Asp. M.C. 281, followed (on an appeal from the City of London Court) in *The Mystery*, (1902) p. 115; and see *The Hopper*, No. 21, (1903) W.N. 114. The Dumb barge "E," while in tow of the steam tug "S," was damaged by a collision with the Steamship "R.L." The owners of the "E," commenced an action joining the owners of both vessels as defendants. At the trial the "R.L." was found alone to blame;—*Held*, that the owners of the "R.L." having endeavoured to throw the blame on the "S" must pay her costs as well as those of the plaintiffs. *The River Lagan*, 57 L.J., Adm. 28; 58 L.T. 773; 6 Asp. M.C. 281. Case for recovery of damages caused by collision between plaintiff's ship "Beamish" and the Canard, S. S. "Slavonia." The collision was in the river Wear-at-Sunderland, county Durham. Plaintiff's allegation was that the Canard ship was negligently moored and proper precautions had not been taken to keep her clear off the "Beamish." The action was originally against Sir James Lang and Son Limited, who provided the tugs and transporting gang. Negligence was denied and the defendants alleged that the vessel was berthed under the direction of the harbour master, the servant of the Wear Commissioners, and if there had been any negligence or improper navigation, it was the fault of the Harbour Master for whose default Sir James Lang and Son Limited were not responsible. Thereupon the River Wear Commissioners were also made party defendants. The learned President, on the evidence before him, came to the conclusion that those in charge of

In an action of damage by collision instituted in the High Court, the Court, in exercising its discretion as to costs, will regard the size of the vessels, the nature of the collision, the length of time occupied at the trial, and the judgment delivered by the Court.⁽³⁸⁾

Points to be considered in collision cases.

Co-plaintiffs in collision cases are severally liable to the whole of the costs.⁽³⁹⁾

Responsibility of co-plaintiffs in collision cases.

Where, in respect of a collision, cross-actions are brought and are consolidated, and the Court finds that both vessels are equally at fault, no costs would be awarded to either side.⁽⁴⁰⁾ This rule has also been followed even in cases where there was no cross-action.⁽⁴¹⁾

Cross-actions in respect of collision.

The owners of a cargo laden on board a vessel which had been sunk in a collision with another vessel brought an action of damage against the owners of such other vessel. The Judge of the Admiralty division pronounced that both vessels were to blame for the collision, gave the plaintiffs half their damages from the defendants, and condemned the defendants in the costs of the action. The decision that both vessels were to blame was upheld by the Court of appeal. It was held, that as the plaintiffs had failed on the issue that the vessel carrying the cargo was not to blame, no costs ought to have been given.⁽⁴²⁾ When both ships are to blame

Collision—Both ships at fault.

the "Slavonia" had failed to carry out the orders of the harbour master, and after the tide fell they did not competently handle the ropes and gear. Sir James Lang and Son were therefore liable, but plaintiffs had failed against the Wear Commissioners. He directed that these added defendants were entitled to have their costs taxed as between solicitor and client (see case of the *Ydun* and Public Authorities Protection Act, 1893, S. 1). And His Lordship ordered that Sir James Lang & Son should pay the costs of plaintiffs against both defendants and the costs of the successful defendant. *The Slavonia*, 9 C.W.N. (Journal portion), p. cvi.

(38) *The Saliburn*, (1892) F. 333; 1 R. 543; 69 L.T. 88; 7 Asp. M.C. 325.

(39) *The Leda*, Br. & Lush, 19; 32 L.J., Adm. 58; 9 Jur. (N.S.) 208; 7 L.T. 864; 11 W.R. 302 (Eng.).

(40) *The Hector*, (1883) 8 P.D. 218, C.A.

(41) *The Quickstep*, (1890) 15 P.D. 196; *The City of Manchester*, (1890) 5 P.D. 221, C.A.

(42) *The City of Manchester*, 49 L.J., Adm. 81; 5 P.D. 221; 42 L.T. 531; 4 Asp. M.C. 261, S.P.; *The Vera Cruz*, 53 L.J., Adm. 33; 9 P.D. 88; 51 L.T. 104; 32 W.R. 783 (Eng.); 5 Asp. M.C. 270; Cf. *The Washington*, 5 Jur. 1067; *The Telegraph*, 1 Spinks 427; *The Lake St. Clair and the Underwriter*, 2 App. Cas. 389; 63 L.T. 155; 3 Asp. M.C. 361; *The Love Bird*, 6 P.D. 80; 44 L.T. 650; 4 Asp. M.C. 427; *The Rigborgs Minde*, 52 L.J., Adm. 74; 8 P.D. 117; 49 L.T. 28; 5 Asp. M.C. 460, C.A.

for a collision, the damages are equally divided, and each party bears his own costs.⁽⁴³⁾

Collision
caused by the
fault of third
ship.

The owners of a pier in the Thames sued the owners of the "Valencia" and the owners of the "Alfred" for damage done to their pier by the "Valencia." The "Valencia" owners admitted collision with the pier, but said that their ship was driven against the pier by the negligent navigation of the "Alfred"; and the jury so found :—The Court held, that the "Alfred" owners must pay the costs of the "Valencia" owners as well as those of the plaintiffs.⁽⁴⁴⁾

Misconduct
after collision
punished by
costs.

The owner of a ship that rendered no assistance to another with which she had been in collision, though not in fault for the collision, was condemned in costs.⁽⁴⁵⁾

Costs in
salvage
actions.

Where a fair salvage agreement has been made an action of salvage should not be brought, and the plaintiffs improperly bringing a suit may, on that ground, be ordered to pay the costs.⁽⁴⁶⁾ Where money has been paid into Court the discretion ought to be exercised by giving the plaintiffs the costs of action up to the date of payment in, and defendants those subsequent to that event, but this general rule would be departed from when salvors unreasonably refuse an offer made before suit; ⁽⁴⁷⁾ and where an offer was made before the commencement of the action, and subsequently the sum

(43) *The Agra and Elisabeth Jenkins*, 4 Moore P.C. (N.S.) 438; 36 L.J., Adm. 16; L.R. 1 P.C. 501; 16 L.T. 755; 16 W.R. 735 (Eng.). In a collision case where both ships are to blame, the plaintiff is entitled to his costs if, in his statement of claim, he admits that he is to blame. *The General Gordon*, 63 L.T. 117; 6 Asp. M.C. 533. Both ships in fault. Appeal dismissed with costs except so far as increased by respondent adhering to appeal. *The Moeander and the Florence Nightingale*, 1 Moore P.C. (N.S.) 63; Br. & Lush. 29. Where in Admiralty or Vice-Admiralty actions the Court finds that both parties were at fault, no order would be made as to costs. *The Englishman v. The Australia*, (1894) P. at p. 246 N. Plaintiffs admitting on their statement of claim that they were to blame, and only asking for a decree of both to blame, may be entitled to costs on such decree being made (*The General Gordon*, (1890) 6 Asp. M.C. 533). The rule of no costs where both ships in fault, applies where the fault of one ship is the fault of her compulsory pilot. *The Hector*, 52 L.J., Adm. 51; 8 P.D. 218; 37 W. R. 491; 5 Asp. M.C. 1013; *The Oakfield*, cited in Mew's Digest, Vol. XIII, Col. 773.

(44) *Green v. Goodyer*, 6 Asp. M.C. 281-n.

(45) *The Celt*, 3 Hag. Adm. 343. A Dutch and a Spanish ship were in collision in the Channel. The Spanish Seamen came on board the Dutch ship with knives and were violent. The Dutch ship was held in fault for the collision, but no costs were given to the Spanish ship. *The Catalina*, 2 Spinks. 23.

(46) *The Nasmyth*, (1885) 10 P.D. 41.

(47) *The William Symington*, (1884) 10 P.D. 1.

offered was paid into Court and accepted, the plaintiffs were ordered to pay the whole costs of the action.⁽⁴⁸⁾

The rule that the plaintiff recovers costs up to date of tender, and the tenderer the costs subsequent, applies to salvage cases.⁽⁴⁹⁾

When two separate salvage actions are consolidated at the instance of the common impugnant, and no order is made giving the conduct of both to one plaintiff, the promovents are entitled to separate costs.⁽⁵⁰⁾

Consolidation
of salvage
claims—
Separate
costs.

The amount of salvage award may be increased in appeal according to circumstances.⁽⁵¹⁾

Increase of
salvage
award.

Where, in an action of salvage, a ship was arrested and the bail asked for was found to be excessive, *held*, that the impugnants should be paid by the promovents the costs of the excessive bail required from them.⁽⁵²⁾

Action of
salvage—
Arrest of ship
—Costs of
excessive bail.

(48) *The Malvern*, (1900) Fo. 240; and see *The Nasmyth*, (1885) 10 P.D. 41. See also Yearly Practice, Vol. I, 1914, p. 1071. As to apportionment of costs between shipowner and cargo-owner in salvage actions, see *The Elton*, (1891) p. 265; Williams and Bruce's Admiralty Practice, 3rd Ed., pp. 464—484; Merchant Shipping Act, 1894, (57 & 58 Vic., C. 60), S. 547.

(49) *The Blanche*, (1908) 77 L.J.P. 99.

(50) *In re Steamship "Drachenfels"*, 27 C. 860 (890). The following observations of Ameer Ali, J., in the course of the judgment may also be noted:—"The plaintiff's counsel contend they are entitled to separate costs. Mr. O'Kinealy contends they are not so entitled especially in view of the consolidation order of the 15th of October 1898. I have carefully considered the order made by the learned Judge on the application of the *Drachenfels* for the consolidation of these two matters, and I am of opinion that that order was made, as it was asked for, with the object of avoiding a double set of costs to the impugnants. It was never intended so far as I can gather from the words of the learned Judge, and his remarks to Mr. Orr, that the conduct of the two actions should be given to one set of promovents. In the order of the 15th of October as well as of the 17th of May, both promovents are allowed to cross-examine the witnesses separately, and having regard to the course which the two actions have taken, both in the examination of the witnesses before the Commissioner as well as in Court, it would be hardly justifiable on my part to give only one set of costs. Mr. Best was cross-examined by the impugnants, as I pointed out before, at extraordinary length. I am forced to make this comment; not satisfied with one answer, counsel returned to the charge over and over again. The impugnants raised every possible objection against the claim of the plaintiff, the result of which has been an inordinate prolongation of the hearing. I think this is a case in which I am bound to give separate costs, and I do so." *Per* Mr. Ameer Ali, J., *In re Steamship "Drachenfels"*, 27 C. 860 at 890.

(51) *In the matter of the Ship "Champion"*, 17 C. 84.

(52) *The George Gordon*, L.R. 9 P.D. 46. See the same point discussed in the "*Bombay and Persia Steam Navigation Company*" v. *S. S. "Cashmere"*, 24 B. 55 (65) = 1 Bom. L.R. 557. The following observations of His Lordship Russell, J., may also be noted:—"I have considered the question of the point raised by Mr. Branson

Costs of appeal
in admiralty
actions.

The general rule is that, in successful admiralty appeals, the appellants will have their costs of the appeal.⁽⁵³⁾ When the Court of appeal varies the decision of the Judge of the admiralty division, by which he found one vessel wholly to blame for a collision, by finding that the collision was an inevitable accident, the practice of the Privy Council that each party should, except under very exceptional circumstances, pay their own costs, will be followed.⁽⁵⁴⁾ When the Court of appeal varies a decision of the Judge of the admiralty division, by which he found one vessel wholly to blame for a collision, by finding that both vessels are to blame, each party will pay his own costs, both in the Court below and in the Court of appeal.⁽⁵⁵⁾ Since an appeal lies under the High Court Act and Letters Patent, from the original side in the exercise of Admiralty or Vice-Admiralty jurisdiction, and the procedure is mainly governed by the Code of Civil Procedure, the usual practice of the High Court, as to costs in appeals from the original side, should be followed.⁽⁵⁶⁾

yesterday with regard to the costs the owners of the "Cashmere" have been put to by reason of excessive bail having been compelled. In a matter of this sort the Court must, of course, allow for the plaintiffs taking a generous view of the value of their services, but I think in this case the bail that was compelled, although it was in the three suits, was excessive. Mr. Justice Butt says in "*The George Gordon*", 1884, 9 P.D. 46: "Parties should not arrest a ship for an exorbitant sum, and if they do, it is no excuse to say that the defendants did not, as is were, struggle to get free by applying to have the bail reduced." This case was directly followed in "*The Champion*," 17 C.84, where the costs occasioned by the bail required being excessive were directed to be paid by the promovents. I think in the present case the plaintiffs ought to pay the costs of and incidental to bail being compelled beyond the sum of Rs. 50,000." *Per Russell, J.*, in *The Bombay and Persia Steam Navigation Company v. S. S. Cashmere*, 24 B. 55 (65)=1 Bom.L.R. 557.

(53) *The Swansea and the Condor, or Perkins v. The Condor*, 48 L.J. Adm. 33; 4 P.D. 115; 40 L.T. 442; 27 W.R. 748, Eng.; 4 Asp. M.C. 115, C.A. And cp. *The City of Berlin*, 47 L.J. Adm. 2; 2 P.D. 167; 37 L.T. 307; 25 W.R. 793, Eng.; 3 Asp. M.C. 491, C.A.

(54) *The City of Cambridge*, 35 L.T. 781; 3 Asp. M.C. 307, C.A.

(55) *The Corinna*, 35 L.T. 781; 3 Asp. M.C. 307, C.A. Where both ships are found in fault in the Court below and the decree is affirmed and no costs of appeal are given. *The North American and the Tecla Carman*, Swabey, 358; 12 Moore P.C. 331; Lush. 79. Where the Court of appeal reverses or varies the decision of the Court below and finds both ships in fault, no costs of the appeal or of the Court below are given. *The Hector*, cited in *Mews Digest*, Vol. XIII, Col. 860. *The Arratoon Apar*, 59 L.J. P.C. 49; 15 App. Cas. 37; 62 L.T. 331; 38 W.R. 481 (Eng.); 6 Asp. M.C. 491, P.C.

(56) *In the matter of the Ship "Champion"*, 17 C.84. In a salvage cause, the Supreme Court, by its sentence pronounced in March 1849, dismissed the claim of the salvors. In the month of April following, the promovents moved for a rule nisi to show cause why the defendants should not pay their costs. This rule the Court refused. In August,

Though in appeals as to the amount of salvage the Privy Council generally would not give a successful appellant his costs of the appeal, yet it has been held that such appeals under the Judicature Act form no exception to the general rule that a successful appellant is entitled to his costs. (56-a)

The Court will not ordinarily interfere with the Registrar's discretion as to taxation, unless a mistake in principle has been made. (57)

Interference by Court with Registrar's discretion as to costs.

Sec. 4. Administration Action—Costs of Executor and Administrator.

Administration actions, what are.

Administration action, jurisdiction of Courts in.

Administration action, costs of—Provisions of the Indian Succession Act as to.

Administration action, what are costs of—"Executorship and testamentary expenses."

(1) Costs out of estate—Cases where costs were ordered to be paid out the estate.

(a) General.

(b) Where litigation is caused by the fault of the testator.

(c) Where proceedings are directed for benefit of estate.

(d) Where a party merely calls for proof of will.

(e) Where party opposing the will has sufficient ground to question validity of will or capacity of testator.

(f) Where there is just cause for litigation.

(g) Where doubtful questions of law are involved.

in the same year, the promovents applied for and the Supreme Court granted leave to appeal to *England* from the principal sentence of March 1849. No objection was taken to the competency of the appeal in *Bombay* by the respondents, nor was any protest against the right of appeal entered in *England*, but the respondents at the hearing objected to the reception of the same, contending, that the appeal was perempted by the proceedings had in the month of *April*. Held, that such objection was fatal, that the application for costs after the decision in the cause, had the effect of absolutely perempting the appeal, so as to entirely take away from the Supreme Court the power of granting leave to appeal, as nothing could, after the proceedings in *April*, be done to restore the appeal from the principal sentence. But under the circumstances of the case the Privy Council was of opinion that no costs ought to be given. *Thomas Charles Loughnan v. Haji Joosub Bhulladina*, 5 M.I.A. 137 (145)=1 Sar. P.C.J. 410=7 Moo. P.C. 373=1 I.R. 1030.

(56-a) *The City of Berlin*, 47 L.J. Adm. 2; 2 P.D. 187; 37 L.T. 307; 25 W.R. 793 (Eng.); 3 Asp. M.C. 491, C.A. The Privy Council has refused costs to successful appellants in appeals from amount of award in Admiralty cases; the rule is apparently the same still; and *The City of Berlin*, L.R. 2 P.D. 187, cited in argument *In re "Champion"* 17 C. 84 (99), which shows the disfavour with which the Court looks upon such appeals.

(57) *The Neera*, 5 P.D. 118; 42 L.T. 743; 4 Asp. M.C. 277. For a case where a decree made by a former Judge as to costs in a collision cause where both ships were found to be at fault was varied by his successor, see *The Monarch*, 1 W. Rob. 21.

- (h) Where the circumstances of the case call for a judicial investigation of the matter.
- (i) Where the executor proves will in solemn form.
- (j) Where next-of-kin or executor successfully contests later will.
- (k) Where legatee brings suit on behalf of himself and other legatees.
- (l) Where legacy is given to a class—Costs of proving title as member of the class.
- (m) Where beneficiary successfully resists attempt by another beneficiary to prove a false will.
- (n) Where joint letters of administration are issued.
- (o) Where probate was granted of subsequent inconsistent will.
- (p) Where decree for payment of legacy is made on admission of assets.
- (q) Where plaintiff is given the conduct of several suits consolidated.
- (2) Cases where costs were not ordered to be paid out of the estate :—
 - (a) Where construction of will is not so difficult as to require assistance of Court.
 - (b) Where action is not for benefit of estate.
 - (c) Where applicant for letters wilfully conceals the existence and claims of relatives of deceased.
 - (d) Where legatee's claim is not proper.
 - (e) Where opposition improper.
 - (f) Where opposing party might have removed suspicion by proper enquiry.
 - (g) Where opposing party makes false charge of fraud and conspiracy.
 - (h) Where plaintiff is guilty of laches.
- (3) Cases where each party was directed to bear his own costs.
- (4) Case where probate was refused to executor—Costs in discretion of Court.

Costs of executors and administrators in administration suits.

General rule—Paid out of estate.

Exceptions :—

- (i) Misconduct.
- (ii) Fraud.
- (iii) Undue influence.
- (iv) Breach of trust.
- (v) Negligence.
- (vi) Perverseness and unreasonable caution and suspicion.
- (vii) Improper investment.
- (viii) Wrongful distribution of assets.
- (ix) Denial of indebtedness to account.
- (x) Executor bringing a useless action.
- (xi) Defaulting trustee or executor, costs of.
- (xii) One of two executors only defaulting.
- (xiii) Principle on which costs of a defaulting trustee are disallowed.
- (xiv) Costs of a defaulting executor who becomes bankrupt.
- (xv) Costs sometimes given to a defaulting executor on account of assistance rendered.

- (xvi) Trustee or executor making good his default : right to costs.
- (xvii) Executor of a defaulting trustee.
- (xviii) Severance from co-trustee or co-executor.
- (xix) Revocation of probate or letters.
- (xx) Where application for probate is dismissed for default.
- (xxi) Where loss caused by agent's default.
- (xxii) Set-off of costs.
- (xxiii) Unnecessary costs.
- (xxiv) Executor, change of attorney by—Costs, liability of executor to pay.

Fees due to Council, Scale of—Costs.

In what cases the plaintiff shall pay the executor's costs.

Costs out of particular portions of the estate :—

- (a) Liability of general estate.
- (b) Liability of residuary estate.
- (c) Liability of particular share.
- (d) Liability of particular fund.
- (e) Liability of settlement fund.
- (f) Liability of specific legacy.
- (g) Liability of real estate.

Costs of particular persons.

- (i) Administrator-General.
- (ii) Creditor bringing administration action.
- (iii) Personal representative.
- (iv) Residuary or other legatee.
- (v) Next-of-kin or person entitled in distribution.
- (vi) Beneficiary.
- (vii) Caveator.
- (viii) Government.

Priority as to executor's and trustee's costs.

Security for costs.

Costs in Administration Actions.

ADMINISTRATION suits are said to be exclusively within the jurisdiction of the Equity Courts. The administrative jurisdiction of such Courts consists rather "in adjusting, enforcing, and executing doubtful or recognised rights, than in deciding between directly hostile litigants." In an administration suit, "whatever property ought of right to be dealt with, in any particular case, is ascertained, got in, and permanently secured under the orders of the Court; and then all claims and interests alleged in respect of it, whether conceded or contested, if made *under*, and not adversely to, the administration, are ascertained and declared, and put in train for liquidation. Immediate and vested demands are at once satisfied ;

Administration actions, what are.

future and contingent claims, and continuing interests of whatever duration, are provided for, and executed during the whole length of their continuance; and ultimately, on the determination of all charges and contingencies, the entire matter is completely wound up, has been managed, and finally disposed of—that is, the property has been *administered*”(1)

An administration suit is usually brought by a creditor of the deceased on his own behalf and on behalf of all other creditors for which their consent is not necessary; or it may be brought by a creditor claiming payment of his own debt only, or by a legatee, or one of the next-of-kin, or a devisee, or the heir. But a suit by one or more creditors on behalf of other creditors cannot be entertained without the leave of the Court being previously obtained for its institution.(2)

An administration suit is in essence a suit for an account and application of the estate of the debtor for the satisfaction of the dues of all the creditors; the whole administration and settlement of the estate are assumed by the Court, the assets are marshalled, and the decree is made for the benefit of all the creditors.(3)

Administra-
tion action,
jurisdiction of
Courts in.

It has been said, that the whole jurisdiction of Courts of equity, in the administration of assets, is founded on the principle, that it is the duty of the Court to enforce the execution of trusts; and that the executor or administrator, who has the property in his hands, is

(1) 1 Law Stud. 339; see *Dhunraj v. Broughton*, 15 B.L.R.O.C. 296. See *Mujamdar's Hindu Wills Act*, pp. 634-635. On the subject-matter of this section, see *Morgan and Wurtzburg on Costs*, pp. 165-204; *Marshall on Costs*, pp. 332-343; *Gordon on Costs*, pp. 35-50; *Mujamdar's Hindu Wills Act*, 1st Ed., pp. 634-635; *Henderson's Indian Succession Act*, Notes under S. 280; *Encyclopædia of the Laws of England*, 2nd Ed., Vol. 4, pp. 59-65. *Halsbury's Laws of England*, Vol. XIV, pp. 347-353; *Mews Digest*, Vol. VI,Cols. 1821-1828, 2062-2064; *Williams on Executors and Administrators*, 10th Ed., 1905, 247-250, 286-290, 1499-1502, 1533-1535, 1667-1681; *Theobald on Wills*, 6th Ed., 1905, pp. 768-771; *Daniell's Chancery Practice*, 7th Ed., Ch. XVIII; *Annual Practice*, Notes under O. LXV, r. 1; *Seton on Judgments and Orders*, 6th Ed., Vol. II, pp. 117C, 1516-1519; *Yearly Practice* (1914), pp. 1052-1064; *Triest and Cote Probate Practice*, 13th Ed., pp. 509-514; 2 *Black Comm.* 51, etc.; *Toller on Executors*, B. 2, Ch. I, p. 137, etc. *Storey's Equity Jurisprudence*, 8th Ed., (Boston) (1861) Vol. I, Ch. 9. Reference may also be made to *Jarman on Wills*, *Spence's Equitable Jurisdiction*; *Thompson's Principles of Equity and Equity Practice of the County Court*; *William's Bankruptcy Practice*.

(2) *Oriental Bank Corporation v. Gobind Lall Seal*, 9 C. 604. As to the practice and procedure in such suits, see S. 213, Code of Civil Procedure (Act XIV of 1882) = O. XX, r. 13 of Civ. Pro. Code, 1908. See also *Storey Eq. Jur.* 548, 548-a.

(3) *Sasi Bhushan Bose v. Maharaja Sir Manindra Chandra Nandy*, 24 C.L.J. 448.

bound to apply that property to the payment of debts and legacies ; and to apply the surplus according to the will of the testator, or, in case of intestacy, according to the statute of distributions. So that the sole ground, on which Courts of equity proceed in cases of this kind is to be deemed the execution of a trust.⁽⁴⁾

With regard to the costs of proceedings in administration suits, S. 280 of the Indian Succession Act⁽⁵⁾ says :—“ The expenses of obtaining probate or letters of administration, including the costs incurred for or in respect of any judicial proceedings that may be necessary for administering the estate, are to be paid next after the funeral expenses and death-bed charges.” ^{Administration action, costs of—} ^{Provisions of the Indian Succession Act as to.} ⁽⁶⁾

There is no distinction in meaning between “ executorship expenses ” and “ testamentary expenses ”.⁽⁷⁾ ^{Administration action, what are costs of—“ Executorship and testamentary expenses.”}

(4) *Adair v. Shaw*, 1 Sch. & Letr. 262. See, also, *Farrington v. Knightley*, 1 P. Will. 548, 549; *Rachfield v. Careless*, 2 P. Will. 161; *Duke of Rutland v. Duchess of Rutland*, 2 P. Will. 210, 211; *Elliott v. Collier*, 1 Ves. 16; *Anon*, 1 Atk. 491; *Wind v. Jekyll*, 2 P. Will. 575; *Nicholson v. Sherman*, 1 Cas. Ch. 57; Bac. Abridg. Legacy, M.; 1 Madd. Ch. Pr. 466, 467. “ The word assets is derived from the French word *assz*, which means sufficient, or enough; that is, sufficient, or enough, in the hands of the executor or administrator, to make him chargeable to the creditors, legatees, and distributees of the deceased, so far as the personal property of the deceased extends, which comes to the hands of the executor or administrator, for administration. In an accurate and legal sense, all the personal property of the deceased, which is of a saleable nature, and may be converted into ready money, is deemed assets, 2 Black Comm. 51; Toller on Executors, B. 2, Ch. I, p. 137. But the word is not confined to such property; for all other property of the deceased, which is chargeable with his debts or legacies, and is applicable to that purpose, is, in a large sense, assets.” 2 Black Comm. 255, 350; Toller on Executors, B. 3, Ch. VIII, p. 409.

(5) Act X of 1865.

(6) See S. 280 of the Indian Succession Act (X of 1865). This section is not made applicable to the Wills of Hindus, Jains, Sikhs, etc., by the Hindu Wills Act. See S. 2, Act XXI of 1870 (Hindu Wills) as amended by S. 154 of the Probate and Administration Act, V of 1881. S. 280 of the Indian Succession Act (X of 1865) corresponds to S. 102 of the Probate and Administration Act, V of 1881. These words “ judicial proceedings that may be necessary ” seem to refer to administration suits. See *Khusrubhai v. Hormajsha*, 17 B. 637. They must not be understood to suggest that, granting probate or letters of administration is a ministerial act and not a judicial one. As a matter of fact, granting probate is a judicial act and not a ministerial act. The proceeding in which such grant is made must therefore be also a judicial proceeding. See *Allen v. Dundas*, 3 Term. Rep. 125; Flood 670.

(7) *Sharp v. Lush*, 10 Ch.D. 463 (470), per Jessel, M.R. Costs of an administration suit have been held to be included under “ funeral and other expenses,” and “ legal expenses.” *Webb v. De Beauvoisin*, 31 Beav. 573; *Coventry v. Coventry*, 2 Dr. & Sm. 470. The plaintiff’s costs of an unsuccessful action impeaching the will are not testamentary expenses. *Godwin v. Prince*, (1898) 2 Ch. 225. The words “ judicial proceedings that may be necessary ” in S. 280 of the Indian Succession Act refer to administration suits. *Khusrubhai Nasarvanji v. Hormajsha Phirozsha*, 17 B. 637; Stokes 177.

Costs of an administration action are included in the term "testamentary expenses."⁽⁸⁾

The term "expenses of obtaining probate or letters of administration, etc.", used in S. 280 of the Indian Succession Act ⁽⁹⁾ has almost the same meaning which the corresponding term "executorship and testamentary expenses" used in English statutes and text books has. These terms include the following :—
 (i) Expenses incident to the proper performance of the duty of an executor : (ii) Probate expenses : (iii) The costs incurred by executors in obtaining the advice of solicitors or counsel as to the distribution of the testator's estate : (iv) The costs of executors and other parties in an action for the administration of the testator's estate : (v) The testator's funeral expenses : (vi) Expenses incurred by executors for the protection of specific legacy : (vii) Payment by the executors in discharge of debts falling due from the testator's estate after his death : *e. g.*, rent ⁽¹⁰⁾.

The following payments have also been held to be included in costs, charges, and expenses : costs of proceedings by an administrator against a defaulting solicitor, taken *bona fide* for the benefit of the estate, ⁽¹¹⁾ the costs of an action properly defended by a trustee, ⁽¹²⁾ costs of a sale rightly made by trustees under a power, ⁽¹³⁾

(8) *Miles v. Harrison*, (1874) L.R. 9 Ch. 316; *Harloe v. Harlos*, (1875) L.R. 20 Eq. 471; *Penny v. Penny*, (1879) 11 Ch. D. 440; *Re Chapman*, (1894) 71 L.T. 778; *Re Young*, (1881) 44 L.T. 499, C.A. Testamentary expenses, or "executorship expenses," are expenses incident to the proper performance of the duty of the executor (*Sharp v. Lush*, (1879) 10 Ch. D. 468). Where a testator directed the payment of the "testamentary expenses" of his widow, this was held to cover the costs of administration on her intestacy (*Re Clemow*, (1900) 2 Ch. 182). The phrase will also include estate duty (*ib.*; *Re Treasure*, (1900) 2 Ch. 648; and see *Re Knapman*, (1881) 18 Ch. D. 300, C.A.). Costs of an inquiry as to what persons were entitled to the pecuniary legacies were ordered to come out of the residue as testamentary expenses (*Re Baumgarten*, (1900) 82 L.T. 711), and on a summons by trustees' solicitor and client costs of unsuccessful claimants to a legacy may be ordered to be paid out of the fund (*Re Clarke, Clarke v. St. Mary's Convalescent Home*, (1907) 97 L.T. 707), but not costs of a probate action raising a serious contest as to the validity of the will (*Re Prince*, (1898) 2 Ch. 225; and see *Re Betts*, (1907) 2 Ch. 149).

(9) Act X of 1865.

(10) *Per Jessel, M.R.*, in *Sharp v. Lush*, 10 Ch. D. 468, (470) cited in 1 Will. Exors., 10th Ed., 752.

(11) *Re Davis*, 57 L.T. 755.

(12) *Walters v. Woodbridge*, 7 C.D. 504; *Re Llewellyn*, 37 C.D. 317, 327.

(13) *Re Mansel*, 54 L.J. Ch. 883.

costs of former trustees paid to the executor of the survivor in consideration of his transferring the trust property. (14)

The costs of administration include the costs of getting in any part of the real and personal estate, which is in a foreign country, and the payment of all duties necessary for that purpose. (15)

The amount paid or agreed to be paid by an administrator to a person for standing surety for due administration of the estate is an expense in administering the estate within the meaning of S. 102 of the Probate and Administration Act, corresponding to S. 280 of the Succession Act, and is a just charge on the estate. (16)

Where an administrator was held liable for loss to the estate due to his neglect to get in part of the deceased's property, he was given credit for the amount of the expenses incurred by him in obtaining letters of administration and the costs of any judicial proceeding necessary for administering the estate. (17)

Where executors took legacies under the will of their testator, which also gave them the residue, and the next-of-kin disputed the will, which was established with the exception of the residuary clause, the executors were allowed all costs of proving the will, including costs ordered by the House of Lords to be paid to the next-of-kin. (18)

It was held by Jessel, M.R., in *Re Chennell*, (19) that an order giving trustees their costs, charges, and expenses, gives them

(14) *Harvey v. Olliver*, 57 L.T. 239.

(15) *Peter v. Stirling*, 10 Ch. D. 279; *Brown v. Maurice*, 75 L.T. 415.

(16) *Imam Bakhsh v. Puran Mal*, 31 P.R. 1906=133 P.L.R. 1906. The section provides that the expenses of obtaining probate or letters of administration, including the costs incurred for or in respect of any judicial proceeding that may be necessary for administering the estate, are to be paid next after the general expenses and death-bed charges. In *Sharp v. Lush*, and cognate cases it was held that executorship or testamentary expenses include costs incurred by executors in obtaining the advice of solicitors or counsel as to the distribution of the estate and costs in an action for the administration of estate. The Court which granted letters of administration found that the administratrix was a fit person for the grant and, in my opinion, the consideration or inducement necessary for compliance with the Court's order demanding security must be included in the expenses of obtaining letters of administration. The result of holding otherwise would be that where security cannot be obtained gratis, letters of administration would not be granted and the estate might be wasted. *Per Reid, J.*, in 31 P.R. 1906 at pp. 116, 117=133 P.L.R. 1906.

(17) *Khusrubhai Nasarvanji v. Hormajsha Phirozsha*, 17 B. 637.

(18) *Fulton v. Andrew*, 46 L.J., Ch. 131.

(19) 8 C.D. 492.

something more than their costs of the action, and therefore entitles them to appeal as to costs only.⁽²⁰⁾

A trustee in passing his accounts is not allowed without question sums paid by him to his solicitor for costs; and the bill, although not submitted to a regular taxation, can be submitted to the taxing-master to be "moderated," i.e., for the taxing-master to disallow such items as are irregular and excessive.⁽²¹⁾

Costs out of
estate.
(1) Cases
where costs
were ordered
to be paid
out of the
estate (a)
General.

As a general rule, the question of costs is always in the discretion of the Court. The Court may in the exercise of discretion order costs to be paid out of the estate, whenever it considers the justice and equities of the case require such an order. But it is not bound to make such an order in any particular case. The following are some of the cases and some of the important grounds which influence the Courts in ordering that costs should be paid out of the estate.⁽²²⁾

(b) Where
litigation is
caused by the
fault of the
testator.

Where the litigation owes its origin to the fault of the testator, "by reason of his testamentary papers being surrounded by confusion or uncertainty in law or fact," or where those interested in the residue have, by their improper conduct, induced the litigation

(20) In *Charles v. Jones*, (33 C.D. 80, 81, 82), however, a different view was taken by Cotton, L.J., and it was held by the Court of appeal in *Bew v. Bew*, (1899 2 Ch. 467, 472), that the view of Cotton, L.J., was the right one.

(21) *Johnson v. Telford*, 3 Russ. 477; *Allen v. Jarvis*, L.R. 4 Ch. 616; *Aylesford v. Poulett*, 63 L.T. 519; *Re Park*, 41 C.D. 326; A solicitor trustee is only entitled to charge his costs and expenses out of pocket found by the taxing-master to have been properly incurred (*Robinson v. Pett*, 2 Lead. Cas. Eq. 214, 6th Ed.), unless he is specially authorized by the instrument creating the trust to make further charges (*Re Shearwood*, 2 Beav. 338; *Moore v. Frowd*, 3 M. & Cr. 45; *Re Wyche*, 11 Beav. 209), and although he be empowered to charge professional charges he is not entitled to charge for services which are not strictly professional, and not for matters which an executor ought to do without the intervention of a solicitor, such as for attendances to pay premiums on policies, attendances at the bank to make transfers, attendances on proctors, auctioneers, legatees, and creditors (*Harbin v. Darby*, 28 Beav. 325); but where an executor was authorized to make the usual professional or other proper and reasonable charges he was held entitled to charge for business not strictly of a professional nature transacted by him in relation to the trust estate (*Re Ames*, 25 C.D. 72; but see *Re Chapple*, 27 C.D. 584; and cf. *Re Fish*, (1893) 2 Ch. 413; *Clarkson v. Robinson*, (1900) 2 Ch. 722). A solicitor should not in a Will appointing him executor or trustee insert any authority to himself to charge for business not strictly professional, unless the testator has expressly instructed him to insert such a power (Kay, J., in *Re Chapple*, 27 C.D. 587).

(22) Bro. P.P. 439; Tr. and Coote 495. See *In re Luchminarain*; *Ram Rick Das v. Brijee Coomaree*, (5 C.W.N. cclxi) and the cases cited therein. Costs properly incurred may be paid by trustees, even though they have become barred by the operation of the Statute of Limitations. *Budgett v. Budgett*, (1895) 1 Ch. 202.

which the Court considers reasonable⁽²³⁾, costs would be ordered to be paid out of the estate. So the costs of two probates of two inconsistent wills, separately taken out, may be allowed out of the estate if the circumstances show that the executors have acted properly.⁽²⁴⁾

It is a general rule, that whenever an action for the administration of the assets of a deceased person is rendered necessary by the nature of his will, or the circumstances of his property, or by his dying intestate, his general personal estate must bear the costs of it.⁽²⁵⁾

If the cause of litigation takes its origin in the fault of the testator or those interested in the residue, the costs may be paid out of the estate.⁽²⁶⁾

Where a litigation is caused by the language of a will, its costs should be borne by the estate of the testator and not by the trustees.⁽²⁷⁾

Where a difficulty of construction is caused by the testator himself, and in regard to the circumstances and position of the parties, costs would come out of the estate.⁽²⁸⁾

(23) *Mitchell v. Gard*, 3 Sw. & Tr. 275; see *Goodacre v. Smith*, L.R. 1 P. and D. 359; Wms. 381; Bro. P.P. 445; Tr. and Coote, 503, 504.

(24) *In re Tara Moni Dasi*, 25 C. 553.

(25) *Jolliffe v. East*, 3 Bro. C.C. 27; *Studholme v. Hodgson*, 3 P.W. 300; *Pearson v. Pearson*, 1 Sch. & L. 12; *Wilson v. Brownsmith*, 9 Ves. 180; *Gwyther v. Allen*, 1 Ha. 505; *Philpott v. St. George's Hospital*, 6 H.L.C. 338; *Shuttleworth v. Howarth*, Cr. & Ph. 228. And as to cases where costs should be given out of an estate generally, see *Di Sora v. Phillips*, 10 H.L.C. 625. The rule equally applies, though the doubt on the construction of the will was introduced by parol evidence for the defendant, *Nourse v. Finch*, 1 Ves. Junr. 362.

(26) *Per* Lord Penzance in *Mitchell v. Gard*, 3 Sw. & Tr. 275.

(27) *Godavarthi Peria v. Godavarthy Lakshmi Devamma*, 24 Ind. Cas. 96. Tyabji, J., said in the course of the judgment;—"The lower Court, therefore, had in its discretion to award costs as it seemed most proper. I do not see any ground to interfere with the exercise of the discretion which, so far as I can judge, was not wrongly exercised. It may well have appeared to the learned Judge (1) that the respondents having been appointed trustees had not done anything to be mulcted in costs, (2) that the testator by the form of his will had caused the litigation and that the proper order was that the costs should be borne by the estate of the testator." *Godavarthi Peria v. Godavarthy Lakshmi Devamma*, 24 Ind. Cas. 96 at p. 97.

(28) *Indar Kunwar v. Jaipal Kunwar*, 15 C. 725 (726) (P.C.) = 15 I.A. 127 = 12 Ind. Jur. 377 = 5 Sar. P.C.J. 150 = Rafique and Jackson's P.C. No. 102. Referred to in *Chatrapat Singh Durga v. Dwarka Nath Ghose*, 22 C. 1 (3) (P.C.); *Balraj Kunwar v. Jagat Pal Singh*, 26 A. 393 (P.C.) = 8 C.W.N. 699 = 11 Bom. L.R. 516 = 1 A.L.J. 384.

When a party has been led into the contest, whether as plaintiff or defendant, by the state in which the deceased had left his papers and his affairs, costs would generally come out of the estate. (29)

Where difficulty has been created and litigation has been in a manner rendered necessary by the act of the testator, for instance, by reason of the ambiguity or inconsistency in the provisions of his will, the Court orders costs of all parties to come out of the estate. (30)

Where the suit is not one for the construction of a will, but is really an attempt of the plaintiff to oust from his property a person who has been enjoying possession of it, in which the plaintiff took the risk as to whether the Court would take his view of the construction—if in such a case, the plaintiff fails,—he must pay the costs of the litigation. (31)

(29) *Hillam v. Walker*, 1 Hagg. 75; *Blake v. Knight*, 2 N. of Cas. 346; *Abbott v. Peters*, 4 Hagg. 381; *Armstrong v. Huddleston*, 1 Moo. P.C. 491; *Ayers v. Ayers*, 5 N. of Cas. 381, cited in *Triest and Coote*, 13th Ed., 512.

(30) *Aghore Nath Mukerjee v. Srimati Kamini Debi*, 11 C.L.J. 461 at p. 462 = 6 Ind. Cas. 554, referring to in *Srinibash v. Monmohini*, 3 C.L.J. 224. His Lordship Mookerjee, J., said in the course of the judgment :—"The fourth ground urged by the appellants relates to the costs of the litigation. It has been contended that in a case of this description, the costs of all the parties ought to be paid out of the estate. No doubt as observed by Lord Cairns, L.C., in *Charter v. Charter*, (1874) L.R. 7 H.L. 364 and by this Court in *Srinibash v. Monmohini*, (3 C.L.J. 224), where the difficulty has been created and litigation has been in a manner rendered necessary by the act of the testator, for instance, by reason of the ambiguity or inconsistency in the provisions of his will, it is proper to direct that the costs of all parties should come out of the estate. The present case, however, does not, in our opinion, fall within this rule. The substantial question raised here had been settled by judicial decisions of the highest authority, and this litigation has been forced upon the plaintiff by reason of the endeavour of the defendant to impair the effect of such decisions. We must further remember that if the costs were to be thrown upon the properties of the endowment, a considerable portion of the income, if not of the corpus also, might be absorbed for purposes never contemplated by the pious founder. We are consequently unable to accede to the last prayer of the appellants that the debutter estate may be burdened with the costs of the contesting claimants for the office of trustees." *Aghore Nath Mukerjee v. Srimati Kamini Debi*, 11 C.L.J. 461 (476, 477) = 6 Ind. Cas. 554.

(31) *Lala Ramjewan Lal v. Dal Koer*, 24 C. 406. The Court, Trevelyan and Beverley, JJ., said :—"Regarding the question of costs, that we think, is a case where the defendant is entitled to his costs. This is not an ordinary case of a suit brought for the construction of a will. It is a case in which an attempt has been made to oust from his property a person who has been enjoying possession of it, although the title of the plaintiff depends upon the construction of a will. He took his risk as to whether the Court would take his view of the construction, and, having failed, he must pay for the litigation. The defendant (appellant) is, in our opinion, entitled to costs against the

In an administration suit no costs can be given out of the estate, except for those proceedings which are in their origin properly directed for the benefit of the estate, or which have in their results conduced to that benefit.⁽³²⁾

(c) Where proceedings are directed for benefit of estate.

If the suit has enabled the Court to administer the estate, the plaintiff though he fails in his particular claim will be allowed his costs out of the estate.⁽³³⁾

Where a party entitled in distribution simply calls for proof of a will, and merely cross-examines the witnesses, without any misconduct or vexatious procedure in the suit, he is entitled to have his costs out of the estate.⁽³⁴⁾

(d) Where a party merely calls for proof of will.

The heirs of a deceased person have a right to insist upon an adverse will being proved in solemn form by the attesting witnesses, and ought not to be saddled with the adverse party's costs when occasioned by such opposition as they were entitled to offer.⁽³⁵⁾

If there is a sufficient and probable ground for looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party will be relieved from the costs of his successful opponent.⁽³⁶⁾

(e) Where party opposing the will has sufficient ground to question validity of will or capacity of testator.

plaintiffs-respondents in each case, and the order we make is that the appellant do recover in each of the appeals one-third of the highest set of costs, in respect to the hearing fee, that he is entitled to in any one of these three appeals. This concerns the hearing fee in this Court alone. He is also entitled to all other costs in these appeals, and to the costs in the lower Court." *Lala Ramjewan Lal v. Dal Koer*, 24 C. 406 at 412. The costs of an administration suit are to be considered as the first charge upon an estate. *Zoomes v. Stotherd*, 1 Sim. and Stu. 461; Wms. 993; Waller and Elg. 184. As regards costs of probate, the residuary estate is primarily liable. *Dayabhai Tapidas v. Damodardas Tapidas*, 21 B. 75.

(32) *Barlett v. Wood*, 9 W.R. Eng. 817; Stokes. 177.

(33) See *Thompson v. Sheppard*, 2 Cox. 161, where the plaintiff filed his bill on the footing of an intestacy, and a will was afterwards established in the Ecclesiastical Court; and *Taylor v. Haygarth*, 8 Jur. 135, where the plaintiffs unsuccessfully claimed to be the next-of-kin of an intestate, and the real next-of-kin were ascertained by enquiries in the suit.

(34) *Prinsep v. Dyce Sombre*, 10 Moo. P.C. 292. For a case in which a caveatrix who not content with requiring proof in solemn form and cross-examining the witnesses, had made charges against the plaintiff, was condemned in costs. *In the goods of Luchminarain; Ramrick Das v. Musst. Brijee Coomari*, 5 C.W.N. colxi.

(35) *Matunginee Dossee v. Huree Pershad Mundul*, 24 W.R. 25.

(36) *Per Lord Penzance in Mitchell v. Gard*, 3 Sw. & Tr. 275. *In the goods of Sirdar Dyal Singh Majitha*, P.L.R. (1900) p. 251; see *Ferry v. King*, 3 Sw. & Tr. 51; *Williams v. Henry*, 3 Sw. & Tr. 471; *Tippett v. Tippett*, 35 L.J.P. & M. 41; L.R. 1 P. & D. 54; Wms. 381; Tr. & Coote, 504, 505; Bro. pp. 442, 448.

Costs would also come out of the estate in cases where there was a reasonable doubt as to the testator's testamentary competency at the time of the execution of the will.⁽³⁷⁾

(f) Where there is just cause for litigation.

No hard and fast rule can be laid down as to whether a party is entitled to costs, because there is *justa causa litigandi*. But it does not follow that a party is entitled to his costs because there is *justa causa litigandi*.⁽³⁸⁾

(g) Where doubtful questions of law are involved.

Where the party opposing relies upon so difficult and doubtful a question of law, that it is desirable that it should be decided by a competent Court ⁽³⁹⁾ costs would be ordered to be paid out of the estate. But where the construction of a will was not so difficult as to have required the assistance of the Court, it was held to be not a case where the estate should bear the costs.⁽⁴⁰⁾

(h) Where the circumstances of the case call for a judicial investigation of the matter;

Where a case from its peculiar circumstances pre-eminently called for investigation of the matter by Court, costs will come out of the estate.⁽⁴¹⁾

(i) Where the executor proves will in solemn form.

Where an executor proves the will in solemn form, whether of his own motion or otherwise, he has a right to have his costs out of the estate. But if probate is refused, it is in the discretion of the Court to grant or refuse him costs out of the estate.⁽⁴²⁾

(j) Where next of kin or executor successfully contests later will.

When a next-of-kin or person entitled in distribution, or an executor or legatee of a former will, successfully contests the validity of a latter will, the Court will give him costs out of the estate, or against the unsuccessful party.⁽⁴³⁾

(37) *Frere v. Peacock*, 1 Rob. Ecc. Rep. 456; *Waring v. Waring*, 5 N. of Cas. 324; *Borlase v. Borlase*, 4 N. of Cas. 140, cited in Triest. and Coote, 13th Ed., 512.

(38) *Barwick v. Mullings*, 2 Hagg. 234, cited in *Barada Proshad Banerjee v. Gajendra Nath Banerjee*, 13 C.W.N. 557 (563) = 9 C.L.J. 323 = 1 Ind. Cas. 289.

(39) *Robins v. Dolphin*, 1 Sw. & Tr. 518; Wins 380 (u); Bro. P.P. 445; Tr. and Coote, 13th Ed., 512; *Brooke v. Kent*, 3 Moo. P.C. 234.

(40) *Narayani Dasi v. Administrator-General of Bengal*, 21 C. 633.

(41) *Jones v. Godrich*, 5 Moo. P.C. 16; *Coventry v. Williams*, 3 N. of Cas. 172; *Symons v. Tozer*, 3 N. of Cas. 55; *Keating v. Brooks*, 4 N. of Cas. 273; *Gregory's case*, 4 N. of Cas. 643, cited in Triest and Coote, 13th Ed. 513.

(42) Tr. and Coote, 496, 498.

(43) *Critchell v. Critchell*, 3 S. & T. 41. See also *In the goods of Taramoni Dasi*, 25 C. 553.

A legatee is now considered as bringing his action on behalf of himself, and all other legatees of the testator.⁽⁴⁴⁾ The costs of an action to establish a title to a legacy, whether pecuniary or specific,⁽⁴⁵⁾ are *prima facie*, and always if there is a difficulty of construction, or general administration is necessary, payable out of the general assets. So the general estate, and not the particular fund, must bear the costs of a suit to establish a *donatio mortis causa*;⁽⁴⁶⁾ or to declare the rights of parties to a legacy charged on real estate;⁽⁴⁷⁾ or to have a legacy in which the plaintiff has a reversionary interest, whether vested or contingent, set apart and secured.⁽⁴⁸⁾

Where a pecuniary or specific legacy is given to a class, the costs of raising the legacy only will come out of the general estate, and the costs of administering the fund comprising the costs of each person proving his title as a member of the class, will come out of the fund itself.⁽⁴⁹⁾

A beneficiary who successfully resists an attempt by another beneficiary to prove a false will is not as a matter of right entitled to be paid his costs out of the estate. The costs are in the discretion of the Court and may be directed to be paid out of the estate of the deceased in a suitable case. S. 102 of the Probate and Administration Act does not justify a contrary inference.⁽⁵⁰⁾

(44) *Thomas v. Jones*, 1 Dr. & S. 134; 29 L.J. Ch. 570.

(45) *Bagshawe v. Newton*, Beames. 17; *Barton v. Cooke*, 5 Ves. 464; *Lonsdale v. Berchthold*, 3 Jur. N.S. 328.

(46) *Gardner v. Parker*, 3 Mad. 184 (Eng.).

(47) *Dugdale v. Dugdale*, 12 Beav. 247.

(48) *Studholme v. Hodgson*, 3 P.W. 300; *Handley v. Davies*, 5 Jur. N.S. 90. See Morgan & Wurtzburg's Law of Costs, 2nd Ed., 1882, Ch. IV, S. 2, p. 168.

(49) *Boycott v. Newman*, 4 W.R. 707 (Eng.); 2 Jur. N.S. 702; *Wallis v. Witham*, Beames. App. 1; but see *contra*, *Dugdale v. Dugdale*, 12 Beav. 247.

(50) *Barada Proshad Banerjee v. Gajendra Nath Banerjee*, 13 C.W.N. 557=9 C.L.J. 383=1 Ind. Cas. 289. His Lordship Mookerjee, J., said in the course of the judgment:—S. 102 of the Probate and Administration Act merely provides that the expenses of obtaining probate or letters of administration, including the costs incurred for or in respect of any judicial proceedings that may be necessary for administering the estate, are to be paid next after the funeral expenses and death-bed charges. This provision does not justify the inference that if one beneficiary set up a false will and another beneficiary successfully resists his application, the latter is entitled as a matter of right to be paid his costs out of the estate. As is pointed out in Williams on Executors, 10th Ed., Vol. I, p. 286, it does not follow that a party is entitled to his costs out of the estate, because there is *justa causa litigandi* (*Barwick v. Mullings*, 2 Hagg. 234 (1830).) The costs are in the discretion of the Court, and may be directed to be paid out of the estate of the deceased in a suitable case, for instance, as was ruled by Sir J. P. Wilde in *Mitchell v. Gard*, 3 Sw. & Tr. 275 (1864), the costs may be properly paid out of the

(n) Where joint letters of administration are issued.

Where a decree in a contested probate case directs that the costs of both parties should be paid out of the estate, and that joint letters of administration should issue to both the parties. *Held*, that this does not entitle one of the joint administrators to execute the decree against the other, and that the proper course to follow is to sell or mortgage a sufficient portion of the estate in order to pay off the costs paid by the parties.⁽⁵¹⁾

(o) Where probate was granted of subsequent inconsistent will.

The executor of a Will had obtained probate thereof, when the executor of a subsequent (and inconsistent) Will applied for and obtained probate of the second Will. *Held*, that having regard to the circumstances of the case, and to the fact that the litigation was produced by the conduct of the testatrix herself, the executors of both wills were entitled to their costs to be paid out of the estate; but that in so far as the costs would not be covered by the estate, each party must bear his own costs.⁽⁵²⁾

estate, if the course of litigation takes its origin in the fault of the testator or of those interested in the residue, or, if there be a sufficient and probable ground to question either the execution of the Will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent. The decision in *Davies v. Gregory*, L.R. 3 P. & D. 28 (1873), indicates some of the circumstances in which each party may be made to pay his own costs; for instance, in cases where neither the testator by his own conduct nor the executors or persons interested under the Will by their conduct have brought about the litigation as to its validity, but the opponents of the Will, after due enquiry into the facts, entertain a belief in the existence of a state of things, which, if it did exist, would justify the litigation, and the opposition is unsuccessful, each party must pay his own costs (*Prinsep v. Dyce Sombre*, 10 Moo.P.C. 232 (1856).) That the successful objectors in such a case would not be entitled as a matter of right, to get their costs out of the estate is evident from the decision in *Nash v. Yelloly*, 3 Sw. & Tr. 59 (1863). In that case, the plaintiff propounded a Will under which he claimed to be one of the executors. The defendant who was the heir-at-law of the deceased contested the validity of the Will on the ground of undue influence; the opposition was successful, and the Court condemned the executor plaintiff in costs. The defendant then applied that he might get such of his costs out of the estate as he might fail to realise from the plaintiff. Sir O. Cresswell declined to extend the practice of ordering costs out of the estate, and held that the defendant must rely on the party condemned in costs for payment." *Barada Proshad Banerjee v. Gajendra Nath Banerjee*, 13 C.W.N. 557 at 563, 564=9 C.L.J. 383=1 Ind. Cas. 289.

(51) *Hari Padu Mandal v. Karunamoyee Dasi*, 24 Ind. Cas. 214.

(52) *In the goods of Taramoni Dasi*, 25 C. 553. *Sale, J.* said in the course of the judgment:—"I have considered the question of costs, and it appears to me the rule is this:—The executor of the Will of the testator is entitled, in the same way as the next-of-kin would be, to call upon the executor of a prior Will to prove in solemn form and to cross-examine the witnesses in support of the Will, supposing there are any suspicious circumstances in connection with the execution of that Will. In the present case I think the executor of the former Will has done nothing more than discharge the duty cast on him. There were circumstances undoubtedly of suspicion in connection with the execution of the subsequent Will. The testatrix very shortly after executing the

Admission of assets by an executor sufficient for payment of a legacy is an admission for all purposes of the suit, and extends to costs.⁽⁵³⁾ And where a decree is made for payment of a legacy on admission of assets, it will in general be with costs, either out of the estate or by the executor personally.⁽⁵⁴⁾

When several administration suits have been consolidated, and one decree made in all, and the conduct of them given to the plaintiff in one of them, he will be entitled to his further costs properly incurred in prosecution of the decree, beyond his ordinary costs as plaintiff in his own suit, including his costs, charges, and expenses incurred in the conduct of sales under the decree.⁽⁵⁵⁾

Where the construction of a will was not so difficult as to have required the assistance of the Court, it was held to be not a case where the estate should bear the costs.⁽⁵⁶⁾

former will left her place of residence, and, while living under the care and protection of her nephews, executed a will in their favour, which was certainly inconsistent with the terms of the provisions of the previous will. It is quite true the learned counsel for the executor of the first will did not confine himself to cross-examining the witnesses to the subsequent will, but also called evidence; but this was to allow the executor of the former will to give his version of an interview which took place after the death of the testatrix between him and the nephew of the deceased. Taking all the circumstances together, I prefer the account given by the nephews, but I think this circumstance should not disentitle the executor of the former will to his costs. The evidence given on his behalf was very short, and I think the litigation was produced by the conduct of the testatrix herself; and under the circumstances I think the order I should make is that the costs of both parties shall be paid in the first instance out of the estate, and, as the estate is a very small one, so far as the costs would not be covered by the estate each party must bear his own costs. The costs of the plaintiff and defendant will be paid rateably out of the estate, if the estate should be insufficient to pay the costs of both parties in full. So far as the estate may not be sufficient to pay these costs, each party will pay his own costs."—*Per Sale, J. In the goods of Taramoni Dasi*, 25 C. 553 at pp. 554 and 555.

(53) *Attorney-General v. Lewes*, 8 Ha. 32, 44; *Philanthropic Society v. Hobson*, 2 My. & K. 357; *Roch v. Callen*, 6 Ha. 531; *M'Carthy v. M'Carthy*, 1 Moll. 186.

(54) See *Morgan & Wurtzburg's Law of Costs*, 2nd Ed., 1882, Ch. IV, S. 2, p. 168.

(55) *Lockhart v. Hardy*, 10 Beav. 292.

(56) *Narayani Dasi v. Administrator-General of Bengal*, 21 C. 688. The Court, Norris, J., said:—"It has been said that the will is a perplexing and obscure one. I do not think the mere fact that a suit has been brought ought to induce me to say that the will is obscure and perplexing. For my own part I cannot say there is any obscurity about it, and I do not see any reason why, in dismissing the suit, I should not, in accordance with the usual rule, direct the unsuccessful party to pay the costs. I must dismiss the suit, and with costs on scale No. 2." *Per Norris, J. Narayani Dasi v. Administrator-General of Bengal*, 21 C. 688 at 697.

(b) Where action is not for the benefit of the estate.

An exception to the general rule which gives the costs of an administration action out of the estate is made where the action is not for the benefit of the estate, or as to so much of the costs as are occasioned by unfounded charges or vexatious proceedings. "No costs ought to be given out of an estate except for those proceedings only which are in their origin directed with some show of reason and a proper foundation for the benefit of the estate, or which have in their result conduced to that benefit." (57)

(c) Where applicant for letters wilfully conceals the existence and claims of relatives of deceased.

Where an applicant for letters of administration concealed the existence and claims, of which he was aware, of the relatives of the deceased, on the application being dismissed, he was ordered to pay the costs of the application and of the caveats entered by the relatives of the deceased. (58)

(d) Where legatee's claim is not proper.

In *Davies v. Austen*, (59) a decree for payment of a legacy was made without costs, on account of the ungraciousness of the claim, the executors having spent more than the amount of the legacy on the legatee during his infancy. (60)

(e) Where opposition improper.

When from circumstances disclosed during the progress of the cause, he might have earlier judged that the opposing party ought

(57) *Per* Lord Westbury, C., in *Bartlet v. Wood*, 9 W. R. 817 (Eng.); and in that case the costs occasioned by charges of fraudulent conduct made in an infant legatee's bill against the executor and disproved were disallowed. In *Mackenzie v. Taylor*, 7 Beav. 467, a bill for general administration was filed on behalf of infants entitled to one moiety of the residue, and the persons entitled to the other moiety by answer, and at the hearing objected to the suit as unnecessary, and the accounts having proved to be substantially correct, the costs were ordered to be paid out of the plaintiff's share alone. See also *Barber v. Barber*, 3 My. & Cr. 688, where the costs were paid out of the two shares of residue which alone were substantially affected by the suit; *Hilliard v. Fulford*, 4 Ch. D. 389; 46 L. J. Ch. 43; 25 W. R. 161 (Eng.); 35 L.T. 750; *In re Chennel, Jones v. Chennell*, 8 Ch. D. 492

(58) *Jaikisondas v. Harikisondas*, 2 B. 9. Green, J. said:—"In the above circumstances the application must be dismissed, and with costs. Had the applicant been unaware of the existence or claims of the caveators and other relations of the husband or had he brought their existence to the attention of the Court when making his application, it might have been a case for not ordering the applicant to pay the caveators' costs. But he was quite aware of their existence and claims, as they were set up directly after Nathibai's death and it is the duty of all applicants for administration to bring to the attention of the Court the existence of persons who have any fair ground of adverse claim or opposition to such application." *In the goods of Nathibai*, 2 B. 9 at p. 19=2 Ind. Jur. 19.

(59) 1 Ves. Jun. 247.

(60) See *Morgan & Wurtzburg's Law of Costs*, 2nd Ed., 1882, Ch. IV, S. 2, p.169.

not to have proceeded further with his objection, costs will not come out of the estate.⁽⁶¹⁾

When, prior to the commencement of the suit, circumstances which *prima facie* cast suspicion, had or might have been removed by inquiries which he had made or had the opportunities of making, the unsuccessful party would be ordered to pay his own costs as well as the costs of the other party.⁽⁶²⁾

(f) Where opposing party might have removed suspicion by proper enquiry.

Where by his plea or his cross-examination the party unsuccessfully opposing the will attempted to make a case of fraud or conspiracy not justified by the evidence, he will forfeit his claim to costs out of the estate.⁽⁶³⁾

(g) Where opposing party makes false charge of fraud and conspiracy.

The plaintiff may lose his costs if he is guilty of laches in bringing forward his claim,⁽⁶⁴⁾ though the defendants set up the Statute of Limitations and fail.⁽⁶⁵⁾

(h) Where plaintiff is guilty of laches.

Where neither the testator by his own conduct, nor the executors or persons interested under the will by their conduct have brought about the litigation as to its validity, but the opponents of the will, after due inquiry into the facts, entertained a *bona fide* belief in the existence of a state of thing which, if it did exist, would justify litigation, and the opposition is unsuccessful, each party must pay his own costs.⁽⁶⁶⁾

(3) Cases where each party was directed to bear his own costs.

When probate is refused to the executor, it is in the discretion of the Court to grant or refuse him his costs out of the estate, or to condemn him in the costs incurred by the party who has successfully opposed the probate.⁽⁶⁷⁾

(4) Case where probate was refused to executor—Costs in discretion of Court.

Where the executor was himself principally benefited by the will, and there were strong suspicions of fraud against him, he was personally condemned in Courts.⁽⁶⁸⁾

So also, he was ordered personally to pay the costs in a case where the will was found to have been unduly obtained by him from his wife.⁽⁶⁹⁾

(61) *Dean v. Russell*, 3 Phill. 334.

(62) *Nichols v. Binns*, 1 S. & T. 239.

(63) *Barry v. Bullin*, 2 Moo. P.C. 492, cited in *Triest & Coote*, 13th Ed., 513.

(64) *Lord v. Lord*, 3 Jur. N.S. 485.

(65) *Ibid.*

(66) *Davies v. Gregory*, 3 P. & D. 28; *Prinsep v. Dyce Sombre*, 10 Moo. P.C. 232.

(67) *Triest & Coote*, 13th Ed., 511.

(68) *Dodge v. Meech*, 1 Hagg. 612, cited in *Triest & Coote*, 13th Ed., 513.

(69) *Marsh v. Tyrrell*, 2 Hogg. 141; *Baker v. Butt*, 1 Curt. 172.

Costs of
executors and
adminis-
trators in
administra-
tion suits—
General rule
—Paid out of
estate.

Executors and administrators are, in the absence of gross misconduct, entitled to their full costs of the suit as between solicitor and client out of the estate, together with any other costs, charges, and expenses properly incurred by them.⁽⁷⁰⁾

As executors can only obtain complete exoneration by having their accounts passed in the Court, the Court is anxious not to deter them from so doing by refusing them costs.⁽⁷¹⁾

A man who fulfils the duties of an administrator, executor or trustee, is entitled as of right to be recouped everything that he has expended properly in his character as administrator, executor or trustee.⁽⁷²⁾

Such costs are in English law, not within the discretion of the Court and do not come within the discretion of the Court until it is adjudicated against such trustee that he has been guilty of misconduct.⁽⁷³⁾

(70) See *Sharp v. Lush*, 10 Ch.D. 468; 27 W.R. 528 (Eng). Although an executor or administrator is entitled to his costs and expenses, he is not entitled to any remuneration unless it be given to him by the will. Ph. and Trev. 411. See also notes under S. 181.

(71) *Low v. Carter*, 1 Beav. 426; *Hall v. Hallet*, 1 Cox. 141; and see *Howard v. Easton*, 29 W.R. 885 (Eng); *Curteis v. Candler*, 6 Madd. 123 (Eng).

(72) *Re Jones*, (1897) 2 Ch. p. 197; *per Kekewich, J.*, *Re Reddo* (1893) 1 Ch., p. 558, C.A., *per Lindley, L.J.*; *Cotterell v. Stratton*, (1872) L.R. 8 Ch. 295, C.A.

(73) *Per Cotton, L.J.*, *Re Knight's Will* (1884), 26 Ch. D., p. 90, C.A.; and see *Re Pugh*, (1888) 57 L.T. 858, C.A.; *Farrow v. Austin*, (1881) 18 Ch. D. 58, C.A.; *Turner v. Hancock* (1882), 20 Ch. D. 303, C.A. If a trustee brings or defends an action unsuccessfully and without leave, it is for him to show that the costs so incurred were properly incurred (*Re Beddoe, supra*). In an action against an executor or administrator, other than an action for administration of the assets, costs are in the discretion of the Court or Judge. R.S.C. O. LXV, r. 1. In such cases the liability to costs will, generally speaking, be governed by the ordinary rule, which throws them on the unsuccessful party. Accordingly, if an executor or administrator is sued in equity by a creditor for a debt of the deceased, and the creditor succeeds in establishing his demand, the Court will direct the payment of the amount due to the creditor, together with his costs, out of the estate. Dan. Ch. Pr. 7th Ed., 998; *Lyse v. Kingdon*, 1 Coll. 184, but unless the estate is insufficient, no order is made with regard to the payment of the costs of the personal representative, it being supposed that he may reimburse himself out of the assets; so that if there be no further fund out of which he may reimburse himself, the costs must come out of his own pocket: and even if it should appear, upon taking the accounts, that there is no such fund, still the Court will not give any directions with regard to his costs. Dan. Ch. Pr. 7th Ed. 998; *Morgan and Wurtsburg on Costs*, 179. The question whether an executor or administrator who sues or defends, and is unsuccessful, is to be repaid his costs out of his estate, is totally distinct from the question whether he is liable to the other party to the action or not. See *Williams' on Executors and Administrators*, Vol. II, 10th Ed., 1905, p. 1668 (1670).

An administrator is entitled to his costs of administration action, even though the action has been caused by a claim by him ultimately disallowed, provided the claim was made under an honest mistake and was neither fraudulent nor monstrous.⁽⁷⁴⁾

Where a suit is instituted, either by creditors or residuary legatees, for a general administration of assets, so that the whole estate of the deceased is necessarily taken from the hands of the personal representative, and distributed under the direction of the Court, his costs of suit, as between solicitor and client, are, generally speaking, provided for; and even where the assets are insufficient to pay the creditors of the deceased, these costs, and any other costs, charges, and expenses properly incurred by him, continue the first charge on the estate.⁽⁷⁵⁾

The rule stated above that the executor or administrator is generally entitled to have his costs paid out of the estate is the general rule; but it is governed by the circumstances of each particular case, and in cases marked by fraud, evasion, or neglect of duty, the Court will not merely refuse to allow the executor his costs out of the assets, but will order him to pay the costs of the suit, or of so much of the suit as is attributable to the breach of duty on his part;⁽⁷⁶⁾ but mere

(74) *Re Jones*, (1897) 2 Ch. 190, following *Taylor v. Taylor*, (1875), L.R. 20 Eq. 155. Trustees are entitled to payment of their costs, charges and expenses in priority to the costs of all other parties *Dodds v. Tuke*, (1884), 25 Ch. D. 617 (action by beneficiaries under creditor's trust deed); *Wetenhall v. Dennis* (1863), 33 Beav. 285, they may retain costs out of income until provision is made for raising them out of the corpus (*Stott v. Milne* (1884), 25 Ch. D. 710; and see *Re Turner*, (1907) 2 Ch. 126).

(75) *Tipping v. Power*, 1 Hare 405, 411; *Gaunt v. Taylor*, 2 Hare 413; *Jackson v. Woolley*, 12 Sim. 12; *Ottley v. Gilby*, 8 Beav. 602; *Tanner v. Dancey*, 9 Beav. 339; *Re Griffith*, (1904) 1 Ch. 807. As to the priority of the executor's costs of an administration action over costs in a probate action, see *Re Mayhew*, 5 C.D. 596. See also *Re Price*, 31 C.D. 485. As to the priority of executor's costs in a creditor's administration action where there is no personal estate, see *Re Pearce*, 56 L.T. 228; *Hibernian Bank v. Lauder*, (1898) 1 I.R. 262. In an administration suit by a mortgagee who has obtained an order for sale of the real and leasehold estate the personal representatives are entitled, if the assets are deficient, to payment of their costs, charges, and expenses, in priority to the plaintiff's costs of the sale; *Re Spensley's estate*, L.R. 15 Eq. 16. But see *Pinchard v. Fellows*, L.R. 17 Eq. 421.

(76) *Heighington v. Grant*, 1 Phil. Ch. C. 600; *Hide v. Haywood*, 2 Atk. 126; *Hewett v. Foster*, 7 Beav. 348. But see as to costs subsequent to decree *Easton v. Lander*, W.N. (1892) 176. In *re Skinner*, (1904) 1 Ch. 289, where proceedings for administration were rendered necessary by the gross and indefensible neglect of trustees

negligence is not sufficient to deprive an executor or administrator of his costs.⁽⁷⁷⁾

(i) Misconduct.

A trustee is, in an administration action, always entitled to his costs as between solicitor and client, unless a case of misconduct is made out against him such as to justify the Judge in depriving him of them.⁽⁷⁸⁾

If misconduct be proved the costs are in the discretion of the Court.⁽⁷⁹⁾

It is, of course, impossible to define exactly what will amount to such misconduct; where executors first withheld accounts and

to deliver accounts, the defaulting trustees were ordered to pay all the costs, including the costs of taking and vouching the accounts. Farwell, J., at p. 293, says: "I think that the view expressed by Lord Langdale in *Hewett v. Foster*, as explained by the Court of Appeal in *Easton v. Landor*, was a correct statement of the law applicable at the date of the case before him. Under the old practice, inasmuch as every one interested in the estate had a right to have the accounts taken in Court, the order for an account in an administration action went as a matter of course, and the costs of taking it came as a general rule out of the estate. But that is no longer the case now. Since October 24th, 1883, there is no longer any such general right to have an account taken, and it is by no means a matter of course that the costs of taking the account are paid out of the estate." See also *Fell v. Lutwidge*, Barnard, Chanc. 322; *Avory v. Osborne*, *ibid.* 352; *Brown v. How*, *ibid.*, 358; *Vaughan v. Thurston Colles*, 175; *Bennett v. Atkins*, 1 Y. & Coll. 247; *Baker v. Carter*, *ibid.* 250; *Toner v. Thompson*, 7 Sim. 145; *Western v. Chapman*, 1 Coll. 181; *Tickner v. Smith*, 3 Sm. and G. 42; *Boynon v. Richardson*, 31 Beav. 340. See also Dan. Ch. Pr. 7th Ed., pp. 991—997.

(77) *Travers v. Townsend*, 1 Moll. 496. See hereon Morgan and Wurtzburg on Costs, 179. Rule I of O. LXV, of the Rules of the Supreme Court of England, which provides that the costs of all proceedings in the Supreme Court are in the discretion of the Judge, except from the general rule the case of an executor or administrator "who has not unreasonably instituted or carried on or resisted any proceedings," "and provides that he is not to be deprived" of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division (O. LXV, r. 1). In *Seers v. Hind*, 1 Ves. Jun. 294; *Newton v. Bernet*, 1 Bro. C.C. 362; *Roche v. Hart*, 11 Ves. 58, 62; *Mosley v. Ward*, *ibid.*, 581, 8; *Ashburnham v. Thompson*, 13 Ves. 402; *Crackell v. Bethune*, 1 J. and W. 586; *Tickner v. Smith*, 3 Sm. and G. 42; *Eglin v. Saunderson*, 3 Giff. 434; *Walron d. Walron d.*, 29 Beav. 586, the executors had to pay all the costs of the suit; and see *Wroe v. Seed*, 4 Giff. 425; *In re Radclyffe*. *Pearce v. Radclyffe*, 50 L.J. Ch. 317; 29 W.R. 420 Eng.; *Hooper v. Hooper*, W.N. (1874), 174.

(78) *Re Love*, 29 C.D. 348. See also *Re Knight's Will*, 26 C.D. 82. And so an administrator, even though the action has been caused by a claim by him for certain payments disallowed in his accounts provided the claim was made under an honest mistake and was neither fraudulent nor monstrous; *Re Jones*, (1897) 2 Ch. 190.

(79) *Charles v. Jones*, (1886), 33 Ch. D. 80, C.A. mortgagee; *Easton v. Landor*, (1892), 62 L.J. Ch. 164, C.A. (trustee). But the question as to whether there was good ground for depriving a trustee of his costs can be the subject-matter of an appeal (*Turner v. Hancock*, (1883), 20 Ch. D. 303, C.A.; *Re Knight's Will* (1884), 26 Ch. D. 82, C.A.; *Re Pugh*, *Lewis v. Pritchard*, (1888), 57 L.T. 858, C.A.

then rendered incorrect ones they were ordered to pay the costs of the action, (80) and mere non-feasance has been held to amount to such misconduct as in *Re Weal*, (81) where executors allowed their solicitor to retain and pay himself some costs which the Court held to be unnecessary, and other costs which should have been charged against *corpus* but which the executors had improperly charged against income.

Where the executor was himself principally benefited by the (ii) Fraud. will, and there were strong suspicions of fraud against him, he will be made personally liable for costs. (82)

In *Hide v. Haywood*, (83) executors guilty of fraud were charged with costs, notwithstanding a special direction in the will that they should have costs out of the estate.

Where the will was found to have been unduly obtained by (iii) Undue the executor from his wife costs were ordered to be paid by the influence. executor personally. (84)

(80) *Re Radcliffe*, 50 L.J. Ch. 317.

(81) 42 C.D. 674.

(82) *Dodge v. Meech*, 1 Hagg 612, cited in *Triest & Coote*, 13th Ed. 513.

(83) 2 Atk 126.

(84) *Marsh v. Tyrrell*, 2 Hogg. 141; *Baker v. Butt*, 1 Curt. 172. The plaintiffs propounded the will and codicils of one *William Mackenzie* of Dublin and London (as executors) who died on May 1899. The Will was dated in 1897 and the codicils in the two following years. The principal defendant was the testator's widow from whom he had separated in 1885, fifteen years after his marriage with her, and to whom he made an allowance, but there was considerable litigation between the husband and wife since. Some of the children were also defendants, but not the testator's eldest son who did not contest the will. One of the questions raised was that the Will was executed by "undue influence." The testator in failing health had engaged a housekeeper called *Mrs. Clarkson*. *Mrs. Clarkson* was the wife of a *Mr. Foote*, but on his deserting her, she had lived with a *Mr. Clarkson*, as his mistress. This was known to the testator. By his testamentary dispositions he had left a legacy for *Mrs. Clarkson* or *Mrs. Foote*, a legacy to his daughter Maude, and the rest and residue to his son. The learned Judge on his summing up to the jury explained what was "undue" influence; to be "undue" the influence must amount to coercion so that a man's will is not the true expression of his wishes, but that of the person exercising the influence, super-imposing his own mind on that of the testator. Every influence was not undue, some were quite legitimate, because the object of making wills was to benefit others as a return for benefits received or because of the influence of kinship or affection. The evidence disclosed that *Mrs. Clarkson* had acted with perfect propriety of conduct. The jury having found for the plaintiffs, supporting the testamentary dispositions, Mr. Justice Barnes pronounced for the Wills and Codicils and ordered costs to follow the result, refusing to order costs personally against the guardian *ad litem* of one of the minor defendants. (See *Morgan*

(iv) Breach of trust.

Costs occasioned by breach of trust will have to be paid by the party or parties guilty of such breach.⁽⁸⁵⁾

Where two or more defendants are implicated in a breach of trust, the plaintiff is entitled to an order for payment of his costs by all, and the Court will not distinguish between the relative degrees of culpability.⁽⁸⁶⁾

Where a breach of trust, not accompanied with fraud, is made good and costs consequent thereon are paid, the trustee will be allowed costs subsequently incurred.⁽⁸⁷⁾

(v) Negligence.

The mere fact of executors being charged with interest on balances in their hands, or any mere negligence, is not in itself a sufficient ground for visiting them with the costs of the action, or even refusing them costs.⁽⁸⁸⁾

Sir A. Hart said:—"I have often heard it laid down as a principle by some of the greatest Judges, that an executor, though in the result made answerable for default by reason of loss incurred through neglect, or chargeable with interest for retaining money

v. Morgan, 12 L.T.R. 199 and *Reynolds v. Mead*, the Times, 6th December 1895). The application that defendants should not be condemned in costs on the ground that there were reasonable grounds for enquiry was also refused. *Hoper v. Mackenzie*, 5 C.W.N. (Journal portion), p. cxiv-cxv.

(85) *Lawrence v. Bowle*, 2 Ph. 140.

(86) *Ibid.* In *Raphael v. Boehm*, 11 Ves. 92; 13 Ves. 590; *Tebbs v. Carpenter*, 1 Madd. 290 (Eng.); *Peacock v. Reddington*, 5 Ves. 800; *Colyer v. Colyer*, 11 W.R. 79 (Eng.); 32 L.J. Ch. 101, executors, though charged with interest on balances in their hands, were allowed the costs of the suit, except as to the enquiries thereby rendered necessary, of which they had to pay the costs. And in *Heighington v. Grant*, 1 Ph. 600, they were charged with compound interest, and made to pay the costs of so much of the suit as sought to charge them with interest, but received their full costs of the rest of the suit; and see *Pride v. Fooks*, 2 Beav. 430; *Sculthorpe v. Tipper*, 13 Eq. 232, where trustees were ordered to pay so much of the costs as was caused by their default: *Wilding v. Lander*, W.N. (1866), 327. In *Birks v. Micklethwait*, 34 L.J. Ch. 362, where large balances were found due from executors, they were not allowed any costs, even on condition of making good the balances.

(87) *Peacock v. Colling* (1885), 33 W.R. 528; *Hewett v. Foster* (1844), 7 Beav. 394, and costs other than those occasioned by such breach will be allowed. *Knott v. Cottee* (1852), 16 Beav. 77; *Heighington v. Grant*, (1844), 1 Ph. 600; *Pride v. Fooks*, (1840) 2 Beav. 430. Cf., however, *Easton v. Landor*, (1892), 32 L.J. Ch. 164, C.A.

(88) *Flanagan v. Nolan*, 1 Moll. 84; *Travers v. Townsend*, *Ibid.* 496; *Noble v. Meymott*, 14 Beav. 471; *Bennett v. Atkins*, 1 Y. & C. 247; *Woodhead v. Marriott*, C.P. C. 62; *Eglin v. Saunderson*, 3 Giff. 434; notwithstanding *Lord Loughborough's dictum in Seers v. Hind*, 1 Ves. Junr. 294, which was disapproved of by *Sir W. Grant in Ashburnham v. Thompson*, 13 Ves. 402, as too broadly stated.

in his hands, yet if there was nothing beyond such negligence or retention of money against him, is entitled to the costs of the suit.”(89)

If the executors' accounts are falsified, or they have been guilty of gross or wilful negligence, or have acted from fraudulent or interested motives, they will have to pay the costs of the suit, or so much of it as has been occasioned by their misconduct : or, at least, will not be allowed costs.(90)

“If a suit would have been proper, and the executor a necessary party, though the executor had not misconducted himself, he ought not to pay all the costs of such suit, though in the course of the suit it appears that he has misconducted himself ; but if the misconduct of the executor was the sole occasion of the suit, he ought then to pay the costs.”(91)

In *Heugh v. Scard*,(92) Sir G. Jessel, M.R., expressed himself as follows :—“In certain cases of mere neglect or refusal to furnish accounts, where the neglect is very gross, or the refusal wholly indefensible, I reserve to myself the right of making the executor or trustee pay the costs of litigation caused by his neglect or refusal. But I expressly guard myself from saying that in every case of mere neglect, or even in every case of mere refusal, an honest executor or trustee, who has fairly discharged his duty, an onerous and thankless duty, is to pay costs. But where I find, in addition to an unjustifiable neglect or delay that there has been misconduct in dealing with the trust fund, then I look upon that neglect or delay, as an aggravation of the latter misconduct ; and although, standing alone, the neglect or delay might not be sufficient to induce me to order the trustee or executor to pay costs, yet, when combined with such misconduct, I should order him to do so.”(93)

(89) *Per* Sir A. Hart, L. C., in *Travers v. Townsend*, 1 Moll. 496.

(90) See *Gilbert v. Lee*, 13 W.R. 1012 (Eng.), where Romilly, M.R. disallowed the costs of an executor who vexatiously obstructed the taking of his accounts.

(91) *Tebbs v. Carpenter*, 1 Mad. 290 (Eng.).

(92) 24 W.R. 51 (Eng.).

(93) In the following cases—*Bailey v. Gould*, 4 Y. & C. 221 ; *Bennett v. Atkins*, 1 Y. & C. 247 ; *Noble v. Meymott*, 14 Beav. 471 ; *Flanagan v. Nolan*, 1 Moll. 84 ; *Travers v. Townsend*, *ibid*, 496 ; *Royds v. Royds*, 14 Beav. 54 ; *Cotton v. Clarke*, 16 Beav. 134 ; *Holgate v. Haworth*, 17 Beav. 259, executors retaining balances in their hands and charged with interest thereon, were nevertheless allowed their full costs.

But if the plaintiff fails to establish the particular charges made, the executors, though they have been guilty of negligence, will be entitled to their costs of meeting those charges.⁽⁹⁴⁾

The circumstance that the estate proves insufficient may be a reason for refusing the trustees all or a part of their costs, if they have not strictly administered their trust.⁽⁹⁵⁾

If trustees by their own neglect to preserve evidence which it was their duty to preserve have allowed colour to be given to the institution of a suit against them, such action, even if dismissed, will be dismissed without costs.⁽⁹⁶⁾

(vi) Perverse-
ness and
unreasonable
caution and
suspicion.

If the executors, though not guilty of any breach of trust and without any fraudulent motives, have acted perversely or with unreasonable caution or suspicion, they will have to pay the costs of a suit occasioned by such conduct. An executor is ordinarily bound to render the accounts of his testator's estate to the solicitor of the residuary legatee, and if he refuses he will have to pay personally the costs of the suit up to the hearing; ⁽⁹⁷⁾ but not the subsequent costs if he accounts fairly.⁽⁹⁸⁾

And even if the trustee has acted honestly if his conduct is unreasonable and he sees risks where none in fact exist and refuses to be satisfied by evidence which would satisfy all reasonable men, he must pay the costs, to be taxed as between solicitor and client, which have been occasioned by his over-caution.⁽⁹⁹⁾

(94) See *Smith v. Chambers*, 2 Ph. 221, where it was held that the costs incurred in injudiciously defending an action were not within "wilful neglect and default," and therefore the executors were allowed costs. And see further as to the costs of injudiciously defending an action, *Noble v. Brett*, 5 Jur. N.S. 4; 28 L.J. Ch. 322; where they were not allowed; *Graham v. Wickham*, 34 L.J. Ch. 220; 13 W.R. 396 (Eng.); 11 Jur. N.S. 168; 12 L.T. 39.

(95) *Beer v. Tapp*, 10 W.R. 277 (Eng.). But in *Haldenby v. Spofforth*, 9 Beav. 195, the representatives of a defaulting executor fairly accounting were held entitled to retain their costs of the suit out of the assets, though insufficient to repair the breach of trust. The suit was, in fact, a mere creditor's suit.

(96) *Payne v. Evens*, (1874) L.R. 18 Eq. 356.

(97) *Kemp v. Burn*, 4 Giff. 348; 1 N.R. 257; 11 W.R. 278 (Eng.); 9 Jur. N.S. 375.

(98) *Ibid.* In *Grasham v. Price*, 35 Beav. 47, however, executors who had neglected to produce their accounts were merely deprived of their costs up to the hearing. So in a legatee's suit, where the executor has returned evasive answers to enquiries by the legatee (*Grierson v. Astle*, 3 L.T. 288); or has been unreasonably cautious as to the evidence of a matter of fact (*Lyse v. Kingdom*, 1 Coll. 184); or has annexed conditions to the payment of the legacy which he has no right to impose (*Waller v. Patey*, 1 Rus. 375).

(99) *Re Chapman*, (1895) 72 L.T. 66, C.A.; and see *In re Knox's Trusts*, (1895) 2 Ch. 483 (trustee ordered to pay costs of application for a vesting order under S. 35 of the Trustee Act, 1893).

"The law requires of a trustee no higher degree of diligence (vii) Improper investment. in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs." (100)

Thus, where no negligence or improper conduct was established, they were allowed costs, although the security upon which they had invested proved insufficient. (101)

An executor or trustee is not justified in refusing to pay a legacy (viii) Wrongful distribution of assets. or distribute a fund without the direction of the Court, on the ground of legal doubts in a clear case. (102)

The opinion of counsel, however eminent, is no protection to an executor against costs if he takes upon himself to act upon a particular construction of the will without seeking the direction of the Court. (103)

If he distributes the whole estate according to a wrong construction, he will have to pay personally the costs of a suit, in which the plaintiff successfully establishes his title to a share. (104)

The reason assigned in the above case for charging the executor personally with costs was that by distributing the estate he had prevented the plaintiff having his rights determined at the expense of the estate. (105)

Where executors in making a partial distribution of a residue made two serious mistakes, it was held that the whole costs of the suit should be taken out of the estate as if they had never divided it, and the executors then charged personally with the share of costs attributable to each of the distributed shares. (106)

(100) *Per* Lord Watson, *Learoyd v. Whiteley*, (1887) 12 App. Cas. p. 739; *Smethurst v. Hastings*, (1885) 30 Ch. D. 490.

(101) *Re Whiteley*, (1886) 32 Ch. D. 196.

(102) See *Harvey v. Harvey*, 3 Jur. 949; *Burrows v. Greenwood*, 4 Y. & C. 251; *Firman v. Pulham*, 2 De. G. & S. 99; *Price v. Lowden*, 21 Beav. 508, where the executor or trustee had to pay costs; and *Knight v. Martin*, 1 R. & M. 17, where he got no costs.

(103) *Boulton v. Beard*, 3 De. G. M. & G. 608. Counsel's opinion is no indemnity to a trustee on the question of costs. *Stott v. Milne*, (1884) 25 Ch. D. 710, C. A.; *Re Knight's Trusts*, (1859) 27 Beav. 45; *Re Beddoe*, (1893) 1 Ch. 547; *Devey v. Thornton*, (1851) 9 Hare, p. 232; but see *Ryan v. Nesbitt*, W.N. (1879) 100.

(104) *Boulton v. Beard*, 3 De. G. M. & G. 608.

(105) See *Curtis v. Robinson*, 8 Beav. 242.

(106) *Hilliard v. Fulford*, 4 Ch.D. 389; 46 L.J.Ch. 43; 25 W.R. 161 (Eng.); 35 L. 750 and see *Bath v. Bell*, 39 L.T. 422.

(ix) Denial of indebtedness to account.

In the absence of misconduct, it is no ground for depriving a trustee of costs that, having paid considerable sums on account of the trust, he denied that he was indebted to the trust, although it turned out, when the accounts were taken, that he was indebted to the trust.⁽¹⁰⁷⁾

(x) Executor bringing a useless action.

In the case of *Re Clabburn*,⁽¹⁰⁸⁾ Bacon, V.C., ordered the plaintiff, who was executor and trustee of the Will, to personally pay the costs of an administration action which was held to be unnecessary. The estate in that case was a very small one, and the defendant beneficiaries had offered to concur in a special case to settle any point of doubt or difficulty arising under the Will.

Where an administration action was held to be unnecessary and oppressive it was dismissed with costs to be paid by the plaintiff executor.⁽¹⁰⁹⁾

(xi) Defaulting trustee or executor, costs of.

It is a clear rule that no costs are given to an executor or trustee who is a debtor to the estate until his debt is paid.⁽¹¹⁰⁾

As bankruptcy does not release from debts arising from fraudulent breaches of trust, a bankrupt trustee cannot in such cases have his costs out of the estate until he has made good the debt.⁽¹¹¹⁾ But where the executor's debt is one which will be discharged by the bankruptcy, the Court has held that after the bankruptcy the executor can no longer be regarded as a defaulting executor. He is therefore entitled to his costs since the bankruptcy, but his prior costs must be set off against his debt.⁽¹¹²⁾

(107) *Turner v. Hancock*, *supra*. In *Knott v. Cotte*, (1852) 16 Beav. 77, the costs of an administration suit were given to an executor, although he was charged with the consequences of an improper investment. And even an executor who had applied for and obtained accounts and inquiries which were unnecessary and improper was not deprived of his costs (*Re Dale*, (1889) 62 L.T. 28). *Re Bosworth*, (1881) 29 W.R. 885 (Eng.), is a case where an executor, although guilty of very gross conduct and endeavouring to embarrass the proceedings, was only partially deprived of costs. As to what is "unreasonableness" in carrying on proceedings, see *Brown v. Burdett*, (1888) 40 Ch. D. 244, C.A.

(108) 46 L.T. 848. As to an unnecessary action by a legatee, see *Re Cope*, W.N. (1885), p. 154.

(109) *Re Cabburn*, (1882) 46 L.T. 848.

(110) Williams on Executors and Administrators, 10th Ed. (1905), Vol. II, p. 1670.

(111) *McEwan v. Crombie*, (1883) 25 Ch. D. 175.

(112) *Re Vowles*, (1886) 32 Ch. D. 243, following *Re Basham*, (1883) 23 Ch. D. 195, and see *Lewis v. Trask*, (1882) 21 Ch. D. 862; Cf. *Clare v. Clare*, (1892) 21 Ch. D. 865.

A trustee under the will of a defaulting trustee being ordered to refund, and the assets being insufficient to answer the breach of trust, was not allowed to deduct his costs.⁽¹¹³⁾

If one of two executors is a debtor to the estate, his co-executor is entitled to act by a separate solicitor and if he does so he will be entitled to his costs.⁽¹¹⁴⁾ (xii) One of two only defaulting.

If two executors employ one solicitor, and one of the two executors is a debtor to the estate, the taxing-master on taxation finds what is the fair amount of costs to be attributed to the executor who is a debtor to the estate. This amount is deducted from the total costs of the two, and the balance after making such deduction is the amount allowed as costs of the other executor.⁽¹¹⁵⁾

The principle seems to be that the costs due to the executor, who is indebted to the estate, are set off against his debt, and the proper form of order appears to be to order payment of the costs due to him from the estate, and for the order also to provide that such costs are not to be paid until he makes good the moneys due from him to the estate⁽¹¹⁶⁾, and it makes no difference for this purpose whether the debt arises from a default of the executor or trustee, or is simply a debt due from him to the testator's estate. (xiii) Principle on which the costs of a defaulting trustee are disallowed.

If an executor who is indebted to the estate becomes bankrupt, his costs incurred prior to the bankruptcy are set off against the debt.⁽¹¹⁷⁾ (xiv) Costs of a defaulting executor who becomes bankrupt.

The costs incurred subsequently to the bankruptcy stand on a different footing, and the question whether such costs will be paid out of the estate seems now to depend mainly on whether the debt due from the executor or trustee is discharged by the bankruptcy or not.⁽¹¹⁸⁾

(113) *Re Knott*, (1887) 56 L.J. Ch. 318.

(114) Jessel, M.R., in *Smith v. Dale*, 18 C.D. at p. 518.

(115) *Smith v. Dale*, 18 C.D. 516. See, also, *McEwan v. Crombie*, 25 C.D. 175. The earlier case of *Watson v. Row*, L.R. 18 Eq. 680, seems not to be overruled. See, also, *Harmer v. Harris*, (1826) 1 Russ. 155; *Nicholson v. Norton*, (1844) 7 Beav. 67.

(116) *Lewis v. Trask*, 21 C.D. 862; *Re Basham*, 23 C.D. 195.

(117) *Smith v. Dale*, 18 C.D. 516; *Re Basham*, 23 C.D. 195; *Re Vowles*, 32 C.D. 243.

(118) *Williams on Executors and Administrators*, 10th Ed. 1905, Vol. II, p. 1671. There are conflicting decisions on the point, one decision of Hall, V.C. (*Clare v. Clare*, 21 C.D. 865) and the other of North, J. (*Lewis v. Trask*, 21 C.D. 862). Both cases arose under the Bankruptcy Act, 1869, in both cases the debt due from the defendant was a debt due in respect of a breach of trust, and by S. 49 of the Bankruptcy Act, 1869, bankruptcy was not a discharge from a debt incurred by breach of trust. North, J.,

Costs due to a trustee who has become bankrupt, whether incurred before or after bankruptcy, are payable to the trustee in bankruptcy; unless the solicitor of the trustee obtains a charging order in his favour.⁽¹¹⁹⁾

(xv) Costs sometimes given to a defaulting trustee on account of assistance rendered.

In meritorious cases, where the Court has derived assistance in taking the accounts from having the executor represented by solicitors and counsel in the action, it will sometimes order him to have costs out of the estate notwithstanding he remains a debtor to the estate.⁽¹²⁰⁾

But the solicitor for the defaulting creditor should, before incurring costs, point out to the beneficiaries that the executor can only attend and assist in the proceedings if his costs are paid out of the estate, and obtain their sanction to his attending on those terms before the costs are incurred.⁽¹²¹⁾

(xvi) Trustee making good his default: right to costs.

A trustee who has not been guilty of dishonesty, and who has made good to the estate the deficiency arising from an improper investment made by him, will not be ordered to pay costs.⁽¹²²⁾

(xvii) Executor of a defaulting trustee.

The executor or administrator of a defaulting trustee, who accounts fairly for the assets come to his hands, is entitled to deduct his costs of the action out of the assets of his testator or intestate, even although they may be insufficient to repair the breach of trust.⁽¹²³⁾

"In the case of *Re Griffiths*,⁽¹²⁴⁾ an action was brought against the executor of a deceased executor for the administration of the

held that as the debt was not discharged the executor was not entitled to his costs incurred after the bankruptcy unless he paid the debt. Hall, V.C., followed an earlier case of *Bowyer v. Griffin* (L.R. 9 Eq. 340), which North, J., declined to follow, and held the trustee entitled to the costs subsequently to the bankruptcy without making good his default, it seeming to him (as his Lordship stated) to be consistent with good sense to hold that any person who, though adjudicated bankrupt, was retained as a party to an action, as executor or trustee, should be paid his costs. (21 C.D. 867.) In the case of *Re Basham* (23 C.D. 196), Chitty, J., after a very full consideration of the authorities, followed the decision of North, J., and both the last named Judge and Pearson, J., acted on the same rule in later cases (*McEwan v. Crombie*, 25 C.D. 175; *Re Vowles*, 32 C.D. 243).

(119) *Baker v. Abbott*, W.N. (1897), 38.

(120) See remarks of Chitty, in *Re Basham*, 23 C.D. 195.

(121) Williams on Executors and Administrators, 10th Ed., 1905, Vol. II, p. 1672.

(122) *Peacock v. Colling*, 54 L.J. Ch. 743.

(123) *Haldenby v. Spofforth*, 9 Beav. 195; *Horne v. Shepherd*, 3 Jur. N.S. 806.

(124) 26 C.D. 465.

estate of the original testator. The defendant properly accounted for all assets which had come to his hands. A balance was found due from the estate of the original executor to the estate of the original testator, which balance the estate of the original executor was insufficient to pay. Cotton, L.J., said that the strict order would be to allow the defendant out of the estate of the original testator all the costs incurred solely with reference to the original testator's estate, but as to the costs incurred by the defendant solely as representative of his own testator, the defaulting executor, he ought to be allowed them solely out of the estate of the defaulting executor. Fry, L.J., in the same case, pointed out that there was a third class of costs, coming under neither of the above heads, and they ought to be divided between the two funds."⁽¹²⁵⁾

Trustees severing from their co-trustees will not be allowed ^(xviii) costs; ⁽¹²⁶⁾ unless the severance was justifiable.⁽¹²⁷⁾ And it is not just to act on the view that a severance is unreasonable without affording the severing trustee an opportunity of explaining his conduct.⁽¹²⁸⁾ Severance from co-trustee or co-executor.

If an executor refuses to join his co-executor as a plaintiff in a proper case, and is therefore made a defendant, he will be refused his costs.⁽¹²⁹⁾

An administrator of a supposed intestate, acting *bona fide*, was ^(xix) held to be entitled to costs out of the estate, although a will was afterwards produced, the residuary legatee under which obtained ^{Revocation of probate or letters.} (xix) revocation of the letters of administration and probate of the will.⁽¹³⁰⁾

(125) See, also, *Lyce v. Kingdon*, 1 Coll. 184, 189; *Palmer v. Jones*, 43 L.J. Ch. 249; *Re Kitto*, 28 W.R. 411 (Eng.).

(126) *Snow v. Teed*, (1870) L.R. 9 Eq. 622; *Gompertz v. Kensit*, (1872) L.R. 13 Eq. 369.

(127) *Browne v. Collins*, (1873) 21 W.R. 222 (Eng.); *Meldrum v. Hayes*, (1873) 21 W.R. 746 (Eng.).

(128) *Re Isaac*, (1897) 1 Ch. 251, C.A. See, also, as to severance of trustees, *Prince v. Hine*, (No. 2), (1859) 27 Beav. 345; *Smith v. Dale*, (1881) 18 Ch. D. 516; *Williams v. Wight*, W.N. (1890) 50; and see *Wiles v. Cooper*, (1846) 9 Beav. 298; *Course v. Humphrey*, (1859) 26 Beav. 402; *Att.-Gen v. Wyville*, (1860) 28 Beav. 464. As to appearance by separate counsel, see *Corroill v. Graham*, (1905) 1 Ch. 478, C.A.; *Re Burton*, (1901) W.N. 202.

(129) *Collyer v. Dudley*, 2 L.J. Ch. (O.S.) 15.

(130) *Mirehouse v. Herbert*, 5 W.R. 583 (Eng.) and see *Taylor v. Haygart*, 8 Jur. 185.

An administrator whose letters are revoked will not get his costs of an administration suit instituted by him with knowledge that another person claimed to administer.⁽¹³¹⁾

The costs in a proceeding for revocation of probate should be assessed as in a miscellaneous proceeding.⁽¹³²⁾

The High Court has full power to make an order for the awarding of costs in the lower Courts. A proceeding instituted for revocation of probate is a miscellaneous proceeding, and cannot be regarded as a regular civil suit; and so, pleader's fees in such a proceeding should be fixed upon that footing.⁽¹³³⁾

(xx) Where application for probate is dismissed for default.

Upon dismissal of an application for probate for default, a suitable order for costs of a deterrent character should be made in favour of the caveator in every case where there is good reason to suspect that the proceeding has not been instituted *bona fide*.⁽¹³⁴⁾

(xxi) Where loss caused by agent's default.

As a general rule, a trustee who, in the ordinary course of business, employs an agent for the purpose of the trust, is not chargeable with loss arising from the latter's default, unless due to some wilful default of his own.⁽¹³⁵⁾

"But the trustee must give to the affairs of the trust such consideration as might reasonably be expected to be given to a like matter by a man of ordinary prudence guided by such rules and arguments as generally guide such a man in his own affairs."⁽¹³⁶⁾ Thus, trustees who had allowed a solicitor to receive rents and pay himself thereout for work which he had done without

(131) *Houseman v. Houseman*, 1 Ch. D. 535; 24 W.R. 592 (Eng.); 34 L.T. 633.

(132) *Garabini Dassi v. Pratap Chandra Shaha*, 4 C.W.N. 602, referred to in *Pratap Chandra Shaha v. Kali Bhanjan Shaha*, 4 C.W.N. 600.

(133) *Pratap Chandra Shaha v. Kali Bhanjan Shaha*, 4 C.W.N. 600. But see 6 C.L.J. 453, where it was stated that a Judge has discretion as to costs on account of pleader's fees in contested applications for probate or letters of administration; he may allow a fee according to the valuation of the estate, or according to such a sum, not exceeding the valuation, as may be reasonable, or according to the importance of the subject of the dispute. The rule laid down as to costs in 4 C.W.N. 600 does not apply to a contested application. (*Pratap Chandra Shaha v. Kali Bhanjan Shaha*, 4 C.W.N. 600.)

(134) *Ramani Debi v. Kumud Bandhu Mookerjee*, 14 C.W.N. 924 at p. 928 = 7 Ind. Cas. 126 = 12 C.L.J. 185.

(135) *Clough v. Bond*, (1838) 3 My. & Cr. 490; *Re Brier*, (1884) 26 Ch. D. 238, C.A.; *Re Blundell, Blundell v. Blundell*, (1888) 40 Ch. D. 370; *Jobson v. Palmer*, (1893) 1 Ch. 71.

(136) *Per Kekewich, J., Re Weall*, (1889) 42 Ch. D. 674.

instructions and without any sufficient reasons, were ordered to pay the costs of an action brought against them in consequence by a beneficiary.⁽¹³⁷⁾

Unless misconduct be proved, a trustee is entitled to be allowed his costs as between solicitor and client, and where two executors and trustees of a will are plaintiff and defendant respectively in an action for the administration of an estate, no misconduct being alleged, each will be allowed his costs as between solicitor and client, and also his charges and expenses properly incurred, out of the estate.⁽¹³⁸⁾

Where legatees assigned their share to mortgagees pending litigation, it was held that the mortgagees took subject to the suit, and that the executor was entitled to set-off his costs against the legacies.⁽¹³⁹⁾ (xxii) Set-off of costs.

An executor whose attendance in Chambers, at the hearing of two summonses by adverse claimants to the income of property which he had paid into Court, was held to be unnecessary was only allowed a fixed sum for costs.⁽¹⁴⁰⁾ (xxiii) Un-necessary costs.

An executor desiring to change an attorney who had been employed by the testator and continued in such employment by him, must pay not only the costs incurred since such employment by him but the past costs incurred in the lifetime of the testator.⁽¹⁴¹⁾ (xxiv) Executor, change of attorney by—Costs, liability of executor to pay.

In a probate proceeding, a caveat was filed by one of the relatives of the deceased. The caveat having been withdrawn at the hearing, the Judge discharged it with costs without passing any order allowing fees to counsel on the higher scale as required by Rule No. 205 of the Rules of the Allahabad High Court, dated the 18th January 1898, and passed a decree for probate. The decree subsequently drawn having contained only the usual lower scale fee, counsel for the applicant, instead of taking objections to Fees due to counsel, scale of—Costs.

(137) *Per Kekewich, J., Re Weall*, (1889) 42 Ch. D. 674.

(138) *Re Love*, (1885) 29 Ch. D. 348, C.A.; *Williams v. Wight*, W.N. (1890) 50; *Turner v. Hancock*, (1882) 20 Ch.D. 303, C.A.; and see *Re Barne, Lee v. Barne*, (1890) 62 L.T. 922.

(139) *Re Knapman*, (1881) 18 Ch. D. 300, C. A., and see *Re Jones, Christmas v. Jones*, (1897) 2 Ch. 190; *Re Goss*, W.N. (1884) 192, plaintiff a residuary legatee who had mortgaged his share pending the administration suit.

(140) *Re Walters*, (1888) 58 L.T. 101. Cf. *Catterson v. Clark*, (1906) 95 L.T. 42, C.A.; *Re Wagstaff*, (1907) 98 L.T. 149, C.A.

(141) *Girindra Coomar Dutt v. Amulya Charan Ghose*, 6 C.W.N. 306 (307).

the decree by adopting the procedure laid down by Rules 89, 90 of the Rules mentioned above, brought the matter to the notice of the Judge in open Court, who, thereupon, ten days after the delivery of the judgment, ordered that fees on the higher scale should be entered up in the decree. The High Court, in a Letters Patent Appeal from this amended decree, allowed a reasonable fee to counsel for the applicant, commensurate with his work in the matter, and held (1) that counsel should have taken the procedure mentioned by Rules 89 and 90 of the Allahabad High Court Rules mentioned above ; (2) that a Resolution of the Court that, in an order for costs, fees should always be taken to be fees on the higher scale, might be looked at for the purpose of interpreting an order as to costs, though such Resolution was not published in the Gazette, and (3) that, in allowing fees on the higher scale, without regard to the amount of such fees, the Judge who passed the amended decree in the probate matter did not exercise a proper judicial discretion.⁽¹⁴²⁾

In what cases
the plaintiff
shall pay the
executor's
costs.

It remains to consider in what cases the executor or administrator is entitled to receive his costs from the plaintiff. If a creditor plaintiff brings or continues an action after he has been correctly informed that there are no assets applicable to the payment of his debt, he will be ordered to pay the costs, wholly or from the time he receives the information.⁽¹⁴³⁾

In *Robinson v. Elliott*,⁽¹⁴⁴⁾ a creditor filed a bill against an executrix, and she stated, by her answer, that there were no assets for the payment of his debt ; he, however, persisted in the suit ; and the result of the account in the Master's office was, that there were no assets unadministered, though the executrix was charged with more than she had admitted. And it was held that the bill should be dismissed without costs as against the executrix.

In another case,⁽¹⁴⁵⁾ on further directions, the case appeared to be, that application had been made to an executor for an account, but that he gave no account. The bill was then filed ; and by his answer, the defendant stated the accounts ; but the plaintiff took a decree for an account. It turned out, on the Master's report, that the account given by the answer was correct : and the question

(142) *H. E. Clark v. E. Caleb*, 25 A.W.N. 83.

(143) *Blueti v. Jessop*, Jacob 240 ; *King v. Bryant*, 4 Beav. 460, 462 ; *Fuller v. Green*, 24 Beav. 217.

(144) 1 Russ. Ch. C. 599. See Dan. Ch. Pr., 7th Ed., 999.

(145) *Anon.*, 4 Madd. 373 Eng.).

then was, as to costs : The Vice-Chancellor gave the plaintiff the costs of the suit up to the decree ; and the defendant the costs of the subsequent proceedings.

In the case of *Ackers v. Ackers*, ⁽¹⁴⁶⁾ North, J., ordered a useless administration action to be stayed, and the plaintiff to pay the costs of the action ; the defendant being at liberty to take out of the estate any costs in default.

Where a guardian *ad litem* of an infant had been guilty of gross misconduct in putting executors to proof of a will, which he wished to upset for his own private purposes, and which, the evidence showed, was to his knowledge duly executed by the testatrix in a sound state of mind,—*held*, that he was liable for the costs of the suit.⁽¹⁴⁷⁾

The Court has power to mulct the guardian in costs on the ground that he, as such, has misconducted himself.⁽¹⁴⁸⁾

Where next of kin, or other persons claiming as a class under the will, succeed in establishing their title, their costs, as above defined, incurred in so doing, are paid out of the general estate before any apportionment of it takes place.⁽¹⁴⁹⁾

Costs out of particular portions of the estate :—
(a) Liability of general estate.

So where a legacy is claimed, in an administration suit, by two legatees adversely to each other, the costs must be borne by the testator's estate (inasmuch as the question arises on his will) and not by the legacy.⁽¹⁵⁰⁾

In a suit for maintenance the defendant need not be allowed proportionate costs on the amount disallowed to the plaintiff unless the claim be an exorbitant one. The object of such a suit is to ascertain the liability of the family estates, and the costs of doing so should ordinarily come out of the estate.⁽¹⁵¹⁾

(146) *W. N.* (1884), p. 82. See also *Re Ormston*, 58 L.T. 74 ; affirmed on appeal, 59 L.T. 594.

(147) *Goolam Hoosein Noor Mahomed v. Fatmabai*, 8 B. 391.

(148) *Daniell's Chancery Practice*, 148 (Eng.) ; *Komul Chunder Sen v. Surbessur Das Goopto*, 21 W.R. 298 ; *Omrao Singh v. Prem Narain Singh*, 24 W.R. 264 ; *Green v. Proctor*, 1 Hagg. Eccl. Rep. 337 (340) (Eng.). See also *Brown on Probate*, p. 441. See the same cited in *Goolam v. Fatmabai*, 8 B. 391.

(149) *Shuttleworth v. Howarth*, 1 Cr. & Ph. 228.

(150) *Wilson v. Squire*, 13 Sim. 212. See also *Jolliffe v. East*, 3 Bro. C. C. 25 ; *Ripley v. Moysey*, 1 Keen 578 ; *Eyre v. Marsden*, 4 M. & Cr. 231.

(151) *Rangathayi Ammal v. Neli Munusawmy Chetty*, 21 M.L.J. 706 at p. 707 = 9 M.L.T. 461 = (1911) (1) M.W.N. 322 = 10 Ind. Cas. 110.

(b) Liability
of residuary
estate.

The fund primarily liable for the costs and expenses of obtaining probate is the residuary estate ordinarily.⁽¹⁵²⁾

The appellant cited the respondent, who was the executor of one Tulsidas Varajdas, to bring in and prove his testator's will. The Division Court (Starling, J.) ordered the respondent to lodge the will in Court and to take out probate, but directed that the appellant should pay half the costs of obtaining probate. On appeal, *held* (varying the order of Starling, J., as to costs) that the fund primarily liable to the costs of probate was the residuary estate; and part of the residuary estate being as yet undistributed, it should in the first instance be applied to this purpose, and after that the appellant and respondent should contribute in equal shares.⁽¹⁵³⁾

The costs of a suit for the administration of a testator's estate are payable out of the residue generally and not primarily out of a lapsed share, as there is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and costs of the administration of the estate of the testator.⁽¹⁵⁴⁾

In an action for the general administration of assets the costs of all proper and necessary parties are paid in the first instance out of the assets before they are distributed; that is, in effect, where the estate is sufficient for all purposes, out of the residue. The residue, however, is, properly speaking only what remains after all the expenses of administering the estate have been paid,⁽¹⁵⁵⁾ including the costs of an administration action;⁽¹⁵⁶⁾ and including also where there is a gift of residue to persons and classes of

(152) *Dayabhai Tapidas v. Damodardas Tapidas*, 21 B. 75.

(153) *Dayabhai Tapidas v. Damodardas Tapidas*, 21 B. 75. Farran, C.J., said in the course of the judgment:—The only point, before us, is as to the source from which the costs of obtaining probate are to be provided. The fund primarily liable is ordinarily the residuary estate. Part of the residuary estate in this case, *viz.*, the interest on a lakh of rupees, appears to be as yet undivided between the brothers. This sum, we think, should in the first instance be applied to the costs and expenses of obtaining probate. After that each brother must contribute in equal shares. The order of the Division Court will be varied accordingly. *Dayabhai Tapidas v. Damodardas Tapidas*, 21 B. 75 at 76.

(154) *Trethwey v. Helyar*, 4 C.D. 53, Jessel, M.R., dissenting from a dictum of Malins, V. C., in *Gowan v. Broughton*, L.R. 19 Eq. 77. See also *Fenton v. Wills*, 7 C.D. 33; *Blann v. Bell*, *ibid*, 382; *Re Jones*, *Jones v. Caless*, 10 C.D. 40.

(155) *Eyre v. Marsden*, 4 My. & Cr. 231; *Shuttleworth v. Howarth*, Cr. & Ph. 228; *Elborne v. Goode*, 14 Sim. 165.

(156) *Trethwey v. Helyar*, 4 Ch. D. 53; 46 L.J. Ch. 125.

persons, the costs of ascertaining of whom such classes consist.⁽¹⁵⁷⁾ And therefore, where there is a residuary gift, but a portion of the residue is undisposed of, either through the happening of some event, or by operation of law, the Court will not throw the costs exclusively on the part undisposed of, but will apportion them between such part and the part which is well given.⁽¹⁵⁸⁾

Where any of the persons entitled have incumbered their shares the rule is that the assignor and assignee are entitled to one set of costs between them, *viz.*, the costs of the assignor, which are directed to be paid to the assignee towards his costs, so far as the same may be required; and the excess (if any) of the assignee's costs is payable out of the particular share.⁽¹⁵⁹⁾ (c) Liability of particular share.

Where a residuary estate was divisible amongst several persons, and an account was made up, and the adults received their shares; and the infants filed a bill for an account against the

(157) *In re Reeve's Trusts*, 4 Ch. D. 841; 46 L.J. Ch. 412; 25 W.R. 628 (Eng.); 36 L.T. 906.

(158) *Eyre v. Marsden*, 4 My. & Cr. 231; *Luchcraft v. Pridham*, 48 L.J. Ch. 636; W.N. (1879) 94; *Trethewy v. Helyar*, 4 Ch. D. 53; 46 L.J. Ch. 125; *Fenton v. Wills*, 7 Ch. D. 33; 47 L.J. Ch. 191; 26 W.R. 139 (Eng.); 37 L.T. 373; *Blann v. Bell*, 7 Ch. D. 382; 47 L.J. Ch. 120; 26 W.R. 165 (Eng.); the cases of *Gowan v. Broughton*, 19 Eq. 77, and *Scott v. Cumberland*, 18 Eq. 578, cannot be considered as law. See Morgan & Wurtzburg's Law of Costs, 2nd Ed., (1882), Ch. IV, S. 2, p. 166. The rule applies equally whether the partial intestacy arises from lapse (as in *Ackroyd v. Smithson*, 1 Bro. C.C. 503; 4 My. & Cr. 245; *Roberts v. Walker*, 1 R. & M. 752; *Trethewy v. Helyar*, 4 Ch. D. 53; *Fenton v. Wills*, 7 Ch. D. 33; 47 L.J. Ch. 97; 26 W.R. 139 (Eng.); 37 L.T. 373), or from revocation of the bequest by the testator himself (as in *Cresswell v. Cheslyan*, 2 Ed., 123; 1 Swan 571, n.); but see *contra*, *Chatteris v. Young*, Beames, App. 27; and *Skrymshire v. Northcote*, 1 Swans. 566; the effect of which latter case seems to be mis-stated in Lord Cottenham's judgment in *Eyre v. Marsden*, 4 My. & Cr. 245.

(159) *Greedy v. Lavender*, 11 Beav. 417, and see *Re Bright's Trusts*, 3 W.R. 544 (Eng.); *Remnant v. Wood*, 27 Beav. 613; *Turner v. Gowdon*, 19 W.R. 403 (Eng.); S.C. sub. nom. *Turner v. Sowdon*, 23 L.T. 799; *Perceval v. Perceval*, 9 Eq. 394; *Ward v. Yates*, 1 Dr. & S. 80. Lord Langdale, M.R., added a direction to the order in *Greedy v. Lavender*, to exclude from the assignor's costs "any additional costs incurred by reason of the said defendants, or any of them, having assigned, mortgaged, or incumbered their shares" 11 Beav. 421; but Sir J. Romilly, M.R., disapproved of this direction as too refined (*Coates v. Coates*, 3 N.R. 355). Hall, V.C., has held in a subsequent case that if in an administration suit an inquiry as to incumbrances is added in Chambers, the costs of the inquiry must be treated as part of the general costs of administration and be paid out of the general estate. (*Gee v. Mahood*, 23 W. R. 71 (Eng.); W.N. (1874) 207). See Morgan and Wurtzburg on Law of Costs, 2nd Ed., (1882), pp. 187, 188. For a case where costs were ordered to be paid out of a particular share and for other directions, as to payment of costs see *Bechar Akla v. P. DeCruz*, 19 B. 221.

executors and the other residuary legatees, who, being satisfied, deprecated the proceedings, and the accounts turned out to be substantially correct ; it was held, that the costs of the suit were payable out of the plaintiff's share alone.⁽¹⁶⁰⁾

The Court considers that it is *prima facie* a benefit to an infant to be made a ward of Court and have his property secured and duly administered.⁽¹⁶¹⁾

(d) Liability
of particular
fund.

The rule has been laid down to be, that if the executors, admitting a legacy to be payable, sever it from the estate, and a dispute arises between the persons or some of the persons to whom the legacy belongs, and the Court has to decide to whom it belongs, there the particular fund bears the costs.⁽¹⁶²⁾

If an administration action is also for other purposes, or it becomes necessary to administer or execute the trusts of another estate or fund in it, the costs of the action will be divided⁽¹⁶³⁾ among the several funds.

A direction that costs are to be paid out of a particular fund, does not conclusively determine that that fund is ultimately to bear them.⁽¹⁶⁴⁾

Where a legacy has been severed from the bulk of the estate, and becomes the subject of litigation, the particular fund, and not the general estate, must bear the costs of a suit respecting it.⁽¹⁶⁵⁾

(160) *Mackenzie v. Taylor*, 7 Beav. 467 ; *Thompson v. Clive*, 11 Beav. 475 ; cf. *Hilliard v. Fulford*, 4 C.D. 389.

(161) *Per L.J. Turner, Clayton v. Clarke*, 9 W.R. 718 (Eng.).

(162) *Secus*, if the dispute arises between the persons claiming the legacy and the residuary legatee whether it is payable. *Attorney-General v. Lawes*, 8 Hare. 43, by Wigram, V. C. See also *Morgan and Wurtzburg on Costs*, 169, 170. But a payment into Court under the Trustee Relief Act (10 & 11 Vict. c. 96) by executors of a sum to answer a legacy to a class, to avoid the trouble of inquiries, was held not to throw the costs on the legacy itself ; *Re Gibbens' Will*, 36 C.D. 486 ; and cf. *Re Birkett*, 9 C.D. 576. Now, by O. LXV, r. 14-B (R.S.C. November 1893), the costs of inquiries to ascertain the person entitled to any legacy, money, or share or otherwise incurred in relation thereto, shall be paid out of such legacy, money or share, unless the Judge shall otherwise direct.

(163) See *Young v. Martin*, 2 Y. & C.C.C. 582, where the costs of a suit to administer the estate of a testatrix, including a fund appointed by her will, were payable, so far as related to the appointed fund, out of that fund, and as to the remainder only, out of general estate. And in *Dean v. Morris*, 5 W.R. 345 (Eng.) it was held that the costs of administering two estates, which had been dealt with as one fund, should be paid out of the estates equally, though they were unequal in amount.

(164) See *Sheppard v. Sheppard*, 33 Beav. 129.

(165) *Attorney-General v. Lawes*, 8 Hare. 32 ; *Martineau v. Rogers*, 8 De G.M. & G. 328 ; and see *King v. Taylor*, 5 Ves. 309 ; *Jenour v. Jenour*, 10 Ves. 562 ; *Wilson v. Squire*, 13 Sim. 212 ; *Hill v. Ratley*, 2 J. & H. 634 ; *Pennington v. Buckley*, 6 Hare 453. In the case last cited, the question was between the residuary legatees and a charity as

The fund must be actually severed from the estate when the action is commenced, and it makes no difference that it was raised and set apart before the persons entitled to it were actually ascertained. (166)

In *Attorney-General v. Lawes*,⁽¹⁶⁷⁾ the distinction between the cases, where the fund is severed, and where it is not, is thus pointed out by V. C. Wigram: "If the executors, admitting the legacy to be payable, sever it from the estate, and a dispute afterwards arises between the persons to whom, or some of whom, the legacy belongs, and the Court has to decide to whom it belongs, there the particular fund bears the costs; but if the dispute arises between the persons claiming the legacy and those claiming the estate in the residue, whether the legacy is payable or not, that cannot be the case of a severance in the sense in which the rule I have referred to applies, because then, until the Court makes its decree that the legacy is payable, the legacy is not severed from the estate: the executors have kept it under their control for the purpose of having the point decided."⁽¹⁶⁸⁾

If the costs of an administration suit are increased by its being also a suit for the execution of the trusts of a settlement, the Court has held that the additional costs must be borne by the settlement fund.⁽¹⁶⁹⁾ (e) Liability of settlement fund.

Where there are no other assets, the costs must be paid out of the specific legacies *pari passu*.⁽¹⁷⁰⁾ (f) Liability of specific legacy.

It is now settled in England that the costs of an administration action, so far as they have been increased by the administration of the real estate, are to be borne by that real estate.⁽¹⁷¹⁾ (g) Liability of real estate.

to the title to a fund, which had been transferred into the names of trustees, after a life interest, and the Court held that it went to the residuary legatees as part of the general assets, and, therefore, the costs came out of it.

(166) *Dugdale v. Dugdale*, 12 Beav. 247.

(137) 8 Ha. 32.

(168) And see *Wollaston v. Wollaston*, 47 L.J. Ch. 117; 26 W.R. 77 (Eng.); 37 L.T. 631.

(169) *Irby v. Irby*, 24 Beav. 525; *Skirrow v. Skirrow*, 17 W.R. 759 (Eng.).

(170) *Bristow v. Bristow*, 5 Beav. 289; *Cookson v. Bingham*, 17 Beav. 262.

(171) *Re Middleton*, 19 O.D. 552; *Patching v. Barnett*, 51 L.J.Ch. 74; *Re Roper*, 45 O.D. 126; *Re Copland*, W.N. (1895), 137.

It would seem that where real estates are sold under a decree in an administration suit, the costs incurred by such sale will be payable out of the estates sold.⁽¹⁷²⁾

The law in England on this branch of the subject has been thus stated. "Costs are to be paid in the first instance out of personal estate ;⁽¹⁷³⁾ and where a bequest of a share of the general residue of the personal estate had lapsed the costs were held to be payable out of the general residue and not out of such lapsed share ;⁽¹⁷⁴⁾ and out of the residuary personalty in priority to a lapsed devise of real estate.⁽¹⁷⁵⁾ Where the sole question raised in an administration action was whether certain sums were raisable out of the specifically devised real estate, it was ordered that the costs, so far as the personal estate was insufficient to pay them, must be assessed upon the specifically devised estates in proportion to the values of those estates respectively at the time of the testator's death.⁽¹⁷⁶⁾ The costs of an administration action, so far as they have been increased by the administration of the real estate, are borne by that real estate.⁽¹⁷⁷⁾ The apportionment in such cases should be made by the Judge and not left to the Taxing Master.⁽¹⁷⁸⁾

Real estate which has descended to the testator's heir-at-law, not because it was not originally disposed of by the Will, but by reason of a subsequent forfeiture by the devisee under the provisions of the Will, is not liable to pay the costs of an action to administer the estate in priority to specifically devised and bequeathed freehold and leasehold estates.⁽¹⁷⁹⁾

(172) *Barnwell v. Iremonger*, 1 Dr. and Sm. 242, 255.

(173) *Trelhewy v. Helgar*, (1876) 4 Ch. D. 53.

(174) *Fenton v. Wills*, (1877) 7 Ch. D. 33 ; *Re Giles*, (1886) 55 L.J. Ch. 695, costs of enquiry as to next-of-kin ; costs of unnecessary payment into Court.

(175) *Re Jones*, (1878) 10 Ch. D. 40 ; and see *Wisden v. Wisden*, (1859) 5 Jur. (N. S.) 86 (personal estate insufficient to pay debts ; costs chargeable on real estate charged with payment of debts).

(176) *Re Price, Williams v. Jenkins*, (1886) 31 Ch. D. 485.

(177) *Re Middleton, Thompson v. Harris*, (1882) 19 Ch. D. 552 ; *Patching v. Barnett*, (1881) 51 L.J. Ch. 74, C.A. ; *Re Copland*, (1895) 44 W.R. 94 ; *Re Roper*, (1890), 45 Ch. D. 128 C.A. ; *Re Betts*, (1907) 2 Ch. 149.

(178) *Patching v. Barnett*, (1881) 51 L.J. Ch. 74 C.A. The practice has not been altered by the Land Transfer Act, 1897. *Re Jones, Elgood v. Kindersley*, (1902) 1 Ch. 92. See Yearly Practice, Vol. I, 1914, p. 1061.

(179) *Hurst v. Hurst*, 28 C.D. 159 ; distinguishing and doubting *Scott v. Cumberland*, L.R. 18 Eq. 578.

The plaintiff sued the Administrator-General and 4 of her sisters, to recover certain property consisting of ornaments and other moveables, which had been taken possession of by the Administrator-General under an order of Court. The facts of the case were as follow :—The plaintiff and defendants 2 to 5 were sisters, being all daughters of one S, a *Naikin* of Bombay, who died in 1885. Shortly after her death, plaintiff went to Delhi leaving certain ornaments and other moveables belonging to her and some belonging to S, in a locked box in the house in which she was residing with S, and took the key herself. During the plaintiff's absence, one of the sisters of the plaintiff (*viz.*, the 3rd defendant) petitioned the High Court alleging that the property in the said box belonged to her deceased mother S, and that it was in danger of being misappropriated, and got an order thereon to the effect that "the Administrator-General should take possession of the property of S, and hold the same subject to the further order of the Court." The Administrator-General accordingly took possession of the box and its contents. On her return, the plaintiff admitting that some of the property in the box belonged to S, sued to recover the remainder of the ornaments contained in it, alleging that these latter were her own. It was opposed by the above said petitioner the third defendant alone, while the other sisters, the other defendants in this suit, admitted the plaintiff's claim. The Court came to the conclusion that the plaintiff had proved her claim, and directed that the property be made over to her by the Administrator-General. The question that arose thereupon, as to the matter of costs, was whether the Administrator-General as an unsuccessful defendant ought to be made liable for plaintiff's costs, and also whether his own costs should be provided for and how. *Held*, on a review of the several English cases on the point, (a) that the Administrator-General was in the position of an interpleading plaintiff, and that he was entitled in the first instance, to recover his costs from the losing claimant (in this case the third defendant), and failing recovery from her, he was entitled to be paid out of the estate of S, and if even that should prove insufficient, he was entitled to recover them from the property which was the subject-matter of the suit; and (b) that the costs of the Administrator-General comprised also the expenses incurred by him in taking care of the property entrusted to him by the order of the Court; and that such expenses should be apportioned

between the estate of S and that of the plaintiff, in the proportion of their respective values.⁽¹⁸⁰⁾

(180) *Amir Jan v. L.W.J. Rivett-Carnac*, 10 B. 350. The following extracts from the judgment of Jardine, J., may also be noted :—" I have had to consider, as regards the matter of costs, whether the Administrator-General as an unsuccessful defendant ought to be made liable for plaintiff's costs, and also whether his own costs should be provided for, and how. Mr. Anderson has cited *Bevis v. Turner*, (7 B. 584), in which Mr. Justice Scott applied the cases of *Ex parte Angerstein*, (L.R. 9 Ch. Ap. 479) and *Pitts v. La Fontaine*, (L.R. 6 Ap. Ca. 482) to the case of the Official Assignee. The head-note is as follows :—" If the Official Assignee defends a suit, he is liable, in the event of failure, to be ordered to pay the plaintiff's costs, in the same way as any other defendant ; and if the estate be insufficient to pay the costs, he will have to bear them personally. It is for him to protect himself by getting a guarantee of indemnity from the parties who set him in motion." The case of *Appleby v. Duke*, (1 Hare, p. 303) overruled several earlier cases. The head-note of that case is as follows :—" The provisional assignee of the Insolvent Court, made a defendant in a cause in respect of his interest in the property of an insolvent debtor assigned under the statute, is in the same situation with respect to costs as the insolvent debtor himself would have been, and, therefore, on a bill of foreclosure, the mortgagor being an insolvent debtor, and the equity of redemption vested in the provisional assignee, the provisional assignee is not entitled to his costs from plaintiff " The ground of the decision was that the provisional assignee stands in the same position as the insolvent, and that the mortgagee is not the proper party to pay the provisional assignee the costs of protecting the insolvent's estate. It was contended " that the provisional assignee is a public officer, and in that capacity is a defendant in numerous suits in which he is necessarily ignorant of the value of his rights, and cannot venture to disclaim all title until he has time to make inquiries, without endangering the interests of the creditors whom he represents. His costs must be borne by the parties for whose benefit he is brought before the Court; or in this case, as in many others where there is no estate belonging to the insolvent, such costs would fall on himself personally—a consequence against which the Court will protect him." " The execution of the law relating to insolvents of necessity casts the estate upon him ; to this materially distinguishes him from other assignees or from devisees who can repudiate the trust or disclaim without affecting the interests of others." If the Administrator-General were in precisely the same position as an assignee in insolvency, I would feel bound by the authorities. But in the present case the Administrator-General was bound to take action, under the orders of the High Court, as to the goods of Sukina, and there is no suggestion that he acted rashly or without due care in respect to the seizure of the goods, which I now hold to be, not goods of Sukina, but of Amir Jan. The latter had allowed Sukina to act as if she was owner. Amir Jan was absent at the time ; there were several claimants. It was not unreasonable under all these circumstances that the Administrator-General should think that they belonged to Sukina ; when the rival claimants intimated their claims to him after the seizure, he referred them to a suit to substantiate their claims against each other. His counsel, Mr. Russel, has pointed out that he has never moved from his impartial position as a mere stake-holder. He has continued to satisfy the definition in S. 470 of the Civil Procedure Code (Act XIV of 1832) of the stake-holder who may institute a suit of interpleader. If the Administrator-General had instituted such a suit he would have been entitled to the benefit of S. 475, which is as follows :—" When the suit is properly instituted, the Court may provide for the plaintiff's costs by giving him a charge on the thing claimed or in some other effectual way." The case of *Burnett v. Anderson* (Merivale, 405) shows that if the Administrator-General had parted with the specific

Under the will of A, who appointed the Administrator-General of Bengal his executor, B had a life-interest in the residue of the

articles to one claimant on an indemnity, he would have ceased to be entitled to bring a suit of interpleader. The Administrator-General has kept the articles. He is thus a defendant as it appears to me in the position of an interpleading plaintiff. If he had brought a suit of interpleader against the claimants, S. 476 of the Civil Procedure Code (Act XIV of 1892) would have empowered the Court to make suitable provision for his costs in the suit brought by him. I must now consider what order should be passed. In the first instance, I think the losing claimant ought to pay the Administrator-General's costs. *Ex parte Streeter* (L.R. 19 Ch. Div. 216) shows this principle. Failing recovery from the losing claimant I am of opinion that he is entitled to be paid out of the undoubted estate of Sukina. If and in so far as that property proves insufficient, I will hold him entitled to recover out of the property specified in list C, which my decree will declare to be the plaintiff's. I pass this direction, because I think the Administrator-General is really a defendant in the position of an interpleading plaintiff. The mere fact that he appears as defendant has not increased the costs of the suit. The plaintiff has deposed that during her mother's, Sukina's, life-time she humoured Sukina by treating her as the owner of the house, and Sukina for the same reason by will directed payment of Rs. 2,000 for her funeral charges. The Administrator-General was justified in supposing that the house was Sukina's, and the property found there hers. I treat him, then, as a defendant in the position of an interpleading plaintiff. Now, for such a party I take S. 476 of the Civil Procedure Code (Act XIV of 1892), to afford the Court some light as to the view recently taken by the Legislature. The case of *Alpin v. Cates* (30 L.J. Ch. 6) appears to be an authority for allowing the Administrator-General's costs out of the estate now awarded to plaintiff. The head-note is as follows:—"P owed a sum to C, which under a letter of license was payable by instalments, subject to a proviso enabling C to sue for the whole sum at once on failure in punctual payment of any instalment. C assigned this to A who afterwards gave notice to P and called upon him to pay the instalments to him. C thereupon told P that the assignment was invalid, and that if P did not continue to pay to C, he would under the proviso determine the letter of license. Held, that P was justified in continuing to pay C until A had obtained an injunction." Before receiving the property described in list C, plaintiff must satisfy the Administrator-General's costs, or such part as has not been satisfied by defendant Nur Jahan, or out of Sukina's estate. Treating the case as substantially the same as interpleader I allow the Administrator-General's costs as between party and party, and do not allow him commission on the property decreed to the plaintiff. I am the more disposed to hold that the Administrator-General may recover his costs out of the fund decreed to a stranger, as a similar order has been passed by Mr. Justice Scott in one of the cases brought to my notice. See also *Annesley v. Muggridge*, (1 Madd. 593) and *Yates v. Farebrother*, (4 Madd. 239). Mr. Russell asks to add the expenses of looking after property, bailiff, &c., but does not ask for those of obtaining the order under S. 18. I think the Administrator-General is entitled to have his expenses of taking care of the property proportioned according to the amounts respectively belonging to Sukina and to plaintiff, the latter proportion to be alone treated as payable out of plaintiff's property as if it were costs against her. Excluding these expenses the plaintiff to be entitled to recover as costs from defendant Nur Jahan such amount as she may be obliged to pay the Administrator-General as costs."—*Per Jardine, J., Amir Jan Narkin v. L.W.J. Rivett-Carnac, Administrator-General of Bombay*, 10 B. 350 (354 to 357).

testator's estate. B brought a suit against the Administrator-General to have it declared that a pecuniary legacy, given under the will, had lapsed and fallen into the residue. Prior to the hearing it was agreed between B and the Administrator-General that the costs of the suit should come out of the testator's estate; this agreement was embodied in a consent order obtained on the application of the plaintiff. The suit was dismissed, and this decision was affirmed on appeal. On the question of costs, *held* that the estate of the testator not being before the Court, the agreement as to costs could not be carried out, and that the plaintiff must pay the costs of all parties to the suit.⁽¹⁸¹⁾

H, a partner, died. The plaintiff, as Administrator-General and administrator of his estate, got a decree against the other partners for H's share in the profits of the partnership. The decree provided that the costs of all parties should be paid out of the assets of the partnership funds and that, in case the partnership assets should be insufficient to meet the plaintiff's costs, the same should be recovered by the plaintiff from the estate of H. After accounts taken, it was found that there were no partnership assets available for payment of costs. The plaintiff claimed them out of H's estate in the hands of his son. The latter objected that he was no party to the decree, and that the decree so far as it gave costs against the estate of H was altogether *ultra vires* and bad. *Held*, that the Court had no jurisdiction to order H's son to pay these moneys. The effect of the closing clause of the decree was a direction or expression of opinion which was not conclusive against the person interested in disputing it, who is of right entitled to an opportunity of being heard.⁽¹⁸²⁾

(181) *J.N. Malchus v. Broughton*, 13 C. 193.

(182) *William Loudon v. Khatao Rowji*, 16 B. 515. Farran, J., said in the course of the judgment:—"The summons must, in my opinion, be dismissed. It is clear that upon summons I have no jurisdiction to order Ranchordass to pay these moneys. It may be that in a regularly constituted suit a decree might be obtained against him; but, however that may be, it is practically admitted that I have no jurisdiction to make a personal order on him by summons. In the alternative it is asked that the property of Hunsraj Currumsey in Ranchordass' hands be attached. There are two objections to my making such an order as that: (1) there has been no order under S. 248 (b) to revive the decree, which is more than a year old; (2) the particulars required by the attachment sections are not set out in the application. On a broader ground, however, I think that the application must fail. There is, in my opinion, no valid decree for the payment of these costs out of the estate of Hunsraj Currumsey. If Loudon, as the administrator of this estate, had had assets in his hands belonging to the estate, and Ranchordass had asked to have them made over to him, Loudon would have to pass his accounts, and could

In a creditor's claim for administration the costs shall be as between party and party payable out of the estate when the estate is sufficient to pay the debts in full.⁽¹⁸³⁾ (ii) Creditor bringing administration action.

But in a proper case the difference of costs between attorney and client and between party and party may be ordered to be borne rateably by the whole body of creditors.⁽¹⁸⁴⁾

According to decided English cases, a creditor bringing an administration action is entitled to solicitor and client costs if the estate proves insufficient for payment of the debts,⁽¹⁸⁵⁾ at any rate

only get credit for the costs he had expended in the suit, if they had been properly incurred. The decree would not of itself prove that they had been properly incurred, for it was made *ex parte* and without an opportunity given to the parties interested of being heard. *A fortiori* this must be the case when Loudon seeks to enforce his claims for these costs against the estate which he never had in his possession. The person in possession of, and entitled to, that estate is entitled to say, show me that you are entitled to these costs. Loudon does not show that by producing an *ex parte* order which he has obtained in his own favour without giving the person interested an opportunity of showing cause. The effect of the closing clause of the decree is, in effect, a direction, or expression of opinion, that Loudon should be allowed his costs of the suit on passing his accounts—an expression of opinion, or direction, which would, under ordinary circumstances, be of conclusive weight with a person taking the account, but is not absolutely conclusive against the person interested in disputing it, who is of right entitled to an opportunity of being heard. The suit was not a suit for the administration of the estate of Hunsraj, but a suit to take partnership accounts against third persons—a suit to which those interested in the estate of Hunsraj would not, therefore, be proper parties. *Per* Farran, J., in *William Loudon v. Khatao Rowji*, 16 B. 515 (518 and 519).

(183) *Iswardas v. Chandik*, 7 M.L.T. 400, following *In re New Zealand Midland Railway*, (1886) 32 Ch. 357.

(184) *Iswardas v. Chandik*, 7 M.L.T. 400. Wallis, J., said:—"The practice in England in a creditor's action for administration—where the assets prove to be sufficient for the payment of the debts in full, as is the case here, is to give the plaintiff costs out of the estate as between party and party only. See the judgment of Sterling, L.J., in *In re New Zealand and Midland Railway*, (1886) 32 Ch. D. 357 and I do not think there are sufficient grounds for departing from that practice and giving costs out of the estate as between attorney and client. As pointed out by the Lord Justice, the Court may in a proper case make an order that the difference between the plaintiff's costs as between attorney and client and the costs allowed him out of the estate as between party and party may be ordered to be borne rateably by the whole body of creditors, who have profited by its exertion, but I cannot pass such an order without notice to the creditors whom it may affect, and I give the plaintiff leave to apply, if so advised, for such an order within fourteen days upon notice to the creditors who were not represented at the argument before me. As regards the 1st defendant who is the legal representative of the deceased, I see no sufficient reason for refusing him his costs out of the estate as between solicitor and client according to the usual practice. The 2nd defendant has failed as regards a very large part of her claim including the jewels and I direct her to bear her own costs including costs to counsel in the reference." *Iswardas v. Chandik*, 7 M.L.T. 400.

(185) *Thomas v. Jones*, 1 Dr. & Sm. 134.

where he sues on behalf of himself and the other creditors of the deceased, ⁽¹⁸⁶⁾ the reason given being that it would be unreasonable that the general body of creditors should take advantage of the exertions of the particular creditor through whose instrumentality the fund has been recovered without paying him all his costs. ⁽¹⁸⁷⁾

Where a voluntary settlement was admitted to be void as against creditors, and an administration suit had been undertaken to ascertain the amount of the debts, the creditors were not allowed to deduct the costs of the action from the balance by which the trust fund exceeded the amount of the debts. ⁽¹⁸⁸⁾

After the costs of the executor or administrator are satisfied, the next claim on the fund arising from the personal estate is that of the plaintiff in the suit for his costs incurred in it. ⁽¹⁸⁹⁾

One consequence of this right of the plaintiff to his costs of the suit appears to be, that if the executor or administrator, after the decree, makes payment of a debt with a view to be reimbursed out of the fund in Court, his right to be so reimbursed must be postponed to the payment of the plaintiff's costs: that is, he must run the risk of the fund not being sufficient to pay the costs and also to reimburse him. ⁽¹⁹⁰⁾

Again, if the suit has been properly instituted and there are either assets in Court or outstanding assets to be administered, it seems to have been held that the plaintiff's costs of suit must be paid out of those assets, whatever may be the hardship on the executor or administrator as to his demand on them in respect of having, before suit, paid other creditors of the estate with his own money. ⁽¹⁹¹⁾

It has also been held that the personal representative's right of retainer for his own debt will prevail, ⁽¹⁹²⁾ against the plaintiff's right to his costs. ⁽¹⁹³⁾

(186) As to this, see Williams on Executors and Administrators, 10th Ed., 1905, Vol. II, 1676.

(187) Jessel, M.R., in *re Richardson*, 14 C.D. 611, 612. See also the reason given by Kindersley, V.C., in *Thomas v. Jones*, 1 Dr. & Sm. 134.

(188) *Re Turner*, (1884) 51 L.T. 497.

(189) *Hearn v. Wells*, 1 Coll. 323.

(190) *Jackson v. Woolley*, 12 Sim. 16, 17.

(191) *Hearn v. Wells*, 1 Coll. 323, 332, 333.

(192) See Williams on Executors and Administrators, 10th Ed., 1905, Vol. II, p. 1676.

(193) (*Ibid.*).

"Creditors other than the plaintiff may come in under the decree and prove their debts and obtain satisfaction of their demands, equally with the plaintiff in the suit, and, under such circumstances, they are treated as parties to the suit. If they decline so to come in, they will be excluded from the benefit of the decree, and yet they will, from necessity, be considered as bound by the acts done under the authority of the Court. Creditors, who have obtained decrees on their claims, should not be formally joined as plaintiffs, unless it was alleged and proved that their interests would be in serious jeopardy, if the plaintiff had the conduct of the proceedings. But where one creditor sues on behalf of himself and the others for administration of the estate of the debtor, the defendant may, at any time before judgment, have the action dismissed on payment of the plaintiff's debt and all the costs of the action." (194)

Where a creditor proceeds against a personal representative (iii) Personal representative. for the administration of the personal estate, and the result shows that there was no personal estate at the time of the commencement of the suit, and that the personal representative is not in any default, the plaintiff must indemnify the personal representative. (195)

A residuary or other legatee who proves a will *in solemn form* (iv) Residuary or other legatee. is also entitled to costs out of the estate, but he should apply to the Court for them. (196)

In the case of *Re Watson*, (197) a residuary legatee who brought an action to establish his identity was allowed costs out of the estate.

When a next-of-kin or person entitled in distribution, or an (v) Next-of-kin or person entitled in distribution. executor or legatee of a former will, successfully contests the validity of a latter will, the Court will give him costs out of the estate, or against the unsuccessful party. (198)

Where the next-of-kin exercises his right to put an executor to proof of his will vexatiously or makes charges which they were not

(194) *Sasi Bhushan Bose v. Maharaja Sir Manindra Chandra Nandy*, 24 O.L.J. 449.

(195) *Hibernian Bank v. Lauder*, (1898) 1 I. R. 262; and see *King v. Bryant*, (1841) 4 Beav. 460; *Fuller v. Green*, (1857) 24 Beav. 217.

(196) *Williams v. Goudie*, 1 Hagg 610; *Thorne v. Rooke*, 2 Curt 331; *Sutton v. Drax*, 2 Phil. 323, cited in *Triest & Coote*, 13th Ed., 510.

(197) 53 L. J. Ch. 305.

(198) *Critchell v. Critchell*, 3 S. & T. 41.

justified by the evidence in doing, they are liable to be condemned in costs.⁽¹⁹⁹⁾

Next-of-kin and executors of former wills, even when unsuccessful in a suit, stand in a more favourable position than legatees do in respect of their rights and liabilities for costs.⁽²⁰⁰⁾

Thus, where after the grant of probate of a prior will, probate of a subsequent inconsistent will was also granted, *held* that under the circumstances of the case, the executors of both wills had the right to be paid their costs out of the estate. So far as the estate was not sufficient to pay these costs, each party was to bear his own costs.⁽²⁰¹⁾

(vi)
Beneficiary.

Section 280 of the Indian Succession Act does not justify the inference that, if one beneficiary sets up a false will and another beneficiary successfully resists his application, the latter is entitled, as a matter of right, to be paid his costs out of the estate.⁽²⁰²⁾

The costs of a person (beneficiary or creditor) bringing proceedings against an executor or administrator are always in the discretion of the Court.⁽²⁰³⁾

Where a beneficiary has mortgaged his legacy or share one set of costs only is allowed to him and his incumbrancer attending the proceedings, that set of costs is payable to the incumbrancer so far as may be necessary to satisfy the incumbrancer's costs of action, and after such payment the balance of costs is payable to the plaintiff.⁽²⁰⁴⁾

(vii) Caveator.

Where a caveatrix had made unfounded charges of forgery and undue influence, the Court may condemn her in costs.⁽²⁰⁵⁾

(199) See Coote's Probate Practice, 4th Ed., p. 266 and 11th Ed., p. 504 referred in *In re Luchminarain, Ramrick Das v. Brijee Coomari*, 5 C.W.N. (Journal portion), cclxi (cclxii).

(200) Triest & Coote, 18th Ed., 514.

(201) *In the goods of Taramoni Dasi*, 25 C. 553.

(202) *Barada Proshad Banerjee v. Gajendranath Banerjee*, 13 C.W.N. 557 (563) = 9 C.L.J. 383 = 1 Ind. Cas. 289.

(203) See R.S.C. 1883, O. LXV, r. 1.

(204) For form of order, see order in *Thomson v. Wingrove*, Seton, Vol. II, p. 1497, 6th Ed. See also *Re Goss*, W.N. (1884), p. 192.

(205) See *Barry v. Builin*, 2 Moo. P.C. 480 at p. 492 (1838); *Coppin v. Dillon*, 4 Hagg. 375; *Constable v. Tuffnell*, 4 Hag. 508 referred in *re Luchminarain, Ramrick Das v. Brijee Coomari*, 5 C.W.N. cclxi at cclxii. In this country, costs are entirely in the discretion of the Court. In *in the goods of Annie Black* (unreported, Hill, J., 17th April 1895) costs were given against the impugnant. There his Lordship found that the defence when it was started was vague and without any foundation. Similar order

In a suit for a certificate of administration under Act XXVII of 1860, Government did not apply for any such certificate or oppose the plaintiff's suit. But having been made a defendant by the plaintiff, and obliged to make an answer it was held that it was not liable to be cast in costs.⁽²⁰⁶⁾

Trustees and executors are entitled to payment of their costs, charges and expenses properly incurred in relation to their trust estate in priority to the costs of all other parties.⁽²⁰⁷⁾

viii) Government.
to executor's
and trustee's
costs.

Where the estate is insufficient for payment of costs executors and trustees are entitled to payment of their costs, charges, and expenses, in priority to all other parties to an administration action.⁽²⁰⁸⁾

Where a creditor brings an action for administration on behalf of himself and all other creditors, and the estate turns out insufficient for the payment of debts, he is entitled to his costs as between solicitor and client.⁽²⁰⁹⁾

And this applies equally where the creditor has obtained the conduct of an action originally begun by a legatee or next-of-kin,⁽²¹⁰⁾ and where the estate turns out sufficient to pay the separate creditors in full, but not the joint creditors.⁽²¹¹⁾

was made in *In the goods of Kaminey Dossee, Madhusudan Seal v. Benode Behary Dutt* (unreported, Ameer Ali, J., 1st January 1898). Where that has been the case the successful party has never been mulcted in costs. It is only where the impugnant restricts himself to requiring the Will to be proved in solemn form that no order for costs is made against him. A similar order was made in *Khas Mehal v. Administrator-General of Bengal*, 5 C.W.N. 505. The order for costs may also carry with it all the costs and charges of the Receiver *pendente lite*. See *Fisher v. Fisher*, L.R. 4 P.D. 281 (1878), where it was held that in a testamentary suit, condemnation in costs includes all the charges of an administrator pending suit. See also *West v. Goodrick* (31 L.J. Probate Div. 89 (1861)). As for a direction to the Taxing Officer as to those costs as also for directions under Belchambers' Rules and Orders, p. 382, headings 10, 14 and 16, see *Gobind Chunder Dutt v. S.S. Gladstone* (unreported, Hill, J., 29th March 1892). A similar order was made in *In re 'Drachenfels'*, 27 C. 860; see *In re Luchminarain*, 5 C.W.N. (Journal portion) cclxi (cclxii). For a case in which a caveatrix who not content with requiring proof in solemn form and cross-examining the witnesses, had made charges against the plaintiff, was condemned in costs, see *Kusum Kumari v. Satya Ranjan*, 5 C.W.N. 162.

(206) *Government v. Musst. Sanoola*, 3 W.R. 23.

(207) *Dodds v. Tuke*, (1884) 25 Ch. D. 617. See, also, *Stott v. Mil*, (1884) 25 Ch. D. 710. *In re Price, Williams v. Jenkins*, (1886) 31 Ch. D. 485; *In re Turner, Wood v. Turner*, (1907) 2 Ch. 126, 133; *In re Shuttleworth, Lilly v. Moore*, (1911) 55 Sol. J. 866.

(208) *Dodds v. Tuke*, 25 C.D. 617; *Wetenhall v. Dennis*, 33 Beav. 285; *Henderson v. Dodds*, L.R. 2 Eq. 532. See, also, *Re Griffiths*, (1904) 90 L.T. 639.

(209) *Thomas v. Jones*, (1860) 1 Dr. & Sm. 134.

(210) *In re Richardson*, (1880) 14 Ch. D. 611.

(211) *Re Mc Rea*, (1886) 32 Ch. D. 613.

In *Henderson v. Dodds*,⁽²¹²⁾ a suit by creditors to administer realty, there being no personalty, and the realty proving deficient, the Court ordered the costs of the plaintiffs and defendants who were beneficial devisees to be taxed as between party and party, and paid *pari passu* out of the fund, and the balance of the fund then remaining to be applied in payment of plaintiff's extra costs between solicitor and client, and then in payment of debts. This case was followed in *Ferguson v. Gibson*.⁽²¹³⁾

In *re Dunn*,⁽²¹⁴⁾ Byrne, J., held that a claimant was entitled to be paid out of the assets the full costs of the trial of an issue which had been directed and in which he had been successful.⁽²¹⁵⁾

Where executors continued the testator's business lawfully and with the assent of the creditors, the costs and expenses of the executors must be paid out of the assets in priority to the debts.⁽²¹⁶⁾

Where there was no personalty and the real estate was insufficient, costs of prior probate suit were postponed to the costs of an administration action, the order being, first, executors' costs in administration action; next, costs of plaintiff-creditor in that action; and then debts.⁽²¹⁷⁾

An executor or administrator has sometimes also a right to retain his own debt in priority to the costs of the suit.⁽²¹⁸⁾

Security for
costs.

In England, security for costs will be required only from a plaintiff who is absent from or about to leave the country, but not from a person who is practically the defendant in the suit.⁽²¹⁹⁾

(212) (1866) L.R. 2 Eq. 532.

(213) *Ferguson v. Gibson*, (1872) L.R. 14 Eq. 379.

(214) (1902) W.N. 76.

(215) And see, as to the giving costs to creditors, *Abell v. Screech*, (1805) 10 Ves. 355; *Loomes v. Stotherd*, (1823) 1 S. & S. 458; *Re Mayhew*, (1877) 5 Ch. D. 596, C.A.

(216) *Re Owen*, (1892) 66 L.T. 718; and see *Douse v. Gorton*, (1891) A.C. 190.

(217) *Re Pearce*, (1887) 56 L.T. 228.

(218) See *Chisum v. Dewes*, 5 Russ. 29; *Tipping v. Power*, 1 Ha. 405; *Horne v. Shepherd*, 26 L.J. Ch. 817; 3 Jur. N.S. 806; *Richmond v. White*, 12 Ch. D. 361.

(219) *Robson v. Robson*, 3 S. & T. 568, cited in *Triest & Cote*, 13th Ed., 522. For the Indian Law see Civ. Pro. Code (Act V of 1908), O. XXV, r. 1.

In England since the Married Women's Property Act, 1882, married women, suing as plaintiffs without their husbands being joined, are not required to give security for costs. (220)

Sec. 5. Adjournment, Costs of.

Costs of adjournment—Power of Court to grant time and adjourn hearing.

(i) Provisions of the Code of Civil Procedure.

(ii) Provisions of the Code of Criminal Procedure.

Costs of unnecessary adjournment.

Costs of necessary adjournment.

Costs of adjournment in *ex parte* suit.

Costs of adjournment—Transfer of case from undefended Board to defended Board.

Costs of adjournment into Court.

Costs of adjournment in criminal cases.

Costs of adjournment—Time and opportunity to be given for payment of.

Costs of adjournment, Execution of order as to.

Costs of adjournment—Payment into Court or to party—What is proper procedure.

(220) *Threlfall v. Wilson*, 8 P.D. 18; cited in *Triest and Coote*, 13th Ed., 522. Samuel Chapman the father of the petitioner died in Bermuda in 1883. In December 1889 Samuel Brownlow Gray and his son as executors under an alleged will of Samuel Chapman commenced a suit against the heir at law and next of kin of the said Samuel Chapman for an order for the administration of his property and effects, alleging that it became necessary to administer under the authority of the Court owing to its having come to their knowledge that the validity of the will was disputed by some members of the family. The petitioner contested its genuineness and validity. The cause not having been brought to a determination and petitioner having failed in her attempts to have it set down for final adjudication, or in obtaining any redress in Bermuda and her application for permission to appeal to Her Majesty in Council from an order of the Bermuda Court refusing to dismiss the suit for non-prosecution having been rejected, an application for special leave to appeal was made to Her Majesty in Council and on the 29th February 1896 after hearing Mr. C.W. Arathoon for the petitioner and Mr. Herbert Cowell *contra* the following minute was recorded by their Lordships:—"Their Lordships directed that the consideration of this petition should be adjourned for four months in order to give an opportunity of bringing the case to trial and that the costs of this application should be paid by the respondents personally." The Bermuda Court took evidence and decided in favor of the will. Petitioner's application to that Court for leave to appeal from such final judgment to Her Majesty in Council was refused by the following order under Bermuda Act of 1876 No. 382 of 1st November 1876. "The prayer of the petition to appeal not allowed, taxed costs of the Court awarded by the Court against the petitioner Mary Anna Pelkington not having been paid." The petitioner again applied for special leave to appeal. Their Lordships granted leave on the condition of petitioner depositing £200 for security within 4 months. During the course of the argument Lord Watson read the following passage from a judgment delivered by Lord James of Hereford in the case of *Johnson v. Voigt* (from Lagos 12th May 1890 not reported) "it is obvious that to require an appellant as a condition of admitting his appeal to give security for compliance with the order proposed to be challenged by the appeal, would in many cases render an appeal impossible. *Samuel Brownlow Gray v. William Henry Chapman*, 1 C.W.N. (Journal portion) pp. cxlv-cxlv.

Costs of adjournment order as to—

- (a) Review.
- (b) Appeal.
- (c) Revision.
- (d) Alteration of amount of costs of adjournment ordered.

Effect of not paying costs of adjournment.

Costs of adjournment—Power of Court to grant time and adjourn hearing.

(i) Provisions of the Code of Civil Procedure.

As regards the power of Courts to grant adjournments, the Code of Civil Procedure provides that "The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit. In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment: Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing *beyond the following day* to be necessary for reasons to be recorded. ⁽¹⁾

The above provisions regarding the granting of time would apply to adjournments granted at the instance of the parties. It has been held that the corresponding sections in the last Code ⁽²⁾ did not apply to an adjournment which is not made at the instance of the parties, but which is necessitated by the rules of Court which regulates the disposition of its own business.⁽³⁾

This rule ⁽⁴⁾ has been held to give the Court ample discretion as to the particular directions to be given in the matter of costs occasioned by the adjournment. Sufficient opportunity should be given to the party obtaining the adjournment to enable him to carry out the order of the Court and produce his evidence.⁽⁵⁾

(ii) Provisions of the Code of Criminal Procedure.

Similarly the Code of Criminal Procedure ⁽⁶⁾ provides that:—"If, from the absence of a witness, or any other reasonable cause,

(1) See Civil Procedure Code (Act V of 1908), O. XVII, r. 1. On the subject matter of this section see Seton on Judgments and Orders, 6th Ed., pp. 184, 364, 383, 1985; Daniells' Chancery Practice, 7th Ed., 1901, Vol. I, p. 586.

(2) Act XIV of 1882 corresponding to rr. 1 and 2 of O. XVII of the present Code (Act V of 1908).

(3) *Sm. Toolsey Monee Dassee v. Sm. Prosad Money Dassee*, 2 C.W.N. 490.

(4) Act V of 1908, O. XVII, r. 1.

(5) *Dhaniram v. Murli Lal*, 13 C.W.N. 525=36 C. 566=1 Ind. Cas. 366=11 C.L.J. 150.

(6) Act V of 1898, S. 344.

it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit,⁽⁷⁾ for such time as it considers reasonable, and may by a warrant remand the accused if in custody."⁽⁸⁾

The costs of adjournment into Court are in the discretion of the Judge, and if the adjournment is unnecessary the party causing it may have to pay costs.⁽⁹⁾

Any objection to the jurisdiction on an originating summons should be taken in Chambers, or the costs of the adjournment, even though the summons be dismissed with costs, will not be allowed;⁽¹⁰⁾ and, under the English practice, even a solicitor will be ordered personally to pay the costs of an unnecessary adjournment on which he insists.⁽¹¹⁾

A party having good and sufficient reason for non-compliance of an order of a Court cannot be burdened with the costs of adjournment.⁽¹²⁾

A plaintiff failed in an *ex parte* suit to bring forward sufficient evidence to entitle him to a decree, and asked for adjournment, in order to obtain further evidence; the Court granted an adjournment on the terms that the plaintiff should bear the whole costs of the hearing.⁽¹³⁾

(7) One of the terms which the Court usually imposes is the payment of costs caused to the other party by the adjournment of the proceedings. See cases noted *infra* under "costs of criminal proceedings".

(8) See Criminal Procedure Code (Act V of 1898), S. 344, cl. 1.

(9) *Lloyd's Bank, Ltd. v. Princess Royal Colliery Co.*, W.N. (1900) 99; 82 L.T. 559; 48 W.R. 427 (Eng.); D.C.F. 502.

(10) *Re Davies*, 38 Ch. D. 210.

(11) *Barnard v. Scoles*, 37 W.R. 668 (Eng.); *Upton v. Brown*, *sup.* Ignorance of pleader as to the nature of the order passed is no valid ground for adjournment. "It is not the duty of the officers of the Court to call upon the pleaders to sign the orders issued, or to inform them of nature of the orders passed. It is for the pleaders to be present at the proceedings and to make themselves acquaint with the orders passed." *Robert Watson & Co. v. Srimati Ambika Dasi*, 4 C.W.N. 237 (238) = 27 C. 529.

(12) *Umat-ul-Mugni Begum v. Salig Ram*, 51 P.W.R. 1915. In accepting the appeal from the order refusing to set aside the *ex parte* decree passed a second time in this case, the Chief Court cancelled all the proceedings subsequent to the passing of the first *ex parte* decree including the orders allowing costs on the occasion of setting aside the *ex parte* decree and granting the adjournments. (*Ibid.*)

(13) *Shanks v. Savage*, 7 C. 177.

Costs of adjournment—Transfer of case from undefended Board to defended Board.

In the case of *Bindoomadub Mitter v. Woomeschunder Paul* (14) which came up before the Calcutta High Court as early as 1864 it was laid down that "a case entered on the Undefended Board can only be transferred to the Defended Board on payment of the costs of the adjournment, if any, thereby occasioned." (15)

Costs of adjournment into Court.

Costs of adjournment into Court are allowed if the claimant succeeds under ordinary circumstances. (16)

Costs of adjournment in criminal cases.

An order requiring the accused to pay the costs of an adjournment, is one which a Magistrate in his discretion may make under S. 344, Crim. Pro. Code. Where such an order was found to be not unreasonable under the circumstances of the case, it was not disturbed by the High Court. (17)

(14) 2 Hyde 86.

(15) *Bindoomadub Mitter v. Woomeschunder Paul*, 2 Hyde 86. See, also, *Bhojrab Chunder v. Chundi Churn*, Bourke O.C. 238. Macpherson, J., said in the course of the judgment:—"If a defendant wishes to appear and answer in a suit, it is under S. 109 of the Civil Procedure Code that he must do so. The section says: "On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance in the Court-house, in person or by a pleader, and the suit shall then be heard, unless the hearing be adjourned to a future day, which shall be fixed by the Court, so that any defendant appearing for the first time on the day fixed in the summons for his appearance is entitled to have his answer taken and his case disposed of then, unless the hearing be postponed to a future day, which shall be fixed by the Court. He is not in any degree the less so entitled, because his case happens to stand in the so-called "Undefended Board." The two Boards in daily use may be a convenience to the Court and to the profession, but they cannot, and do not, affect the rights which the parties possess under the law which regulates the procedure of the Civil Courts, unless the Court chose to adjourn the hearing under the power given to it in S. 109. The defendant, appearing for the first time on the day fixed in the summons for his appearance, is bound then and there to proceed with his defence, even though his suit is called on among the undefended cases. Cases in the Defended and in the Undefended Board are in exactly the same position as regards adjournment. They may be adjourned in either case, if the adjournment appear to the Court to be necessary, or if good cause is shewn why there should be an adjournment. But when a case is in the list for the day, and both parties are *prima facie* bound to be ready to proceed, if an adjournment is rendered necessary by the laches or negligence of one of the parties, or if it be for his interest, and his interest only, that an adjournment should take place, the usual practice has always been—and it is an obviously wholesome practice—that that party should pay all the costs attendant on the adjournment. The same rule must be applied to "undefended" as to "defended" suits. The party seeking an adjournment must necessarily show sufficient cause for it, and pay the costs consequent upon it." *Bindoomadub Mitter v. Woomeschunder Paul*, 2 Hyde 86 (87, 88).

(16) *Bailey and Leetiam's case*, (1863) L.R. 8 Eq. 94; *Ex parte Wright & Gamble*, (1869) L.R. 8 Eq. 123, cited and followed in *In re Tricumdas Mills Company Ltd*, 13 Bom. L.R. 482=11 Ind. Cas. 552.

(17) *Sew Prosad Poddar v. Corporation of Calcutta*, 9 C.W.N. 18 (19).

A Magistrate in granting an adjournment under the provisions of S. 344 is competent under the same section to order the costs of the day to be paid by the party in whose favour the order for adjournment is made.⁽¹⁸⁾

Section 344 of the Code dealing with proceedings in prosecution expressly empowers the Court to postpone or adjourn an enquiry upon such terms as it thinks fit. This clearly entitles the Court to award costs to the party who has been put to unnecessary expenses by the conduct of the other side and to order that the same be paid up by the latter in whose favour the order for adjournment has to be made.⁽¹⁹⁾

A Court, under S. 344 of the Crim. Pro. Code, is entitled to award costs as a condition precedent to adjourning a case and make

(18) *Mathura Prasad v. Basant Lal*, 28 A. 207 = (1905) A.W.N. 256 = 2 A.L.J. 831, following *Sew Prosad Poddar v. Corporation of Calcutta*, 9 C.W.N. 18; discussing and doubting *King-Emperor v. Chhabraj Singh*, (1902) A.W.N. 59. The Court said in the course of the judgment,—"Section 344 of the Code of Criminal Procedure dealing with proceedings in prosecutions expressly empowers the Court to postpone or adjourn an inquiry upon such terms as it thinks fit. It seems to me that this clearly entitles a Court to award costs to a party who has been put to unnecessary expenses by the conduct of the other side. I further more think that it would be greatly to be deplored if the Court had no such power. I think the Court has power to award costs, and in proper cases it is a power that the Court should exercise; and I think a judicious exercise of the power would have the effect of preventing many useless adjournments. The learned Sessions Judge referred to the case of *King-Emperor v. Chhabraj Singh*, (1902) A.W.N. 59. In that case Mr. Justice Blair set aside an order awarding costs of an adjournment against the Government. The attention of the learned Judge does not appear to have been called to the terms of section 344 of the Code of Criminal Procedure, and furthermore the case does not seem to have been argued, and the award of costs was against the Government. It also appears that the adjournment was not the adjournment of a trial in the strict sense of the word, but of an appeal. The report of the case is a very short one, and I should think that in all probability the view that the learned Judge took was that an award of cost against the Government was made without jurisdiction. In the case of *Sew Prosad Poddar v. Corporation of Calcutta*, (9 C.W.N. 18) a Bench of the Calcutta High Court in a considered judgment held that the Magistrate in granting an adjournment was entitled under the provisions of s. 344 of the Code of Criminal Procedure to order costs to be paid by a party in whose favour an order for adjournment was made. For these reasons I think the order of the Magistrate of the first class was right and should not be set aside." *Mathura Prasad v. Basant Lal*, 28 A. 207 (208, 209) = (1905) A.W.N. 256 = 2 A.L.J. 831.

(19) *Mathura Prasad v. Basant Lal*, 28 A. 207 = 2 A.L.J. 831 = A.W.N. (1905) 256 = 2 Cr. L.J. 803, following *Sew Prosad Poddar v. Corporation of Calcutta*, 9 C.W.N. 18, discussing & doubting *King-Emperor v. Chhabraj Singh*, A.W.N. (1902), 59, where it was held that a Court of criminal appeal cannot, on granting a motion for an adjournment made by the public prosecutor, order that the applicant should pay the costs of the day incurred by the appellant.

the same payable by the party for whose benefit the case is adjourned.⁽²⁰⁾

The Chief Court of the Punjab seems to have taken a different view on the subject. The following recent rulings of that Court may be noted. It was held that "Criminal Courts have no authority to order an accused person to pay costs of an adjournment consequent on his failure to appear on the date fixed for hearing."⁽²¹⁾

A Criminal Court's order to an accused person to pay costs of adjournment under S. 344 of the Crim. Pro. Code, 1898, on an application made by the former under S. 526 of the said Code is obviously improper and unjustifiable, and though not appealable, is liable to be set aside on revision by the High Court.⁽²²⁾

But the same Court held in a previous case the words "on such terms as it thinks fit" in S. 344, Crim. Pro. Code, justify Criminal Courts in allowing costs of adjournment to the party endamaged by such adjournment.⁽²³⁾

Costs of
adjournment
—Time and
opportunity
to be given for
payment of.

Where, upon an application of the plaintiff the Court made an order for adjournment conditional upon the immediate payment of costs, held—that although, no doubt, S. 156 of Act XIV of 1882 gives ample discretion as to the particular directions to be given in the matter of costs occasioned by the adjournment, in the circumstances of the case, the Court ought to have adjourned the case to a subsequent date and made the hearing on that date conditional on the payment of costs before that date, so as to enable the plaintiff to carry out the order of the Court.⁽²⁴⁾

(20) *Ram Dayal v. Karan Singh*, A.W.N. (1905), 257, note = 28 A. 209, note, referred to in *Mathura Prasad v. Basant Lal*, 28 A. 207 = 2 A.L.J. 831 = A.W.N. (1905), 256.

(21) *Browne v. Chanda Singh*, 6 P.R. 1906, Cr. = 114 P.L.R. 1907 = 4 Cr. L.J. 78, distinguishing *Crown v. Shuldham*, 20 P.R. 1904, Cr., and referred to in *Fatta v. Crown*, 8 P.W.R. 1911, Cr. = 10 Ind. Cas. 851.

(22) *Fatta v. Crown*, 8 P.W.R. 1911, Cr. = 10 Ind. Cas. 851, following *Browne v. Chanda Singh*, 6 P.R. 1906, Cr.

(23) *Crown v. Shuldham*, 20 P.R. 1904, Cr. But see *Fatta v. Crown*, 8 P.W.R. 1911, Cr. ; *Browne v. Chanda Singh*, 6 P.R. 1906, Cr.

(24) *Dhaniram Mahata v. Murli Lal Mahata*, 13 C.W.N. 525. Mookerjee, J., said in the course of the judgment:—"As regards the second point taken on behalf of the appellant, it is contended that under S. 156 of the Code of 1882, it was open to the Subordinate Judge to make the order for adjournment conditional upon the immediate payment of costs. It is suggested that if, in the opinion of the Subordinate Judge, an adjournment was necessary in the interests of justice, the object of the grant of an adjournment ought not to have been defeated by the imposition of an order for costs, inability to comply with which would nullify the very object which the Court had in

The order directing payment of costs under this rule may be executed under S. 36 of the Civil Procedure Code as a decree.⁽²⁵⁾

Costs of adjournment, execution of, order as to,

Where a party to a suit was directed by the High Court to pay the costs of the day, and his solicitor paid the money into Court under S. 257 of the Code of Civil Procedure : ⁽²⁶⁾ *Held* that section was not applicable as the order was not a decree.⁽²⁷⁾

Costs of adjournment — Payment into Court or to party — What is proper procedure.

view. In our opinion, there is no foundation for the broad contention that the Court could not make an appropriate order for costs ; the second paragraph of S. 156 clearly gives the Court ample discretion as to the particular directions to be given in the matter of costs occasioned by the adjournment. At the same time we are of opinion that in the circumstances of this case, the Court might have adjourned the case to a subsequent date and made the hearing on that date conditional upon the payment of costs before that date. Such an order would have enabled the plaintiff or his legal adviser to comply with the order for costs. We are of opinion, therefore, that sufficient opportunity was not given to the plaintiff to enable him to carry out the order of the Court and to produce his evidence." See *Dhaniram Mahata v. Murlilal Mahata*, 13 C.W.N. 525 at pp. 529-530.

(25) See Sarkar's Civil Procedure Code (Act V of 1908), Vol. II, 1909, Notes under O. XVII, r. 1, p. 716.

(26) Act XIV of 1882.

(27) *Shank's v. The Secretary of State for India in Council*, 12 M. 120. This was an application made before Mr. Justice Karnan in Chambers for leave to execute an order that defendant should pay the plaintiff the costs of the day. The defendant, instead of paying the amount to the plaintiff, paid it into Court under S. 257 of the Code of Civil Procedure. The plaintiff's attorney contended that plaintiff was entitled to have the money paid to him direct, and that the money ought not to have been paid into Court, and that plaintiff was not bound to go to the expense of applying for payment out of Court. The acting Advocate-General, for the defendant, contended that the course adopted by the defendant's solicitor was correct, as the order of the Court amounted to a decree within the meaning of S. 257 of the Code of Civil Procedure. Karnan, J., said in the course of the judgment :—An order was made, under S. 218 of the Civil Procedure Code, that the defendant should pay the cost of the day. The taxed costs, including Rs. 45, for costs of execution, amounted to Rs. 189-9-0. The defendant's attorney lodged the amount in Court, treating the order as a decree under S. 257. S. 257 provides that all moneys payable under a decree should be paid as follows : 1st into Court whose duty it is to execute the decree, etc. The present is an application to me in Chambers to decide whether payment into Court was the proper course for the defendant's attorney to adopt." His Lordship then went on to discuss whether such an order for the payment of costs of the day was a decree, and having come to the conclusion that it was not a decree and that the procedure applicable to the payment of money payable under a decree was not applicable to the payment of money payable under such an order proceeded as follows :—"The amount of costs awarded on an application under any of the sections of the Code is generally a small matter, and of small amount, probably contemplated by the Code to be disposed of without the necessity of the formal adjustment and certificate of payment into Court. But decrees for payment of money are contemplated as being of more importance, and a record of the adjustment and certificate of payment into Court should be applied to the amount of costs of application awarded under the Code the result might be that the

Costs of
adjournment,
order as to
(a) Review.
(b) Appeal.

Once an order for adjournment has been made on terms as to costs it should not be rescinded on review unless on good and sufficient cause shown and in the presence of the other party.⁽²⁸⁾ Orders under r. (1) of O. XVII, Civ. Pro. Code, ⁽²⁹⁾ are not open to appeal.⁽³⁰⁾ Their propriety can be questioned in an appeal from the final decree. An appellate Court, however, is not generally inclined to interfere with inferior Courts, in the exercise of the discretion allowed to them to grant or refuse an adjournment.⁽³¹⁾ An order made by a Judge of the High Court at settlement of issues fixing a distant date for the hearing of a suit is not an order under this rule and is appealable under the Letters Patent.⁽³²⁾

(c) Revision.

An order to adjourn a case conditional on payment of costs thereof is merely an interlocutory order and is not one of those the revision of which is contemplated under S. 115 of the Code of Civil Procedure.⁽³³⁾

award of costs of the day or other small sums of costs awarded by the Court on applications, under any section of the Code (most frequently only a few rupees), would be nugatory or nearly so. The costs, if paid into Court, could not be paid out without an order of the Court,—the expenses of which might be more in many cases than the small amount of costs awarded. Though the Code provides that the orders for costs of application may be executed as if they were decrees, it does not provide that the amount of such an order should be paid in any of the ways mentioned in S. 257. As an instance, if at Chambers, an order for costs will be Rs. 7, r. 44, 24th July 1874. Is that sum to be paid into Court, and to be drawn out at the expense of Rs. 5 provided by Rule on the order to draw it out, or was it intended to burden the party needlessly with that fee on such a small amount? In my judgment the course taken on behalf of the defendant in paying the amount of the costs awarded by the order of the 18th of October was not correct. I think that S. 257 does not apply to the amount of costs awarded in applications, or under orders which are not decrees within the definition of S. 2 of the Code. The Court has of course power to make a special order in a fit case for payment of any moneys into Court. The plaintiff, therefore, is entitled to enforce payment in the usual way, unless the money is paid to him. The question is a new one, and the plaintiff has got costs of execution, and therefore I will give no costs of this application." *Per* Karnan, J. in *Shanks v. The Secretary of State*, 12 M. 120 at pp. 121-123.

(28) *Bishen Perakash v. Ruttun Geer*, 20 W.R. 3.

(29) Act V of 1908.

(30) See Act V of 1908, O. XLIII, r. 1.

(31) *Simon Elias v. Jorawar Mull*, 24 W.R. 202.

(32) *R. v. R.*, 14 M. 88.

(33) *Mul Chand v. Juggi Lal*, 12 A.L.J. 460. Tudball, J., said in the course of the judgment :—"This is an application in revision against what is really an interlocutory order of the Court below under which it granted an application by the present application for an adjournment conditional on payment of Rs. 500, as costs thereof to the opposite party. A preliminary objection is taken that no revision lies under S. 115 of

In proceedings before a District Judge with reference to a claim to a certain property said to have been the property of a person who had died intestate, the claimant asked for an adjournment to enable her to produce evidence of her title, which adjournment was granted on condition of her paying the costs thereof, assessed at Rs. 58. On a representation being made to the District Judge by the applicant's pleader, the Judge reduced the amount of the costs to Rs. 28. *Held*, that it was within the power of the District Judge to alter his order as to costs. ⁽³⁴⁾

A widow applied for a succession certificate to her late husband. The application was opposed by his brother who claimed to have been undivided from him. The matter came on for hearing, but was adjourned on his application, he being ordered to pay the costs. He failed to pay the costs, and the certificate was issued to the widow: *Held* that S. 158 of the Civ. Pro. Code was inapplicable to the case in the absence of a specific order making the payment of costs a condition precedent to the hearing of the evidence of the party in default. ⁽³⁵⁾

Sec. 6. Arbitration and Award.

Arbitration, what is an.

Provision as to costs in reference to arbitration.

General rule as to power of arbitrators.

Provisions of the Code of Civil Procedure relating to costs in arbitration.

Provisions of the Indian Arbitration Act relating to such costs.

Provisions of the English Arbitration Act, 1889, regarding the same.

the Code of Civil Procedure and it is quite clear that this objection is based on good grounds. The order is merely an interlocutory order and is certainly not one of those revision of which is contemplated under S. 115. After all it is a question of costs and the Court which finally decides the case will have full power to do justice in all matters of costs. The application fails and is, therefore, dismissed with costs." *Per Tudball, J.*, in *Mul Chand v. Juggi Lal*, 12 A.L.J. 460.

(34) *Eleanor Wintile v. Mahbubani*, A.W.N. (1902) 98.

(35) Act XIV of 1882.

(36) *Virabhadrapa Chetti v. Chinamma*, 21 M. 403 (404)=8 M.L.J. 189. A Court has no power to dismiss a plaintiff's suit merely because the plaintiff has omitted to comply within an order of the Court directing him, within a certain time, to pay the costs of preparation of a map considered by the Court to be necessary to the decision of the suit. If an order of this kind is not complied with, it is the duty of the Court to go on and decide the suit on such material as it has before it. *Sitara Begam v. Tulshi Singh*, 23 A. 462. Followed in *Moriannissa v. Ram Kalpa*, 34 C. 235=5 C.L.J. 260, in which after reviewing all the cases under Ss. 157, 158, Civ. Pro. Code, 1882, the distinction between these two sections has been clearly explained and pointed out. See also *Nagendra Kumar v. Nabin Mandal*, 36 C. 189, following *Moriannissa v. Ram Ram Kalpa*, 34 C. 235; *Cooke v. Equitable Coal Co.*, 8 C.W.N. 621, and distinguishing *Sitara Begam v. Tulshi Singh*, 23 A. 462.

Certain terms occurring in cases referred to arbitration explained and distinguished.

- (i) "Costs of the cause."
- (ii) "Costs of the reference."
- (iii) "Costs of award."
- (iv) "Costs of special case."

Costs—Duty of arbitrator to deal with—When he is empowered to deal with the same.

Costs—Amount of, to be stated in award.

Costs not dealt with by arbitrator—Power of Court to refer back matter to arbitrator.

Costs, scale of—Power of arbitrator to fix.

Costs, apportionment of—Power of arbitrator as to.

Costs of each party to be borne by himself—Powers of arbitrator as to direct—Practice.

Costs incurred in filing award in Court—Power of arbitrator to deal with.

Costs left to the discretion of arbitrators settled by umpire.

Duty of umpire.

Costs of umpire.

Costs of umpire and of arbitrator—Award should separate the two.

Costs, unauthorised provision as to, in award, effect of.

Costs, effect on, when award is set aside on ground of arbitrator exceeding his authority.

Court acting in excess of its jurisdiction.

Court's power to award costs and arbitration fees where no award is made.

Arbitrator's remuneration, suit for.

Order of reference providing that costs shall abide the event—Discretion of arbitrator.

Effect of award when costs abide the event.

Suit for costs of award.

Arbitration,
what is an.

"ARBITRATION is the settlement of disputes by the decision not of regular and ordinary Court of law, but of one or more persons who are called arbitrators".⁽¹⁾

(1) See Encyclopedia of the Laws of England, 2nd Ed., 1902, p. 458. Regarding the subject-matter of this chapter see Ralia Ram's Digest of Indian Cases law on the law of Arbitration (Amritsar), 1906, pp. 83—86. (N.B.—This contains a specially good collection of the Punjab cases relating to the subject) Surendra Nath Roy's Indian Law of Arbitration, 1906, pp. 27-29 & 76; Morison's Indian Arbitration Act (IX of 1899), 1901, pp. 7, 8, 12, 13, 16, 21, 27 and 42; Nanniah's Law of Arbitration published by the Lawyer's Companion Office (1916), pp. 70—75; 107—109, 150; Marshall's Law of Costs, 2nd Ed., 1862, pp. 426—437. Russell on the power and duty of an arbitrator, 9th Ed., 1906, pp. 215—217; 234—247, and 358—362. See, also, Banerjee's Law of Arbitration in British India, 1908; Law of Arbitration and Award by Redman, Ed. III, 1897; Annual Practice (1908), Vol. I, Notes under O. LXV, r. 1, p. 915; Yearly Practice, 1914, Notes under O. LXV, r. 1, pp. 1076, 1077; Encyclopædia of the Laws of

Persons may agree to refer matters in dispute between them, whether involved in an action pending or not; and at any time before trial, or at the trial, the parties to the action may, by a Judge's order, or rule of Court, refer the action, together with any other matters in difference, to arbitration. Further, the Court or a Judge has power at any time after the issuing of the writ, to refer, upon the application of either party, matters in dispute to an arbitrator appointed by the parties, upon such terms as to costs and otherwise as such Judge shall think reasonable; and the Judge at the trial has a like power. In each of these cases the costs are governed principally by the terms of the reference, whether contained in a rule, order, bond, or agreement.⁽²⁾

Provision as to costs in reference to arbitration.

Arbitrators who have been appointed in the course of a suit under a submission which has been made a rule of Court can exercise no greater power than is vested in them by the referring order, as their powers are circumscribed within the four corners of that instrument and can neither be enlarged nor narrowed by the view the arbitrators may themselves take of their duties.⁽³⁾

General rule as to power of arbitrators.

The Code of Civil Procedure, ⁽⁴⁾ Sch. II, entitled arbitration deals with the subject of "Arbitration" in Courts of law.⁽⁵⁾

Provisions of the Code of Civil Procedure relating to costs in arbitration.

England, 2nd Ed., Vol. I, pp. 458, 462. Halsbury's Laws of England, Vol. I, pp. 470—471 & 490—491; Mew's Digest, Vol. I, Cols. 754—778; Morgan and Wurtzburg on the Law of Costs, pp. 36, 386 and 439; Daniell's Chancery Practice, 7th Ed., 1901, Vol. II, p. 1881; Amir Ali's C.P.O. Notes under sch. II; Seton on Judgments and Orders, 6th Ed., 1901, Vol. I, pp. 413, 414.

(2) See Marshall on the Law of Costs, p. 426.

(3) *Ramditta v. Must. Bhagan*, 3 P.R. 1883.

(4) Act V of 1908.

(5) That Schedule deals with the subject of arbitration under three heads: *Ghulam Khan v. Muhammad Hassan*, 29 C. 167 = 29 I.A. 51 (P.C.) 1. Where a suit has been instituted and all the parties interested agree to refer to arbitration any matter in difference between them in the suit. In that case all proceedings from first to last are under the supervision of the Court, and they are governed by the provisions of paras. 1 to 16 of this schedule. The first step is to apply to the Court for an order of reference under para. 1. If all the parties interested have joined in the application, an order of reference will be made under para. 3. See para. 1-16 of Sch. II of Civ. Pro. Code, Act V of 1908. 2. Where parties without having recourse to litigation agree to refer their differences to arbitration and it is desired that the agreement of reference should have the sanction of the Court. In that case the parties to the agreement or any of them may apply to the Court under para. 17 to have the agreement filed in Court and to make an order of reference thereon. If an order of reference is made, all further proceedings will be under the supervision of the Court, and they will be governed by the provisions of paras. 3 to 16 so far as they are consistent with the agreement. 3. Where the agreement of reference is made and the arbitration itself takes place without th

It provides that "the Court may make such order as it thinks fit respecting the costs of the arbitration, if any question arise respecting such costs and the award contain no sufficient provision concerning them."⁽⁶⁾

Provisions of
the Indian
Arbitration
Act relating
to such costs.

Section 6 of the Indian Arbitration Act provides that "a submission, unless a different intention is expressed therein, shall be deemed to include the provisions set forth in the first schedule, in so far as they are applicable to the reference under submission."⁽⁷⁾

The said first schedule to the Indian Arbitration Act ⁽⁸⁾ contains the following provisions as to costs:—"The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom, and in what manner, those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client ⁽⁹⁾.

The costs must be ascertained and definitely stated in the award, otherwise they would be liable to taxation in the ordinary way. ⁽¹⁰⁾

Section 17 of the Indian Arbitration Act provides that "Any order made by the Court under this Act may be made on such terms as to costs or otherwise as the Court thinks fit." ⁽¹¹⁾

intervention of the Court and the assistance of the Court is only sought in order to give effect to the award. In that case any person interested in the award may apply to the Court under para. 20 to have the award filed in Court. See Mulla's Civ. Pro. Code, 5th Ed., 1913, p. 904.

(6) Act XIV of 1882 (Civ. Pro. Code), S. 519=Act V of 1908 (Civ. Pro. Code), Sch. II, r. 13.

(7) Act IX of 1899 (Arbitration), S. 6. The provision as to arbitrators awarding costs of the reference and award in the schedule is an instance of a subject perhaps not contemplated by the parties and not mentioned in the submission. Under the old law, unless there was an express provision on this subject, the arbitrator had no power to award costs, with the result that the successful party could not get his costs either from the arbitrator or the Court, however large they may have been, and however unsuccessful his opponent may have been. *In re Williams and Stepney*, 60 L.J.Q.B. 686.

(8) Act IX of 1899.

(9) Act IX of 1899 (Arbitration), Sch. I, r. 9. This rule is a verbatim reproduction of r. (1) of the first schedule to the English Arbitration Act, 1889, 52 and 53 Vic., C. 49.

(10) *In re Frebble and Robinson*, (1892) 2 Q.B. 602.

(11) Act IX of 1899 (Arbitration), S. 17. This section deals with the costs of matters before the Court. Apart from the special terms of the submission, Art. IX of Schedule I gives the umpire or arbitrators the sole discretion to award the costs of the reference and award. *In re Frebble and Robinson*, (1892) 2 Q.B. 602.

The amount of the costs to be paid under the above provision must be ascertained and stated in and by the award itself, otherwise the costs of the reference and award, including the arbitrator's fees, are liable to taxation in the ordinary course. (12)

The fees shall be according to the Table of fees for the original side of the Court as near as the circumstances will permit, the petition for that purpose being deemed a plaint. (13)

Section 11 of the Indian Arbitration Act provides that "When the arbitrators or umpire have made their award, they shall sign it and shall give notice to the parties of the making and signing thereof and of the amount of the fees and charges payable to the arbitrators or umpire in respect of the arbitration and award. The arbitrators or umpire shall, at the request of any party to the submission or any person claiming under him, and upon payment of the fees and charges due in respect of the arbitration and award, and of the costs and charges of filing the award, cause the award, or a signed copy of it, to be filed in the Court; and notice of the filing shall be given to the parties by the arbitrators or umpire." (14)

"The arbitrator or umpire has a lien for his reasonable costs on the award and submission and on any memoranda or valuation obtained by himself from other persons for his guidance, but not on documents put in as evidence before him by the parties." (15)

If necessary, an arbitrator may employ a solicitor or counsel to draw up the award and he may also claim such expenses as costs of the award. (16)

Under the English Arbitration Act, 1889, a submission, by consent out of Court unless a contrary intention is expressed therein, is also deemed to include a provision to the effect that "The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs, or any part thereof, shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client." (17)

Provisions of
the English
Arbitration
Act, 1889,
regarding
the same.

(12) *In re Prebble and Robinson*, (1892) 2 Q.B. 602.

(13) Rules of the Bombay High Court, r. 11, framed under the Indian Arbitration Act (IX of 1899) cited in Morison's Indian Arbitration Act, 1901, p. 42.

(14) Act IX of 1899 (Arbitration), S. 11.

(15) *Laing v. Todd*, 13 C.B. 276.

(16) *Threlfall v. Fanshawe*, 19 L.J.Q.B. 334.

(17) Russell on Arbitration and Award, 9th Ed., 1906, p. 287.

Certain terms occurring in cases referred to arbitration explained and distinguished:

(i) Costs of the cause.

"When a cause is referred to arbitration the 'costs of the cause' comprise the costs incurred in the cause up to the time of the submission to arbitration, the costs of the order of reference, and the costs of ulterior proceedings in the cause, if any, after the award."⁽¹⁸⁾

(ii) Costs of the reference.

"Ordinarily, the expense incurred by the parties of the whole inquiry before the arbitrator, whether with respect to the matters in the cause or the matters out of it, are costs of the reference. They include the costs of witnesses and the costs of a brief in the cause referred, prepared after the reference for the purposes of the arbitration. This is the case even if the arbitrator expressly find that there are no matters in difference except in the cause. ⁽¹⁹⁾ The costs are taxed usually as between party and party."⁽²⁰⁾

The costs of an accountant employed by the arbitrator, by consent of parties, to examine the defendant's books, and of the attendance of the plaintiff's solicitor with the accountant, may be costs of the reference.⁽²¹⁾

"Sometimes the costs of the cause include the costs of the reference; thus, where the whole cause is referred to a special referee for trial ⁽²²⁾ the special referee is in the position of a Judge and the costs of the trial include the costs of the reference."⁽²³⁾

(iii) Costs of award.

"The costs of the award are the amount of the arbitrator's charges, which are usually paid to him when the award is taken up. As between the parties, if the arbitrator's demand be excessive, the costs of the award are such amount only as on taxation the

(18) *Ex relatione of a Master*. See *Goodall v. Ray*, 4 Dowl. 1; *Clarke v. Owen*, 2 H. & W. 324. It includes, also, the costs of witnesses present at the trial ready to be examined, but not the costs of a witness who was subpoenaed, but who did not arrive until after the cause was referred, though he was examined the same day before the arbitrator. *Fryer v. Stuart*, 16 C.B. 218; 24 L.J.C.P. 154. Russell on Arbitration and Award, 9th Ed., 1906, p. 234.

(19) *Brown v. Nelson*, 13 M. & W. 397; *Utting v. Evans*, M'Clel. 12.

(20) *Eccles v. Blackburn Corporation*, 30 L.J. Ex. 358. Arbitration and Award by Russell, 9th Ed., 1906, p. 235. Where on an action being stayed, as being contrary to an agreement to refer, the parties then prepared and executed a further submission to arbitration, under which the arbitration took place, it was held that the costs of and incidental to the further submission were part of the costs of the reference. *In re Zutohreplic, &c., Co.*, 21 Q.B.D. 182; 57 L.J.Q.B. 488.

(21) *Hawkins v. Rightby*, 29 L.J.C.P. 228=8 C.B.N.S. 271.

(22) Under R.S.C. of England, O. XXXVI, r. 50.

(23) *Patten v. West of England Iron Co.*, (1894) 2 Q.B. 159; 63 L.J.Q.B. 757.

Court or the master deems the arbitrator entitled to have claimed⁽²⁴⁾, for he has power to inquire into the propriety of the arbitrator's charges when a serious objection is made to them."⁽²⁵⁾

"If a verdict be taken by consent, subject to a special case to be stated by A. B., who, in the event of the Court deciding in favour of the plaintiff, is empowered to direct for what amount the verdict is to be entered, and to whom the action and all matters in difference, subject to the special case, are referred, all costs up to the judgment of the Court on the special case are costs in the action."⁽²⁶⁾

"When the costs of the cause, or of the reference or award, are stated by the submission to be in the discretion of the arbitrator, he should give some direction respecting them, as otherwise the Court may say that the award is not final."⁽²⁷⁾

(iv) Costs of special case.
Costs, Duty of arbitrator to deal with, when he is empowered to deal with the same.

Where the arbitrator who was empowered to that effect awarded that the defendant should pay a certain sum to the plaintiff, but made no mention of costs, it was held that the award was bad.⁽²⁸⁾

In a suit filed in *forma pauperis*, the whole case was referred to arbitration. The award allowed about one-third of the claim but was silent as to costs. The Court, in passing decree in accordance with the terms of the award, awarded full costs to the plaintiff. *Held*, on appeal, that the order of the lower Court as to costs was wrong. The Chief Court ordered the parties to bear their own costs.⁽²⁹⁾

Arbitrators have power to settle the cost of hearing if empowered in that behalf by the Court or the party or parties by whom such costs are to be paid or borne.⁽³⁰⁾

(24) *Brazier v. Bryant*, 2 Dowl. 600; *Dossett v. Gingell*, 2 M. & G. 870; 10 L.J. O.P. 193.

(25) *Webb v. Wyatt*, 3 Jur. N.S. 496; *Barnes v. Hayward*, 1 H. & N. 742; *Westwood & Co. and Cape of Good Hope Government, In re*, 2 Times L.R. 667; *Arbitration and Award*, Russell on Arbitration, 9th Ed., 1906.

(26) *Edwards v. The Great Western Rail Co.*, 12 C.B. 419; *Russell on Arbitration and Award*, 9th Ed., 1906, p. 234.

(27) *Morgan v. Smith*, 9 M. & W. 427; 11 L.J. Ex. 379; *Richardson v. Worsley*, 5 Ex. 613; 19 L.J. Ex. 317; *Williams v. Wilson*, 9 Ex. 90; 23 L.J. Ex. 17; *Russell on Arbitration and Award*, 9th Ed., 1906, p. 241.

(28) *Richardson v. Worsley*, 5 Ex. 613=19 L.J. Ex. 317.

(29) *Kartar Singh v. Faqir Singh*, 35 P.L.R. 1906.

(30) *Barrut Chunder Dass v. Damjee Pettumber*, Bourke O.O. 7=7 Cor. 150.

The question of costs of the reference and award may be dealt with by the arbitrators, only when they are specially empowered to that effect or when all the matters in difference between the parties have been referred to them.⁽³¹⁾

The rule in England is, that a submission of all matters in difference does not give the arbitrator power to award the costs of the reference and award, but only the costs of the suit, and that in such a case each party must bear his share of the costs of the reference and award. There the Court is constituted by the parties, and its powers must be strictly construed.⁽³²⁾

It is clearly contemplated under Indian Law that an award, made under an order in the terms of S. 315, Civ. Pro. Code, ⁽³³⁾ should contain a sufficient provision for costs.⁽³⁴⁾

The power of an arbitrator to award costs of the reference has also been supported in England in *Walker v. Brown*, ⁽³⁵⁾ where it has been held that a power to award as to the cost of the reference and also over the costs of the award rests with the arbitrators.

When a reference to arbitration in a suit is a general one of the whole case, the power of dealing with costs rests with the arbitrators; this is not so where one or more specific issues have been referred, and the question of costs is not included in the issues so referred.⁽³⁶⁾

Under the old law ⁽³⁷⁾ where all matters in difference between the parties in the suit were referred to arbitration under an order of Court it was held that the arbitrators had power to award interest after the date of the submission, and to deal with the costs of the reference and award. In *Steel v. Roberts* ⁽³⁸⁾ it has been held that there is nothing in the Civil Procedure Code which authorises arbitrators to apply to the Court for confirmation of an order passed by them making payment of their fees a condition precedent to the hearing of a reference.

(31) *Mohan Lal v. Nathuram*, 1 B.L. R.O.C. 144; *Hargolal v. Sodhi Kartar*, 91 P. R. 1888; *Muddoosoodun Chowdhry v. Koylas Chunder Shaw*, 2 Ind. Jur. N.S. 12.

(32) *Mohanlal v. Nathuram*, 1 B.L.R.O.C. 144 (145).

(33) Civ. Pro. Code, Act VIII of 1859.

(34) *Mohanlal v. Nathuram*, 1 B.L.R. 144 (145).

(35) 9 Q.B.D. 434.

(36) *Hargolal v. Sodhi Kartar Singh*, 91 P.R. 1888.

(37) Act VIII of 1859 (Civil Procedure Code).

(38) 6 C. 809.

In *Dagdusa Tilakchand v. Bhukan Govind Shet*, (39) where the parties to a suit having referred the matters in dispute between them to arbitration, the arbitrators, without being specially authorised to decide the question of costs, included in the award a direction that the defendant should pay the costs of the plaintiff. On the application of the plaintiff, the Subordinate Judge under S. 526 of the Civil Procedure Code (40) ordered the award to be filed, holding that the arbitrators had, as such, an implied power to deal with the costs. The defendant applied to the High Court, under its extraordinary jurisdiction, praying that the record of the case might be sent for, and the order of the Subordinate Judge set aside. It was held that the arbitrator had no implied power to deal with the question of costs, and that, on the defendant's objection, the Subordinate Judge should have refused to file the award. Under the circumstances the High Court, instead of setting aside the order to file the award, directed the award to stand good, except so far as it awarded costs, and that the decree should be drawn in accordance with it, as it would be if it contained no direction as to costs.

The amount of the costs to be paid must be ascertained and stated in and by the award, itself; otherwise the costs of the reference and award, including the arbitrator's fees, are liable to taxation in the ordinary course. (41)

As the award when filed is, unless set aside or remitted, enforceable as a decree, it must be complete and certain. If it award that any sum of money be paid, that amount must be definitely stated. If costs are granted, the award must specify the amount. Where the arbitrator or umpire award costs without specifying the amount, the award is bad for uncertainty. (42)

Where there is a reference under the submission of the parties, and the costs are left to the discretion of the arbitrator, but he

Costs,
Amount of, to
be stated in
award.

Costs not
dealt with by
arbitrator—
Power of
Court to refer
back matter
to arbitrator.

(39) 9 B. 82.

(40) Act XIV of 1882. The decision of arbitrators in a matter not in difference between the parties, referred to them, is null and void for want of jurisdiction. *Moshahel Singh v. Konomutty Bewa*, 15 W.R. 172.

(41) *In re Prebble & Robinson*, 2 Q.B. 602; 67 L.T. 267; 41 W.R. 30 (Eng.); 57 J. P. 54.

(42) *James Finlay & Co. v. Asudamal*, 5 S.L.R. 89 (91).

fails to deal with them in his award, the Court will refer back the matter to the arbitrator to enable him to deal with the costs.⁽⁴³⁾

Costs, scale of
—Power of
arbitrator to
fix.

It has been held that, when the order of reference gives the arbitrator full discretion over costs, he alone can fix the scale.⁽⁴⁴⁾

An award directed that the defendant should pay the costs of the suit, and of the reference, and of the award, without fixing the scale. On application to the Court to do so, the case was sent back to the arbitrator for that purpose. *Held* that when the order of reference gives the arbitrator full discretion over costs, he alone can fix the scale.⁽⁴⁵⁾

The costs are taxed usually as between party and party.⁽⁴⁶⁾

Costs,
apportion-
ment of—
Power of
arbitrator
as to.

“When an arbitrator has power over the costs he may apportion them as he thinks right, he may order either the plaintiff or the defendant to pay the whole amount of them, or that each shall pay in certain proportions.⁽⁴⁷⁾ He may direct an infant party to the reference, or a person who though not a party to any cause referred has made himself a party to the reference, to pay the whole costs.⁽⁴⁸⁾ He may make a successful party pay all the costs.⁽⁴⁹⁾

Costs of each
party to be
borne by
himself—
Powers of
arbitrator so
to direct—
Practice.

“When he does not wish to give a preference to either party, unless there be some special reason for awarding otherwise, the arbitrator should direct that each party shall bear his own costs of the reference, and pay half the costs of the award. This will save the delay and trouble of taxing the costs of the parties which would be necessary if the award directed that each party should pay half the costs.”⁽⁵⁰⁾

Costs
incurred in
filing award
in Court—
Power of
arbitrator to
deal with.

Except, in cases of special agreement, all costs incurred in the process of obtaining an order from the Court to file the award are

(43) *Warburg & Co. v. McKerrow & Co.*, 90 L.T. 644. See, also, *Barrut Chunder Doss v. Damjee Pitumber*, Bourke O.C. 7=Cor. 150 (1865). See *James Finlay v. Asudamal*, 5 S.L.R. 89 at p. 91, where the matter was not referred back as the arbitrator was not then in the country.

(44) *Muddoosoodun Chowdhry v. Koylas Chunder Shaw*, 2 Ind. Jur. N.S. 12; *Barrut Chunder Doss v. Damjee Pitumber*, Bourke O.C. 7=Cor. 150.

(45) *Barrut Chunder Doss v. Damjee Pitumber*, Bourke O.C. 7=Cor. 150 (1865).

(46) *Eccles v. Blackburn Corporation*, 30 L.J. Ex. 358.

(47) *Cargey v. Aitcheson*, 2 B. & C. 170; 1 L.J. (O.S.) K.B. 252; *Young v. Bulman*, 13 C. B. 623; 22 L. J. C. P. 160; *Boys v. Bluck*, 13 C. B. 652 at p. 699.

(48) *Proudfoot v. Poile*, 3 D. & L. 624.

(49) *Fearon v. Flinn*, L. R. 5 C. P. 34.

(50) Russell on Arbitration and Award, 9th Ed., 1906, pp. 241, 242.

within the discretion of the Court, and are outside the province of the arbitrator.⁽⁵¹⁾

Although costs incurred in the process of obtaining an order from the Court to file the award are within the discretion of the Court, and outside the province of the arbitrator, yet the Court will not set aside an award merely because the arbitrator has, in excess of his authority, awarded such costs, but will treat that portion of the award as a mere recommendation to the Court that they be granted.⁽⁵²⁾

If the submission leaves the costs in the discretion of the arbitrators, who have power to choose an umpire, the award is good if the amount of the costs is settled by the umpire.⁽⁵³⁾

Costs left to the discretion of arbitrators settled by umpire.

The duties of an umpire appointed under a reference are, in certain cases, indistinguishable from those of a single arbitrator. He must give reasonable opportunity to the parties to appear before

Duty of umpire.

(51) *James Finlay & Co. v. Asudamal*, 5 S. L. R. 89. The Court (Crouch, A. J. C.) said in the course of the judgment:—"The authority of the arbitrator as to costs is limited except in cases of special agreement to "costs of the reference and award," (para. IX of 1st Schedule, Arbitration Act). The costs and charges of filing the award are a separate matter, and are distinguished in S. 2 of the Act. Under the rules of this Court, the award is filed by presenting a petition, and the Act gives power to the Court to pass orders on this petition, "on such terms as to costs as it may think fit." It is clear that, under the Act, all costs incurred in the process of obtaining an order from the Court, are within the discretion of the Court, and are outside the province of the arbitrator. Practically, it is impossible for the arbitrator to grant costs of filing the award, for, he cannot know, at the date of his award what these costs will amount to. It is impracticable to remit the award back to Mr. Sawyer, as he is not now in India. I set aside the award." *James Finlay & Co. v. Asudamal*, 5 S. L. R. 89 (91).

(52) *J. M. Lang v. Holland*, 8 S. L. R. 136 = 27 Ind. Cas. 526 (referring *James Finlay & Co. v. Asudamal Harbhagwandas*, 5 S. L. R. 89). The Court (Crouch, A. J. C.) said in the course of the judgment:—"I have previously held in the case of *James Finlay & Co. v. Asudamal Harbhagwandas*, 5 S. L. R. 89, that all costs incurred in the process of obtaining an order from the Court are within the discretion of the Court and outside the province of the arbitrator; but it is an almost universal practice of arbitrators in Karachi to add at the end of their award the words complained of, and the Court may fairly regard such words as nothing more than a recommendation that the costs referred to be granted. As the costs are not specified the award cannot be enforced of itself and without some order of the Court. Construing the words in this sense I hold that the award is not bad merely because of their inclusion. So far as I am aware no award has been held bad solely because the arbitrators awarded costs of filing the award. Let the award stand filed." *J. M. Lang v. Holland*, 8 S. L. R. 136 (137) = 27 Ind. Cas. 526. A reference by agreement giving power over the costs of the reference gives authority to direct as to the costs of the award. *In re Walker and Brown*, 9 Q. B. D. 494.

(53) *Taylor v. Dutton*, 1 L. J. K. B. 158.

him, to state their case, and adduce evidence. Within reasonable limits, he must take such evidence as each party offers.⁽⁵⁴⁾ If the parties clearly agree that the umpire shall decide on the notes of the arbitrators alone, his award will be ordinarily upheld⁽⁵⁵⁾ even in respect of costs. But where there has been no such agreement and the judgment of the umpire has proceeded on materials which the parties have had no opportunity of commenting on, such a decision is against the principles of justice and equity.⁽⁵⁶⁾

Costs of
umpire.

When an award is made by an umpire on the disagreement of the arbitrators, or on their failing to make the award, the fees due to the arbitrators are part of the costs of the umpire.⁽⁵⁷⁾

Costs of
umpire and of
arbitrator—
Award should
separate the
two.

An umpire should, in his award, separate the sum which he awards to himself for his charges, from the sum which he awards to the arbitrators for their charges.⁽⁵⁸⁾

If the reference is to two arbitrators and an umpire, and the latter fixes the costs of the award and names a sum to cover the costs of the umpire and arbitrators, the award may be remitted to him to state how much of the sum fixed is for the umpire and how much for the arbitrators.⁽⁵⁹⁾

Costs,
unauthorised
provision as
to, in award,
effect of.

Where a submission to an arbitration does not leave the question of costs to the arbitrators, an award which makes provision therefor should not be filed in Court.⁽⁶⁰⁾

It has also been held that an award will be set aside if the arbitrator award costs without authority;⁽⁶¹⁾ or if he improperly direct costs to be taxed as between solicitor and client.⁽⁶²⁾

Costs,
effect on,
when award
is set aside on
ground of
arbitrator
exceeding
his authority.

If the arbitrator exceeds his jurisdiction, and on that ground the award is set aside as being wholly bad, the party to whom the arbitrator has awarded the costs of the proceedings cannot recover them.⁽⁶³⁾

(54) *Salkeld v. Slater*, (1841) 10 L.J.N.S.Q.B. 22.

(55) *Firth v. Howlett*, (1850) 19 L.J.Q.B. 169; *In re Jenkins*, (1842) 11 L.J.Q.B. 71.

(56) *Brook v. Delcomyn*, (1864) 33 L.J.C.P. 246 cited in *James Finlay & Co. v. Asudamal*, 5 S.L.R. 89 (90, 91).

(57) *Ellison v. Achroyd*, 20 L.J.Q.B. 193.

(58) *Gilbert and Wright, In re*, 68 J.P. 143.

(59) *Re Gilbert and Wright*, 20 Times Rep. 164.

(60) *Dagusa Tilak Chand v. Bhukan Govind*, 9 B. 82.

(61) *Boodle v. Davies*, 3 A. & E. 200. But see *J. M. Lang v. Holland*, 8 S.L.R. 186 = 27 Ind. Cas. 525.

(62) *Secombe v. Babb*, 6 M. & W. 129 = 9 L.J. (N.S.) Ex. 65.

(63) *Davis v. Witney Urban Council*, 15 Times L.R. 275. See *London & North Western Rail Co. v. Walker*, (1903) A. C. 289.

Where, in a suit brought in *forma pauperis* the points in issue Court acting were referred to arbitrators who, in their award, directed that each party should bear its own costs, and the Court varied the arbitrator's jurisdiction. in excess of its order by making an additional order that the defendant and the plaintiff should, as regards the Government, each pay half the amount of the Court fees, *held* that the order of the Court making the defendants liable was in conflict with the award of arbitrators and was made in excess of the Court's jurisdiction.⁽⁶⁴⁾

Where no provision as to costs is made in the award or where Court's no award has been made by an arbitrator appointed by Court, the power to award costs Court has power to award costs of the arbitration, as, for instance, and arbitration fees the arbitrator's fee as costs of a proceeding incident to a suit, under where no award is made. S. 35, Civ. Pro. Code, 1908.⁽⁶⁵⁾

The power of Court to award the arbitrator's fees as costs is not limited to cases when an award has been made.⁽⁶⁶⁾

It has been stated by Mr. Wood Renton, one of the Justices of Arbitrator's the Supreme Court of Ceylon in an article contributed to the remuneration, Encyclopædia of the Laws of England ⁽⁶⁷⁾ that "the better opinion suit for. appears to be that an arbitrator cannot sue for his fees, unless upon an express promise to pay them." ⁽⁶⁸⁾

In *Crampton v. Ridley*, ⁽⁶⁹⁾ however, a strong opinion has been expressed that in a commercial arbitration, at least, there is an implied contract to pay the arbitrators and the umpire a reasonable remuneration for their services.

In the absence of any express promise by the parties to a reference to remunerate an arbitrator, the latter has no right of action in respect of such remuneration, his sole remedy being to refuse to deliver his award until his charges are paid. On general principles

(64) *Mir Mahomed v. Mussammat Khair-ul-Nissa*, 19 P.R. 1880, referred to in *Hargolal v. Sodhi Kartar*, 91 P.R. 1888. Where a reference to arbitration was a general one of the whole case, the power of dealing with costs would rest with the arbitrators; but where one or more specific issues in the proper legal sense of the words were referred to arbitration, the arbitrators would have no power to deal with costs, the point not having been included in the issues referred.

(65) *Gurdinomal v. Wadhmal*, 6 S.L.R. 226 = 19 Ind. Cas. 611.

(66) *Gurdinomal v. Wadhmal*, 19 Ind. Cas. 611 = 6 S.L.R. 226.

(67) 2nd Ed., Vol. I, p. 458.

(68) See also *Hoggins v. Gordon*, (1843) 3 Q. B. 466.

(69) (1887) 20 Q. B. D. 48.

or in the absence of any direct provision to the contrary, an arbitrator has a lien on his award for the payment of his reasonable charges. (70)

An arbitrator may properly be regarded as an ordinary seller and entitled to a lien under S. 95, Contract Act. (71)

An arbitrator is not without protection for his fees. He may retain the award till his fees are paid. (72)

The arbitrator usually notifies to the parties the amount of his charges, and takes care to have them paid before he delivers up his award. (73)

It seems that an arbitrator on refusing to give up an award except payment of an extortionate fee, cannot be attached for contempt. (74) The proper course for the party from whom such a fee is demanded is either to pay it and sue the arbitrator for money had and received, (75) or to apply to the Court to set the award aside on the ground that the charges are so excessive as to amount to misconduct on the part of the arbitrator. (76)

"The lien of an arbitrator covers the award, the submission and any document containing information which he himself has procured, or caused to be procured, but not papers put in evidence by the parties. In the course of the reference an arbitrator may himself fix the amount of remuneration and costs, if the submission does not otherwise provide, and if the amount is named in, and as part of, the award. (77) When, however, the amount is not specified in the award, but is contained (*e.g.*) in a separate notice given the parties, the Court or the Master must tax the costs and remuneration (78) and, even where the amount of the costs and remuneration is stated in the award, the Court may, as stated above, set the award aside, if the charges are so excessive as to constitute misconduct on the part of the arbitrator." (79)

(70) *In the matter of Cyril Kirkpatrick*, 22 P.R. 1897.

(71) *Per Roe, C.J.* in (*Ibid.*)

(72) *Encyclopædia of the Laws of England*, 2nd Ed., Vol. I, p. 458.

(73) *Roberts v. Eberhardt*, 28 L.J.C.P. at p. 79.

(74) See *Encyclopædia of the Laws of England*, 2nd Ed., Vol. I, p. 458.

(75) *Doset v. Gingell*, (1841) 2 Man. & G. 870; 58 R.R. 593.

(76) See *Encyclopædia of the Laws of England*, 2nd Ed., Vol. I, p. 459.

(77) *In re Stephens & Co., and Liverpool and Globe Insurance Co.*, (1892) 36 Sol. J. 464.

(78) *In re Prebble and Robinson*, (1892) 2 Q.B. 602.

(79) See *Encyclopædia of the Laws of England*, 2nd Ed., Vol. I, p. 459.

Where the arbitrator has power to specify in his award the amount of the costs of the award, and does so, his charges are not subject to taxation.⁽⁸⁰⁾

On a reference to arbitration, the Court in the absence of any agreement by the parties either spontaneously or in answer to a demand by the arbitrators, to pay any sum as remuneration to the latter, has no jurisdiction, either special or general, to make an order for deposit in Court of a sum for that purpose, or to direct its payment to the arbitrators.⁽⁸¹⁾

Instead of leaving the costs in the discretion of the arbitrator, the order of reference may provide that *they shall abide the event*, in which case the arbitrator has no control over the costs, and the award should be silent respecting them. In such a case it is an excess of authority on his part to determine their amount.⁽⁸²⁾

Order of reference providing that costs shall abide the event—Discretion of arbitrator.

The effect of such an order of reference of an action is to substitute the reference as regards the issues of fact, and the legal consequences resulting from them for the trial by Judge and the provision that the costs of the action shall abide the event, amounts to no more than that whatever would have been the legal effect of the verdict and judgment as regards costs, remains the same as if the judgment of the Court had been taken and judgment followed thereupon.⁽⁸³⁾

“When the costs of the cause are to abide the event of the award, the costs which are allowed are generally those costs only which would have followed the legal event had the conclusion arrived at by the award been obtained in the ordinary course of law.”⁽⁸⁴⁾

Effect of award when costs abide the event.

“Where the parties agreed in an action that the arbitrator was to award a lump sum if he found for the plaintiff, and that the costs of the action, arbitration and award were to follow the event of the verdict, and the arbitrator found for the plaintiff, but only

(80) *Stephens & Co. and Liverpool, &c., Insurance Co., In re*, 36 Sol. J. 464. It may be noted that it has been decided as early as 1854 by the Sudder Dewanny Adawlut Court of the North West Provinces that “an arbitrator is fully competent to pass order regarding costs and the Courts cannot in any way interfere with or modify such order. See *Kishore Chund and Netram v. Mussummut Oomeidee*, 31st Jan. 1854, p. 61.

(81) *Mool Chand v. Narinjan Doss*, 94 P. R. 1894.

(82) *Kendrick v. Davies*, 5 Dowl. 693; *Cockburn v. Newton*, 10 L.J.C.P. 207=9 Dowl. 676.

(83) See *per Cockburn, C.J.*, in *Stooke v. Taylor*, 5 Q.B.D. 569 (581); Russell on Arbitration and Award, 9th Ed., 1906, p. 242.

(84) Russell on Arbitration and Award, 9th Ed., 1906, pp. 244, 245.

gave one-fifth of the plaintiff's claim, it was held that the plaintiff was entitled to all costs." (85)

Suit for costs
of award.

Where two parties agree to employ an arbitrator, and one pays a sum to take up the award, he may, in the absence of any provision to the contrary, recover a moiety from the other party in an action for money paid. (86)

Sec. 7. Claim and Counter-claim.

Costs of counter-claim, what are.

Costs in case of claim and counter-claim—English and Indian law.

(i) Where both the claim and counter-claim are allowed.

(ii) Where both the claim and the counter-claim are disallowed.

(iii) Where defendant recovers more on his counter-claim than plaintiff on his claim.

(iv) Where defendant recovers less on his counter-claim than plaintiff on his claim.

(v) Where counter-claim is really in the nature of a defence.

(vi) Taxation of costs in case of a counter-claim.

Set-off of costs and amounts recovered.

Costs of
counter-
claim, what
are.

THE costs of the counter-claim are only the costs occasioned by the counter-claim as a counter-claim; and costs which would have been incurred if a cross-action had been brought ought not to be included. (1)

Where there are costs common to the defence and the counter-claim, they must be apportioned, and the costs attributable to the defence will be costs in the action and those attributable to the counter-claim will be costs of the counter-claim. (2)

Costs in case
of claim and
counter-
claim—
English and
Indian law.

In cases of a claim and a counter-claim the general principle would hold good that "Where a party succeeds on some and fails on other issues, the costs follow the event, and he will get the costs of the issues on which he succeeds." (3)

(85) *O'Rourke v. Railway Commissioners*, 15 App. Cas. 371; 59 L.J.P.C. 72.

(86) *Marsack v. Webber*, 6 H. & N. 1.

(1) Daniell's Chancery Practice, 1901, 7th Ed., Vol. I, p. 982. On the subject-matter of this section, see Chap. VIII on "Set off of Costs," *supra*; Daniell's Chancery Practice, 7th Ed., 1901, Vol. I, Chap. XVIII, pp. 982-984; Seton on Judgments and Orders, 6th Ed., 1901, Vol. I, pp. 265-267; Yearly Practice, 1914, pp. 1122, 1128, 1146, 1147; Annual Practice Notes under O. LXV, r. 1; Amir Ali's Code of Civil Procedure, 2nd Ed., 1916, pp. 216, 217, 737, 739, 855-860; Encyclopædia of the Laws of England, 2nd Ed., Vol. IV, Heading "Costs;" Halsbury's Laws of England, Vol. XXV, Ss. 949, 950, pp. 518-520; Morgan and Wurtzburg on Costs, pp. 132-134; Mews Digest, Vol. IV, Heading "Costs" cols. 695-699, 720; 825-847; Marshall on Costs, pp. 312-320.

(2) Daniell's Chancery Practice, 1901, 7th Ed., Vol. I, p. 982.

(3) *Slatford v. Erlebach*, (1912) 81 L.J.K.B. 372, C.A. The cases bearing on the costs of claim and counter-claim were discussed by the C.A. in *Atlas Metal Co. v. Miller*,

The Indian Law of Procedure does not sanction a set off or counter-claim in all cases contemplated by the English Supreme Court Rules. (4) Thus it has been held by the Calcutta High Court that a cross-claim cannot be set up as a defence except when it arises out of the very transaction sued upon and is in the nature of a set-off. (4-a)

Where the plaintiff and defendant both succeed on the claim (i) Where both the claim and counter-claim are allowed, and counter-claim respectively, judgment should be entered for the plaintiff on the claim with costs and for the defendant on the counter-claim with costs. (4-b)

(1898) 2 Q.B. 500. In that case, after a trial by jury, judgment was given for the defendants on the claim with costs and for the plaintiff on the counter-claim with costs. The C.A. decided: (1) That in considering what are costs of the claim, the counter-claim, as distinguished from the defence, ought to be disregarded and the costs of the action taxed as if there were no counter-claim. The plaintiff who is to pay or be paid the costs of his action is to pay or be paid the whole of such costs as if there were no counter-claim. Whether both parties fail (see *Sauer v. Bilton*, (1879) 11 Ch. D. 416; *Mason v. Brentini*, (1880) 15 Ch. D. 287; or both succeed (see *Baines v. Bromley*, (1881) 6 Q.B.D. 691; *Re Brown, Ward v. Morse*, (1883) 23 Ch. D. 377, C.A.; *Shrapnel v. Laing*, (1888) 20 Q.B.D. 334; *Sharpe v. Haggith*, (1912) 106 L.T. 13, C.A.; *Hewitt v. Blumer*, (1886) 3 T.L.R. 221; *Hallinan v. Price*, (1879) 41 L.T. 627; *Fox v. Central Silkstone Collieries, Ltd.*, (1912) 2 K.B. 597) makes no difference; (2) That the counter-claim is to be treated as an independent action and the costs of the counter-claim paid to or by the defendant as the judgment adjudges. The costs of the counter-claim include only the costs occasioned by it, and do not include costs saved by reason of there being a counter-claim instead of a cross-action (*Sharpe v. Haggith, supra*). So far as Lord Esher's dictum in *Shrapnel v. Laing*, (1888) 20 Q.B.D. 334, at p. 339, is to the contrary it is not correct. (3) That where there are costs common to defence and counter-claim, they must be apportioned; and the costs of the defence will be costs in the action, while those attributable to the counter-claim will be costs of the counter-claim (*Fox v. Central Silkstone Collieries, Ltd., supra*). The general result is that if the plaintiff succeeds on the claim and the defendant on the counter-claim, the plaintiff recovers the costs of the claim and the defendant the costs of the counter-claim (*Sharpe v. Haggith, supra*). The claim is treated as if it and its issues were an action, and the counter-claim is treated as if it and its issues were an action, and the *allocatur* for costs is given to the litigant in whose favour the balance turns (*Baines v. Bromley*, (1881) 6 Q.B.D. 691, 695, C.A.; *Westacott v. Bevan*, (1891) 1 Q.B. 774).

(4) See the judgment of Straight, J., in *Abdul Hasan v. Gohra Jan*, 5 A. 301; *Secretary of State v. Madane Lal*, 13 A. 296 (299, 300); *Roulet v. Fetterle*, 18 B. 717.

(4-a) See *Fakir Chundra Dutta v. Gisborne*, 8 C.W.N. 174. S. 128 (c) of the present Code of Civil Procedure however allows rules being made on the subject.

(4-b) *Sharpe v. Haggith*, (1912) 106 L.T. 13, C.A. For instances of practice where claim and counter-claim are both successful, see *Baines v. Bromley*, (1881) 6 Q.B.D. 691, C.A.; *Re Brown, Ward v. Morse*, (1883) 23 Ch. D. 377; *Shrapnel v. Laing*, (1888) 20 Q.B.D. 334, C.A.; *Hewitt v. Blumer*, (1886) 3 T.L.R. 221; *Westacott v. Bevan*, (1891) 1 K.B. 774; *Sharpe v. Haggith*, (1912) 106 L.T. 13 C.A.; see, also,

(ii) Where both the claim and the counter-claim are disallowed.

Where there is both a claim and a counter-claim the general rule is that when both are unsuccessful, the plaintiff shall pay the general costs of action and the defendant shall pay the costs so far as they have been increased by reason of the counter-claim.⁽⁵⁾

In another English case it has been held that "Where both the claim and the counter-claim fail, judgment should be entered for the defendant on the claim with costs, and for the plaintiff on the counter-claim with costs, with a set-off of costs and an order for payment of the balance."⁽⁶⁾

(iii) Where defendant recovers more on his counter-claim than plaintiff on his claim.

"When the sum recovered on the counter-claim exceeds the sum recovered on the claim, it is a matter for the discretion of the Judge whether judgment shall be entered for the defendant for the balance, or for the plaintiff on the claim and the defendant on the counter-claim."⁽⁷⁾

(iv) Where defendant recovers less on his counter-claim than plaintiff on his claim.

In *Finska v. Brown*,⁽⁸⁾ the defendant expressly admitted the claim subject to his counter-claim, and the parties went to trial on the latter, on which the defendant succeeded, but to an amount less than the plaintiff's claim, and it was held that the plaintiff must pay the costs of the trial of the counter-claim.

(v) Where counter-claim is really in the nature of a defence.

Where the counter-claim is really in the nature of a defence, as in the case of a counter-claim for inferior and defective work set up in answer to a claim for the price of the work, the Court may give the defendant the whole costs.⁽⁹⁾

(vi) Taxation of costs in case of a counter-claim.

Whichever way judgment is entered, the adjudications on the claim and counter-claim are, *for the purpose of the taxation of costs*, treated as separate and independent.⁽¹⁰⁾

Set-off of costs and amounts recovered.

In cases where both the claim and the counter-claim are allowed by the Court, a set-off of costs and amounts recovered will generally be ordered.⁽¹¹⁾

Amon v. Bobbett, (1889) 22 Q.B.D. 543, C.A.; *Stumore v. Campbell*, (1892) 1 Q.B. p. 31; *Finska Angfartygs Aktiebolaget v. Brown, Twogood & Co.*, W.N. (1891) 116; *Atlas Metal Co. v. Miller*, (1898) 2 Q.B. 500 (where the cases are reviewed and the modern rule is laid down by the C.A.). See, also, *The Yearly Practice*, 1914, Vol. I, p. 1047.

(5) *Saner v. Bilton*, (1879) 11 Ch. D. 416; approved in *Mason v. Brentini*, (1880) 15 Ch. D. 287, C.A.

(6) *James v. Jackson*, (1910) 2 Ch. 92; see, also, *Seton on Judgments and Orders*, 7th Ed., Vol. I, p. 285; and *Jones v. Scott*, (1910) 1 K.B. 893, 904 C.A.

(7) *Per Lord Esher, M.R.*, in *Shrapnel v. Laing*, (1888) 20 Q.B.D. p. 338.

(8) W.N. (1891) 116.

(9) *Lowe v. Holme*, (1883) 10 Q.B.D. 286.

(10) *Re a Bankruptcy notice*, (1906), 96 L.T. 133, C.A.

(11) *Meynoll v. Morris*, (1911) 104 L.T. 667.

Sec. 8. Commission, Costs of.

Provisions of the Code of Civil Procedure regarding the issue of commission and the costs thereof.

Costs of commission—Liability of party applying for the same.

Costs of commission to examine purdanashin lady—Who should bear.

Costs of commissioner, when his enquiry is held illegal.

Costs of commission not deposited—Dismissal of suit not proper.

Fees for commissioner, how fixed.

Fees for commissioner appointed by Court in India to take evidences in England—
Scale of fees.

Fees paid to pleader to examine witness on commission, if allowed.

Fees awarded to commissioner, how realized.

Additional fees awarded to commissioner, how realized.

Appeal against order in execution of order for commissioner's fees.

THE Code of Civil Procedure ⁽¹⁾ provides for the issue of commissions for certain purposes.⁽²⁾ Rules 1 to 8 of O. XXVI of the Code provide for the issue of a commission for the examination of witnesses. Rules 9 and 10 make provision for the issue of a commission for local investigation. Rules 11 and 12 empower the Court to issue a commission for the examination of accounts. The next two rules deal with commissions to make partition. Rule 15 provides for the expenses of the above said commissions. It enacts that "Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued."⁽³⁾

Provisions of the Code of Civil Procedure regarding the issue of commission and the costs thereof.

Section 133 of the Code ⁽⁴⁾ provides for the exemption of certain persons from personal appearance in Courts, the examination of such persons on commission and the costs occasioned by such

(1) Act V of 1908.

(2) See O. XXVI of the Code of Civil Procedure (Act V of 1908). On the subject-matter of this section, see Amir Ali's Code of Civil Procedure, 2nd Ed., 1916, pp. 489, 490.

(3) Civ. Pro. Code (Act V of 1908), O. XXVI, r. 15. A commission issued to an ameen to hold a local investigation for the purpose of ascertaining the amount of mesne profits, is not a *process* within the meaning of cl. 1 of S. 20 of the Court Fees Act; and Art. 3, Part II of the rules promulgated in 1878, framed under that section, is therefore *ultra vires*, and cannot be enforced. *T. K. Acharjea Chowdhry v. D. N. C. Chowdhry*, 17 C. 281.

(4) Act V of 1908.

examination. The section runs as follows:—"The Local Government may, by notification in the *Local Official Gazette*, exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption. The names and residences of the persons so exempted, shall, from time to time, be forwarded to the High Court by the Local Government and a list of such persons shall be kept in such Court, and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court. Where any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs."⁽⁵⁾

Costs of commission—
Liability of party applying for the same.

Where a commissioner was appointed by a Court to take accounts at the request of the plaintiffs, and his costs were not prepaid and the defendant was by the decree ordered to pay the costs of the suit, but the costs of the commissioner were not entered in the decree: *Held* in a suit by the commissioner against the plaintiffs for remuneration for his labour that the plaintiffs were liable.⁽⁶⁾

Costs of a commission to take evidence is generally made costs in the cause;⁽⁷⁾ and this has been done where a commission issued to examine a *purdanashin* at her own request.⁽⁸⁾

Costs of commission to examine *purdanashin* lady—Who should bear.

The Court will not order the costs of a commission to examine a defendant who is a *purdanashin* lady to be paid by her, or order the

(5) See, also, notes in Amir Ali's Civ. Pro. Code, 2nd Ed., 1916, S. 133, pp. 489 and *490.

(6) *Gopalaratnammayyar v. Bupalanarasimma Nayudu*, 4 M. 399. The Court (Turner, C.J., and Muthuswami Iyer, J.) said:—"By moving the Court to appoint a commissioner, the appellants impliedly undertook to pay a fair remuneration to the commissioner for his services, and although it was competent to the Court to require that a sum should, for this purpose, be deposited, the omission to exercise this power does not debar the commissioner from recovering his remuneration from the party at whose instance he was engaged. The subsequent order of the Court that the then defendant should bear the costs of the commission, was irregular. If the appellants had paid the costs of the commission, they might have moved the Court to review its order as to costs, so as to enable them to recover from the then defendant, in execution of decree, the amount paid by them as the remuneration of the commissioner. *Gopalaratnammayyar v. Bupalanarasimma Nayudu*, 4 M. 399.

(7) *Gahan v. Owen*, Coryt. 11 (1864-65).

(8) *Monendrobhoosun Biswas v. Sosheebhoosun Biswas*, 5 C. 866.

estimated costs of the commission to be paid into Court, although the application for the commission is made by the lady herself.⁽⁹⁾

The decree-holder obtained a decree against the judgment-debtor for possession with mesne profits. A pleader as a commissioner was at first deputed to give possession of the decretal land to the decree-holder and to ascertain the amount of mesne profits, but his proceedings were set aside as being illegal. A Civil Court Amin was then deputed for the same purpose, and he after giving possession and ascertaining the amount of mesne profits, submitted his report. The Court of first instance held that the decree-holder was not entitled to get the costs of the enquiry made by the first commissioner, but that he would get the costs of the enquiry made by the Civil Court Amin. On appeal by the decree-holder the District Judge was of opinion that the decree-holder was entitled to have the costs of the first enquiry and observed as follows:—“The appellant before me does not suggest that the pleader was appointed at the instance of the decree-holder or that the latter was guilty of any misconduct in connection with the enquiry. I therefore see no reason why the decree-holder should not have the costs of this enquiry and these will accordingly be allowed.” On second appeal, it was held, that no party should suffer through the acts of the Court and that the costs incurred in connection with the appointment of the first commissioner should be divided equally between the parties concerned, the decree-holder bearing half the costs and the judgment-debtor the other half.⁽¹⁰⁾

Costs of commissioner, when his enquiry is held illegal.

The Code of Civil Procedure does not authorise the dismissal of a suit on refusal or failure of a party to deposit the amount

Costs of commission not deposited—Dismissal of suit not proper.

(9) *Monindrobhoosun Biswas v. Sosheebhoosun Biswas*, 5 C. 866. This was a suit for partition. One of the defendants, Juggodumba Dasse, applied to be examined on commission, upon the ground that she was a Hindu *puṛdah* lady of such rank and station in life as, according to the customs and usages of the Hindus, precluded her from appearing in public. Mr. Dutt for the plaintiff consented to the application but asked that the applicant might be ordered to pay the costs of the commission, or to pay estimated costs of the commission into Court. He referred to Belchambers' Rules and Orders, 326; Civ. Pro. Code, S. 397; and *Nasrut Banoo v. Mahomed Sayem*, 18 W.R. 230. Wilson, J., refused to order the applicant to pay the costs of the commission, or to order her to pay the estimated costs into Court, and ordered the commission to issue. Costs to be costs in the cause. See, also, *Monindrobhoosun Biswas v. Sosheebhoosun Biswas*, 5 C. 866.

(10) *Maharaja Jagadindra Nath Roy Bahadur v. Jagat Kishore Acharja Chowdhry*, 9 C.W.N. Journal portion, p. cvii.

ordered by the Court as remuneration to a commissioner appointed under S. 394 (11) to examine accounts.⁽¹²⁾

A suit for land was dismissed in 1886 on the plaintiff's failure to comply with an order to pay a fee for the appointment of a commissioner to value the land. No issues were framed in the suit, and the order directing payment of the fee prescribed no time within which it was to be made. The plaintiff now sued the defendants again for the same land. It was *held*, that the claim was not *res judicata*.⁽¹³⁾

Fees for commissioner,
how fixed.

The remuneration of a commissioner appointed by the Court to examine accounts should, as a rule, be a definite amount and not at a monthly allowance.⁽¹⁴⁾

There are obvious objections, except in very special cases, to a remuneration at a monthly rate.⁽¹⁵⁾

Fees for commissioner
appointed by Court in
India to take
evidence in
England—
Scale of fees.

Where a Court in India appoints a commissioner to take evidence in England, it expects that his fees shall not exceed those which the Supreme Court in England would allow to a special Examiner or commissioner acting in England under its orders; and parties should choose their commissioners with reference to this understanding. If they desire that higher fees should be allowed to the commissioner whom they name, they should obtain an order from the Judge appointing the commissioner.⁽¹⁶⁾

On the issue of a commission to take evidence in England in respect of a suit in India, the bill of costs as regards such commission must be taxed by the taxing master of the Court in India and not in England. It is to be taxed on the same principle and on the same scale as would be adopted in England. Where the taxing master finds any difficulty, he must refer to England for information.⁽¹⁷⁾

(11) Of the Code of Civil Procedure, 1877=O. XXVI, r. 11 of the present Code (Act V of 1908).

(12) *Ragava Chariar v. Vedanta Chariar*, 3 M. 259=5 Ind. Jur. 633.

(13) *Shaik Saheb v. Mahomed*, 13 M. 510.

(14) *Ragava Chariar v. Vedanta Chariar*, 3 M. 259=5 Ind. Jur. 633.

(15) *Per Innes and Tarrant, JJ.*, in *Ragava Chariar v. Vedanta Chariar*, 3 M. 259=5 Ind. Jur. 633.

(16) *The Gokuldas Bulabdas Manufacturing Co., Ltd. v. James Scott*, 15 B. 209.

(17) *The Gokuldas Bulabdas Manufacturing Co. Ltd. v. James Scott*, 15 B. 209. When an item in the taxation is objected to, the master is to re-consider and review his taxation, and, in doing so, he must throw the *onus* of proof as to the necessity of the item, upon such party as, having regard to its particular nature, he considers ought to bear it. *The Gokuldas Bulabdas Manufacturing Co., Ltd. v. James Scott*, 15 B. 209.

According to the rules framed under the Legal Practitioners' Fees paid to Act (18) fees paid to a pleader to examine witnesses on commission out of the jurisdiction of the Court are not costs in the suit recoverable from the losing party. (19) pleader to examine witness on commission —If allowed.

While it is competent to a Court to require that a sum should be deposited, the omission to exercise this power does not debar a commissioner from recovering his remuneration from the party at whose instance he was engaged. (20) Fees awarded to commissioner, how realized.

A commissioner has no lien on a return of partition for his fees, and cannot refuse to give it up till they are paid. (21)

When after the issue of a commission it is found that the work is in excess of the amount paid in for the costs of the commission, and that the party at whose instance the commission was issued is not willing to pay, the only way in which the additional costs can be realized is by making the amount costs of the suit, and entering the same in the decree. An order for depositing additional costs when not entered in the decree cannot be enforced. (22) Additional fees awarded to commissioner, how realized.

(18) Act XVIII of 1879.

(19) *Alagappa Chetty v. Muthia Chetty*, 6 M.L.J. 124. The Court, Shephard and Subramania Aiyar, JJ., said:—"According to the rules framed under the Legal Practitioners' Act, the fee allowed for prosecuting and defending a suit is strictly limited, and although it may be reasonable to retain more than one vakil or pay more than the maximum fee, no sum in excess can be charged against the losing party. The question is whether any sum can be allowed on account of fees paid to pleaders to examine witnesses on commission out of the jurisdiction. No exception is made in favour of such costs and we cannot accede to the contention that they can be treated on any other footing than that of fees payable to a pleader." *Alagappa Chetty v. Muthia Chetty*, 6 M.L.J. 124 (125).

(20) *Gopalaratnamayyar v. Bupala Narasimma*, 4 M. 399; as to nature of remuneration, see, also, *Raghava Chariar v. Vedanta Chariar*, 3 M. 259.

(21) *Rajmoheeny Dabee v. Muddoosoodun Dey*, Bourke 24 (1865).

(22) *Tadhin Proshad Singh v. Sardar Coomar Narayan Singh*, 10 O.W.N. 234. In this case the order directed that the petitioner should deposit the said amount for payment to the commissioner as additional costs—the work done by him having been found to be in excess of the amount deposited previous to the issue of the commission. The order was sought to be executed as if it were a decree. The petitioner objected. The Munsif in disallowing the objection observed as follows:—"The said order has become final as there had been no appeal; and it directs that a specified sum should be paid by the plaintiff and the proforma defendants to the commissioner. Here the amount to be paid has been determined and is a specified sum. The said order also directs by whom and to whom the sum is to be paid. Hence there is no ambiguity in the said order and is therefore capable of execution. "It was contended that under High Court's General Rules and Circular Orders (Civil) the commissioner could stay his

Under S. 36 of the present Civ. Pro. Code⁽²³⁾ the order of the Court regarding payment of commissioner's costs may be executed as a decree. There was no such express provision in the old Code.⁽²⁴⁾

Appeal
against order
in execution
of order for
commis-
sioner's fees.

Where an order directing the payment of a certain fee to a commissioner was executed at his instance as if it were a decree, and an appeal was filed against the order granting execution, it is not open to the commissioner to say that S. 244, Civ. Pro. Code,⁽²⁵⁾ had no application to the case and that no appeal lay.⁽²⁶⁾

Either the commissioner's fees should have been ordered to be paid into Court before the commission was proceeded with or the

hands only in the matter, and cannot realise his fee by executing the order. But I think that the procedure laid down in the aforesaid General Rules and Circular Orders is one of the methods, by which the commissioner's fee can be realised; but it does not lay down that the commissioner's fee cannot be realised otherwise. On the whole I am of opinion that the procedure laid down in the General Rules and Circular Orders (Civil) does not prohibit the commissioner to realise his fee by any other legal means. I therefore hold that the applicant can realise the sum of Rs. 250 by executing the order under which the said sum is due to him. The petition of objection is disallowed and execution proceedings must be proceeded with if the amount Rs. 250 with costs of this execution case be not either paid or deposited in Court within 15 days." The Court, Rampini and Caspersz, JJ., in setting aside this order of the lower Court stated the law as follows:—"This is a rule, calling upon the opposite party to show cause why the order of the Munsif, directing that a certain order for the payment of the fees of the commissioner in this case should be enforced as a decree, should not be set aside. The order in question is one directing that the petitioner should deposit an additional sum of Rs. 250 for payment to the commissioner. The learned Munsif has directed that this order should be executed as a decree by attachment and sale of the property of the petitioner. In our opinion the order should not be executed as a decree, because the Code of Civil Procedure does not provide for the issue of any judicial process for realization of the amount so ordered to be paid by one of the parties. Under S. 397, O.P.C., it is provided that the order for the payment of the costs of the commission should be passed before the issue of any commission. But, if the work is in excess of the amount paid in for the costs of the commission then clearly the proper thing for the Court to do, if the party at whose instance the commission was issued, will not pay, is to make that amount costs of the suit and enter it in the decree. But it cannot be realised unless it is entered in the decree." See *Tadhin Proshad Singh v. Sardar Coomar Narayan*, 10 C.W.N. 234 (235, 236).

(23) Act V of 1908.

(24) See Sircar's Civil Procedure Code, Vol. II, p. 1076; notes under O. XXVI, r. 15.

(25) Of the old Code (Act XIV of 1882)=S. 47 of the present Code (Act V of 1908)

(26) *Venkatanarasimhulu v. Narasimhamurti*, 10 M.L.J. 241 (242). But see for the present law S. 36 of the Code of Civil Procedure (Act V of 1908).

commissioner should bring a suit to recover his remuneration. It is not open to him to proceed by way of execution. (27)

Sec. 9. Criminal Proceedings, Costs of.

Costs incurred in prosecuting case in Criminal Court, Suit for.

Costs of criminal proceedings in English Law.

Provisions of the Code of Criminal Procedure regarding costs.

- (1) Costs incurred in possession proceedings in Criminal Courts.
 - (i) Provisions of the Code of Criminal Procedure regarding the same.
 - (ii) Such costs to be awarded in the presence of parties.
 - (iii) Such costs, for what purposes awardable—What should they include.
 - (iv) Such costs not to be awarded on withdrawal of proceedings.
 - (v) Such costs, when to be awarded.
 - (vi) Such costs, if can be assessed and taxed by a succeeding Magistrate.
 - (vii) Such costs not to be awarded after long interval and without notice.
 - (viii) Such costs may be awarded by one order and assessed by separate order.
 - (ix) Such costs refused by Magistrate—No bar to civil suit—Not *res judicata*.
 - (x) Setting aside order as to such costs.
 - (xi) Revision of order as to such costs.
 - (xii) Suit to enforce such order as to costs, if lies in Civil Court.
- (2) Costs incurred in sanction proceedings.
- (3) Costs of attachment of property of absconding offender.
- (4) Costs of enforcing order for removal of nuisance and realization of such costs.
- (5) Costs incurred by way of Court fees on complaint.
- (6) Costs incurred by way of process fees in Criminal Courts.
- (7) Costs incurred in frivolous or vexatious accusations—Compensation for.
- (8) Costs of reference by Presidency Magistrate to High Court.
- (9) Costs, security for, in case of an application for transfer of criminal case.
- (10) Costs incurred by way of expenses of complainants and witnesses.

(27) *Venkatanarasimhulu v. Narasimhamurti*, 10 M.L.J. 241 (242). Shephard and Benson, JJ., said :—"We agree that there would be no appeal in this case but for the fact that the commissioner set the Court in motion as if he were a party to the decree, and, therefore, cannot now be allowed to turn round and say that his application is not made under S. 244 of the Code. The order appealed against is clearly wrong. The order for payment of fees to the commissioner is not an order which can be executed at the instance of the commissioner as if he were party to a decree. The order ought to have provided for payment of the money into Court (S. 397) or it was open for the commissioner to sue. We must reverse the order as one made without jurisdiction and with costs throughout." *Venkatanarasimhulu v. Narasimhamurti*, 10 M.L.J. 241 (242). *N.B.*—But see the present Code of Civil Procedure (S. 36) which provides that "the provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders."

- (11) Power of Court to pay expenses or compensation out of fine.
- (12) Costs of witness in criminal cases.
- (13) Costs of adjournment in criminal cases.

Costs incurred in successful defence of malicious prosecution.

Costs against Crown.

Costs unnecessarily incurred.

Damages for medical attendance.

Costs
incurred in
prosecuting
case in
Criminal
Court, suit
for

A SUIT will not lie to recover as damages the expenses incurred by the plaintiff in prosecuting the defendant in a Criminal Court.⁽¹⁾

Such a prosecution in the Criminal Court is a voluntary act of the prosecutor. He is not bound to prosecute, and therefore cannot recover costs in that case. The prosecutor is not under any necessity to proceed against the defendants in the Criminal Courts.⁽²⁾

(1) *Fazal Imam v. Fazul Rasul*, 12 A. 166=10 A.W.N. (1890) 19; followed in *Churamoni v. Baidya Nath*, 32 C. 429 and *Doma Teli v. Jagan Nath*, 15 C.P.L.R. 129 (180). Edge, C.J., said:—"The plaintiff prosecuted the judgment in a Criminal Court for assault. The defendant was convicted. The plaintiff in this suit sues the defendant for, amongst other damages, the expenses which the plaintiff was put to in prosecuting the defendant in the Criminal Court. In respect of that head of claim, Rs. 40 have been decreed. The defendant has appealed here on the ground that he is not liable for the expenses of the prosecution or any part of them. There is a judgment of Mr. Justice Oldfield in the case of *Ram Lal v. Tula Ram*, 4 A. 97, which justified the Court below in decreasing those damages. My brother Straight and I have on previous occasions dissented from that portion of the judgment of Mr. Justice Oldfield. I am clearly of opinion that the plaintiff cannot maintain his suit so far as that head of claim is concerned. The case of a defendant in a malicious prosecution bringing a civil suit against the prosecutor and obtaining as damages the expenses he was put to in defending himself on the criminal trial has no analogy to the present case. The same view has been held by my brother Mahmood and myself in the case of *Chandan v. Sumera*, 7 A.W.N. (1887) 104. The appeal is decreed, the decrees of the lower appellate Court is modified by decreasing the decrees of the Court below by Rs. 40. The plaintiff will have proportionate costs in the Courts below and the appellant will have to the extent of his success here and below." *Fazal Imam v. Fazul Rasul*, 12 A. 166 (168)=10 A.W.N. (1890), 19. See, also, *Jodhi Ram v. Abdul Mian*, A.W.N. (1893) 62; *Bunnomali Nundiv. Hurrydass Byragi*, 8 C. 710=11 C.L.R. 263. On the subject-matter of this chapter see Halsbury's Laws of England, Vol. IX, pp. 445-450; Mews Digest, Vol. IV, Cols. 1674, 1938-1950; Roscoe's Criminal Evidence, 13th Ed. by Herman Cohen, (1908) pp. 169, 204-208, 287, 514, 515, 571; Ameer Ali's Code of Civil Procedure, 2nd Ed., pp. 89, 155; Prinsep's Code of Criminal Procedure, 14th Ed. (1907), pp. 312, 313, 679-687; Marshall on Costs Chaps. XXXIX & XL, pp. 513-563; Encyclopedia of the Laws of England, 2nd Ed., Vol. IV, heading Costs, pp. 97-104. Stephen's History of the Criminal Law of England, (1883) Vol. I, pp. 497, 498. Russell on Crimes, 6th Ed., 1896; Archbold's Criminal Law, 23rd Ed. 1905; Stone's Justice's Manual, 39th Ed., 1907; Odgers on Libel, 4th Ed., English Crown Office Rules 1906.

(2) *Churamoni v. Baidya Nath Nath*, 32 C. 429 (430), following *Fazul Imam v. Fazul Rasul*, 12 A. 166.

Similarly it was recently decided by the Judicial Commissioner's Court of Central Provinces that "a suit will not lie to recover as damages the expenses incurred by the plaintiff in prosecuting the defendant in a Criminal Court."⁽³⁾

There is nothing to prevent a person upon whom an assault has been committed from subsequently suing in a Civil Court to obtain damages in respect of such assault. But a suit will not lie to recover as damages the expenses incurred by a plaintiff in prosecuting the defendant in a Criminal Court.⁽⁴⁾

No suit will lie to recover costs incurred in defending a criminal prosecution. The only way of recovering such costs is by a suit for damages for malicious prosecution.⁽⁵⁾ Similarly no action lies for the recovery of costs incurred by a defendant in defending himself in a possessory suit brought against him in a

(3) *Doma Teli v. Jagannath*, 15 C.P.L.R. 129; dissenting from *Lekhraj Bansidhar v. Rambhagat*, 4 C.P.L.R. 131. The Court (Stanley Ismay, I.C.S.) said :—"The facts are very simple. The defendants were prosecuted by the plaintiff on a charge of committing house-trespass under S. 448 of the Penal Code. Each of the defendants was fined Rs. 3 but no order was made by the Magistrate for payment of expenses or compensation out of the fines. The plaintiff brought the present suit to recover Rs. 20 expenses incurred in the prosecution. On behalf of the defendant it was pleaded that such a suit would not lie and exception was also taken to certain items of the claim. The Court has found that if the suit is maintainable the plaintiff is entitled to recover from the defendants the sum of Rs. 3-8 0. The question referred to this Court is whether such a suit does or does not lie. I am of opinion that this question must be answered in the negative. 'It is a general principle that the right to costs must always be considered as finally settled in the Court where the question is adjudicated on, to which that right is accessory; so that if any costs are awarded, nothing beyond the sum taxed, according to the rules of the Court, can be recovered as damages; or if costs were expressly withheld by an adjudication in the particular case, none would be recoverable by suit in any other Court' (Mayne on Damages p. 88). The cases in which a Court is not empowered to award costs form an exception to the rule (page 90). This is substantially the rule laid down by Mr. Justice Mahmud in *Mahram Das v. Ajudhia*, 8 A. 452 which was followed in *Kadir Bakhsh v. Salig Ram*, 9 A. 474. It was no doubt held by the Allahabad High Court in *Ram Lal v. Tula Ram*, 4 A. 97 that a suit will lie to recover as damages the expenses incurred by the plaintiff in prosecuting the defendant in a Criminal Court, and a similar view was apparently taken by this Court in *Lekhraj Bansidhar v. Rambhagat*, 4 C.P.L.R. 131, but the earlier Allahabad case was dissented from in *Fazal Imam v. Fazul Rasul*, 12 A. 166, in which it was held that a suit such as that referred to is not maintainable. I have no doubt as to the correctness of this view and my answer to the present reference is that the suit does not lie." *Doma Teli v. Jagannath*, 15 C.P.L.R. 129 (180).

(4) *Jodhi Ram v. Abdul Mian*, 13 A.W.N. 62 (following *Fazal Imam v. Fazal Rasul*, 12 A. 166).

(5) *Mahomedali v. Bayama*, 14 B. 100.

Mamlatdar's Court under Bombay Act V of 1864.⁽⁶⁾ There is however an old ruling of the Allahabad High Court that "a Hindu father can maintain a suit, against a person who abducted his daughter while under his protection, for the costs incurred in a successful prosecution of such abductor." ⁽⁷⁾

Costs of criminal proceedings in English Law.

At common law no provision existed empowering any Court to direct the payment, either out of public funds or by the parties, of the costs of any prosecution for a criminal offence. The right to indemnity for costs in criminal cases rests wholly on the legislation; and it is to be noted that, from the nature of criminal proceedings which are in support of public justice and for the protection of the public peace, provision is, to a large extent, made for defraying, out of public funds, the costs of a prosecution and, to some extent, of the defence, instead of applying the ordinary provisions of civil proceedings as to party and party costs.⁽⁸⁾

(1) Costs incurred in possession proceedings in Criminal Courts.

(i) Provisions of the Code of Criminal Procedure regarding the same.

(ii) Such costs to be awarded in the presence of parties.

(iii) Such costs for what purposes awardable—What should they include.

When any costs have been incurred by any party to a possession proceeding under the Criminal Procedure Code for witnesses, or pleaders' fees, or both, the Magistrate passing a decision under S. 145, S. 146 or S. 147 of the Code may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion. All costs so directed to be paid may be recovered as if they were fines.⁽⁹⁾

The award of such costs must be in the presence of the parties ⁽¹⁰⁾ except when the original order under S. 145 of the Code contained directions in respect thereof.⁽¹¹⁾

A Magistrate is not entitled to make an order under S. 148, except for the costs incurred for witnesses and pleaders' fees or both. He cannot award costs on account of damages to crops.⁽¹²⁾

Proceedings under S. 145 of the Criminal Procedure Code were instituted with reference to a *bundh* erected by the second party upon

(6) *Jalam Punja v. Khoda Javra*, 8 B.H.C. (A.C.J.) 29.

(7) *Ram Lal v. Tula Ram*, 4 A. 97 = 1 A.W.N. (1881) 148 = 6 Ind. Jur. 483, dissent-
ed from in *Fazal Imam v. Fazul Rasul*, 12 A. 166 (168) and not followed in *Doma Teli v. Jagannath*, 15 C.P.L.R. 129 (130).

(8) *Encyclopædia of the Laws of England*, Vol. IV, 2nd edition, pp. 97 (98).

(9) See *Criminal Procedure Code* (1898), S. 148 (3).

(10) *Empress v. Tomijuddi*, 24 C. 757.

(11) (*Ibid.*)

(12) *Prayag Mahaton v. Gobind Mahaton*, 32 C. 602 (604) = 9 C.W.N. 862 = 2 Cr. L.J. 552.

land claimed both by the first and second parties. The Magistrate treated the case as if it were solely one of title and made an order directing the removal of the *bundh*, and he further awarded one of the parties Rs. 50 for the damage done to his crops as well as for costs in the case. *Held* that the entire order was illegal and should be set aside, including the order as to costs.⁽¹³⁾

Under cl. 3 of S. 148, the Magistrate has no jurisdiction to include in costs, the penalty on a document not properly stamped.⁽¹⁴⁾

Additional costs incurred for extra fees and travelling and other expenses of a like nature incurred by reason of bringing pleaders or counsel from a distance ought not to be allowed.⁽¹⁵⁾

A Magistrate in whose Court a complaint was pending for two years, passed an order directing the complainant to pay costs to the accused and a witness. On a subsequent date he dismissed the complaint, and in that made another order in the absence of the complainant directing him to pay costs to the accused, *held* that the first order was a proper one having regard to the wide provisions of S. 344 of the Code of Criminal Procedure; and that the second order purporting to have been passed under S. 250 was bad inasmuch as no opportunity was afforded to the complainant of objecting to the order.⁽¹⁶⁾

(13) *Prayag Mahaton v. Gobind Mahaton*, 32 C. 602=9 C.W.N. 862=2 Cr. L.J. 552.

(14) *Tummalagunta Kotiah v. Popuri Peddanna*, 13 M.L.T. 224=19 Ind. Cas. 306=14 Cr. L.J. 210.

(15) *Rajendra Narain Roy v. Mahomed Arzumand Khan*, 9 C.W.N. 887=1 C.L.J. 331. Henderson and Geidt, J.J., said :—"A wide discretion as to costs is given to a Magistrate by S. 148 (3) and under the present Code this Court has no power in revision to interfere with his exercise of that discretion. Our attention has been drawn to the fact that out of the sum of Rs. 3,546, Rs. 2,000 represent fees at the rate of Rs. 200 per day paid to a pleader brought from Faridpore to the District of Maldah where the disputed land is situated and where the enquiry took place. Moreover the costs said to have been incurred included 4 days' travelling and other expenses paid to that pleader. We desire to point out for the guidance of Magistrate that in our opinion additional costs incurred for extra fees and travelling and other expenses of a like nature incurred by reason of bringing pleaders or counsel from a distance ought not to be allowed. Otherwise a rich party by the employment on high fees of pleaders or counsel from a distance might have the effect of preventing a poorer party taking part in the proceedings lest he might, in the case of an adverse finding, have to pay an enormous bill of costs incurred by his opponents. We are not in a position however to disturb the order as to costs in the present case." *Rajendra Narain Roy v. Mahomed Arzumand Khan*, 9 C.W.N. 887 at pp. 888, 889=1 C.L.J. 331.

(16) *Gulzarri Lal v. Gunga Ram*, 9 A.L.J. 170=14 Ind. Cas. 652=13 Cr. L.J. 268.

(iv) Such costs not to be awarded on withdrawal of proceedings.

An order allowing proceedings initiated under S. 145 of the Criminal Procedure Code to be withdrawn, is not a "decision" within the meaning of that section, and an award of costs to the counter-petitioner under S. 148 is illegal.⁽¹⁷⁾

(v) Such costs, when to be awarded.

In the usual course an award of costs should almost invariably be contemporaneous with the decision as to the main question. A different course should be pursued only when the circumstances of the case really require the postponement of the disposal of the question of costs, and no order in the matter should be passed, except within a reasonable time after the disposal of the principal subject and in the presence of both the parties.⁽¹⁸⁾

The intention of S. 148 would seem to be that an order for, and the assessment of, costs should be made at the time of the original order and in the presence of parties.⁽¹⁹⁾

Only the Magistrate who passes an order under S. 145, 146 or 147 of the Crim. Pro. Code, can decide by whom the costs of the proceedings are to be paid but the amount of the costs may be assessed by his successor. *Held* further, that an order for costs should as a rule be made at the time of passing the order under S. 145, 146 or 147, Crim. Pro. Code, when the facts are fresh in the mind of the Magistrate.⁽²⁰⁾

(17) *Narasimhaachariar v. Pillanna*, 9 Ind. Cas. 289=9 M.L.T. 324=12 Cr. L.J. 49.

(18) *Vythianada Tambiran v. Mayandi Chetty*, 29 M. 373 (375)=4 Cr. L.J. 232, following *Queen-Empress v. Tomijuddi*, 24 C. 757; *Giridhar Chatterjee v. Eradullah Naskar*, 22 C. 384; *Binoda Sundari v. Kali Kristo Pal*, 22 C. 387.

(19) *Queen-Empress v. Tomijuddi*, 24 C. 757 (759). The meaning of the words "at the time" in 24 C. 757, is, while the same Magistrate is still sitting and the parties are able to appear before him. *Bansi Singh v. Mohamed Akbar*, 15 C.W.N. 811=11 Ind. Cas. 144=12 Cr. L.J. 376. See, also, *Iklas Kuar v. Raghuraj*, 13 O.C. 66=5 Ind. Cas. 943=11 Cr. L.J. 335.

(20) *Iklas Kuar Thakurain v. Raja Raghuraj Bahadur Singh*, 13 O.C. 66 (67). The Court (Chamier, J.C.) said:—S. 148 (3) provides that "when any costs have been incurred by any party to a proceeding under this chapter for witnesses or pleaders' fees, or both, the Magistrate passing a decision under S. 145, 146 or 147, may direct by whom such costs shall be paid, whether by such party or any other party to the proceeding, and whether in whole or in part or proportion." The question of the costs of a proceeding is always treated as one which the Court or officer who conducts the proceeding is best fitted to decide. In awarding costs, the Court may properly take into consideration various matters, such as the conduct of the parties which may not be easily, if at all, ascertained from the record. The words "The Magistrate passing a decision" apply literally to the Magistrate who actually passed the order under S. 145, 146 or 147 and to no other, and I see no reason why we should give them any other meaning. *Iklas Kuar Thakurain v. Raja Raghuraj Bahadur Singh*, 13 O.C. 66 at 69=5 Ind. Cas. 943=11 Cr. L.J. 335.

Where a Magistrate passed an order for costs but did not state what the amount was to be, his successor in office had no jurisdiction to assess the cost more than two years after the date of the order for payment of costs. (21)

(vi) Such costs, if can be assessed and taxed by a succeeding Magistrate.

Where the Magistrate who passed the decision under S. 145 had already awarded the costs, it is not necessary that the costs should be assessed or taxed at the time of the decision or by the same officer who decided the case. (22)

When there was an order to pay costs under S. 148 by the Magistrate deciding the case, another Magistrate has jurisdiction to assess the amount of the costs. (23)

The award of costs under S. 148 should be made by the Magistrate at the time of giving his decision; unless for any reason the consideration of the matter is reserved for any future stage of the proceedings, (24) in the same manner as under S. 218, Civ. Pro. Code. (25)

It has been held in a recent case by the Calcutta High Court that though a Magistrate did not himself pass the order under S. 145, he still has jurisdiction to assess costs. (26)

In proceedings under S. 145, Crim. Pro. Code, the Sub-Divisional Magistrate passed a final order directing the counter-petitioners, among other things, to pay the petitioner's costs. Within three days after the order, two memoranda for taxing costs were put into the Court by the petitioner. The Magistrate passed an order directing the inclusion of the costs. But through some negligence in the Magistrate's office, costs were not actually taxed.

(21) *Bhojal Sonar v. Nirban Singh*, 21 C. 609 (611); but see *Giridhar Chatterjee v. Ebadullah*, 22 C. 384; not followed in *Vythina v. Mayandi*, 29 M. 373; see hereon *Ershad Ali Khan v. Saroda*, 23 C. 37. *Iklas Kuar v. Raghuraj*, 13 O.C. 66 = 5 Ind. Cas. 943 = 11 Cr. L.J. 335.

(22) *Giridhar Chatterjee v. Ebadullah*, 22 C. 384 (386). The Court (Beverley, J.) said:—"The provision in question is of a quasi civil character, and indeed, the language of the section appears to have been borrowed from S. 219 of the Code of Civil Procedure (Act XIV of 1882), and it is not necessary in civil cases that the costs should be assessed or taxed at the time of the decision, or by the same officer who decided the case."

(23) *Ershad Ali Khan v. Saroda*, 23 C. 37 (39); following *Giridhar Chatterjee v. Ebadullah*, 22 C. 383 and not following *Bhojal Sonar v. Nirban Singh*, 21 C. 609.

(24) *Binoda Sundari v. Kali Kristo Pal Chowdhry*, 22 C. 387 (391).

(25) Act XIV of 1882 = O. XX, r. 6 of Act V of 1908 (the present Code of Civil Procedure).

(26) *Dilbasi Koer v. Deorati Koer*, 10 C.W.N. 1030 = 4 Cr. L.J. 171.

Nearly three years later, the petitioner's son applied to the Magistrate's successor-in-office for costs being assessed, the petitioner having died in the interval. The son's application was rejected. *Held*, that the application by the son is sustainable and he is entitled to have the costs assessed. The Code of Criminal Procedure contains no special provisions for bringing on record representatives of the deceased parties. All that the Court has to see is that the appeal or application has not abated by reason of the death of one of the parties. *Held*, also, that the successor of the Magistrate who decided the case has jurisdiction to assess the amount of costs. His Lordship, Sadasiva Iyer, J., said:—" Courts should always lean in favour of that view of the law which would enable a party who has got an order in his favour to obtain the fruits of that order, and not in favour of highly technical objections which render the Court's order infructuous and a mere piece of waste paper. Courts have power within reasonable limits to invent rules of procedure for this purpose, when the Legislature has not enacted such rules, unless the Legislature prohibits them from doing so." (27)

(vii) Such costs not to be awarded after long interval and without notice.

An order awarding and assessing costs made three months after the original order without allowing all the parties affected an opportunity to appear and show cause, is bad. (28)

(viii) Such costs may be awarded by one order and assessed by separate order.

In this case, the Magistrate, in his order made under S. 145, directed that the petitioners should bear the costs of the other side, but he did not specify the amount. He fixed the amount in a supplementary order, after a memo of costs was filed and both parties were heard on the matter. *Held*, that this procedure is not illegal. The Magistrate's order directing payment of the costs of the other side was a sufficient compliance with the requirements of the law. There is no reason why the actual amount should not be subsequently assessed, as is done in civil cases. (29)

(ix) Such costs refused by Magistrate—No bar to Civil suit—Not *res judicata*.

The order of Magistrate refusing costs to a witness incurred by him in appearing and giving evidence in a proceeding under

(27) *Subbiah Servai v. Chokkalinga Thevan*, 16 M.L.T. 248 = (1914) M.W.N. 790 = 27 M.L.J. 613 = 15 Cr. L.J. 676 = 25 Ind. Cas. 1004.

(28) *Queen-Empress v. Tomijuddi*, 24 C. 757 (759).

(29) *In the matter of Ammireddi*, 14 M.L.T. 195 = (1913) M.W.N. 771 = 21 Ind. Cas. 170 = 14 Cr. L.J. 570.

S. 145 and referring him to a Civil Court, will not operate as *res judicata* in bar of a suit in the Civil Court for such costs. (30)

A Magistrate who passed an order as to costs has no power to (x) Setting aside order as to such costs. set it aside without giving notice to the opposite party. (31)

The High Court, sitting as a Court of Revision, cannot, by the (xi) Revision of order as to such costs. terms of S. 435 (3), consider the order as to costs passed under S. 148 (3) of the Code of Criminal Procedure. (32)

A wide discretion as to costs is given to a Magistrate by S. 148 (3) and, under the present Code, the High Court has no power to interfere with his exercise of that discretion. (33)

When costs allowed are within the scope of this section, the High Court will not interfere on the ground that they are neither excessive nor deficient. (34)

(30) *Nemai Chandra v. Ajahar*, 8 C.W.N. 178; but see, also, *Forbes v. Hayes*, 11 C.W.N. celrlii, noted *infra*.

(31) *Dilbasi Koer v. Deorati Koer*, 10 C.W.N. 1030 (1031)=4 Cr. L.J. 171.

(32) *Mussammatt Gulab v. Trilok Bhagat*, 4 C.W.N. Journal portion, p. lxxxiii. This was a rule, obtained on the 8th December 1899, to show cause why an order of the Deputy Magistrate of Jamui, Monghyr, passed on the 14th August 1899, should not be set aside. The facts of the case material to this report were as follows:—On the 30th January 1899, the Deputy Magistrate of Jamui drew up a proceeding under S. 145 of the Code of Criminal Procedure making certain persons the 1st party and certain others, the second party, and copies of the proceedings were served on both the parties. On the matter coming on for hearing, the Deputy Magistrate, on the 14th August 1899, made an order declaring the 2nd party Trilok Chand and Ram Dulari Bhagat to be in possession of the property in dispute and forbidding all disturbance of such possession until they were evicted in due course of law. He ordered that the costs for witnesses and pleader's fees incurred by the 2nd party be paid by the 1st party. Subsequently on the 29th August 1899, the said Magistrate assessed the costs at Rs. 666-9-6 pies. Against the order of the Deputy Magistrate the petitioner moved the High Court and obtained this rule, and it was contended that the Deputy Magistrate added new parties to the proceeding, which he had no power to do and that the order as to costs should be modified as the costs awarded were excessive. In shewing cause the opposite party contended that so far as the persons in whose favour the order had been made were concerned, they were made parties when the proceedings were drawn up. Further it was urged that the High Court could not, sitting as a Court of Revision, revise an order made under S. 148, Crim. Pro. Code, by reason of S. 435 of the Code. *Held*—That the High Court is debarred by the terms of cl. (3), S. 435 of the Code of Criminal Procedure from considering the matter as to costs passed under S. 148 of the Code. That the order has not been made in favour of persons not originally on record. *Mussammatt Gulab v. Trilok Bhagat*, 4 C.W.N. Journal portion, p. lxxxiii.

(33) *Rajendra Narain v. Mahomed Arzumand*, 9 C.W.N. 887 (888)=1 C.L.J. 331 =2 Cr. L.J. 408. But see *Peaddanna v. Trummala*, 13 Cr. L.J. 297.

(34) *Bansi Singh v. Mohamed Akbar*, 15 C.W.N. 811=11 Ind. Cas. 144=12 Cr. L. J. 376. An order for assessment of costs under S. 148, Crim. Pro. Code, does not become illegal simply because it was not made at the time of pronouncing judgment in

The jurisdiction of a Magistrate to award costs under S. 148 (3) is limited to the costs mentioned therein. The section does not permit him to give any direction in respect of other costs which might be admissible under the much wider provisions of the Criminal Procedure Code, as costs incidental to the proceedings. The Magistrate cannot deal with such other costs by reason of S. 44 (3) of the Stamp Act. Where a Magistrate awards such other costs, it is open to the High Court to interfere in revision. (35)

(xii) Suit to enforce such order as to costs, if lies in Civil Court.

The plaintiff sought to recover the expenses incurred by him in connection with a case under S. 145 of the Criminal Procedure Code. The Courts below held that the suit was not maintainable. The plaintiff appealed to the High Court and contended that there having been a tort committed by disturbance of the possession of the plaintiff, the plaintiff must be entitled to an action by way of damages for expenses to which he was put by reason of such tort. *Held*—Where a Court of competent jurisdiction orders or refuses costs no separate action will lie. *Held also*—A mere delivery of a possessory order by a Criminal Court under S. 145, Criminal Procedure Code, does not necessarily predicate any tort on the part of either of the parties but merely indicates that if they approached each other to claim possession there might be a danger of a breach of the peace. (36)

(9) Costs incurred in sanction proceedings.

In an enquiry for the purpose of S. 195, Criminal Procedure Code, there is no authority for granting costs. (37)

the proceeding under Ss. 145, 146, or 147, Crim. Pro. Code. The order will be good if it is made within a reasonable time while the same Magistrate who decided the proceeding is sitting and the parties are able to appear before him. *Bansi Singh v. Sayad Mahomed Akbar Ali Khan*, 15 C.W.N. 811, referring and explaining *Benoda Sundari Chowdhurani v. Kali Krishto Paul Chowdhury*, 22 C. 387; and *Queen-Empress v. Tomi-juddi*, 24 C. 757.

(35) *Peddanna v. Tummala*, 13 Cr. L.J. 297=13 M.L.T. 224=14 Ind. Cas. 761 (distinguishing *Rajendra Narain v. Mahomed Areumand*, 9 C.W.N. 887=1 C.L.J. 331=2 Cr. L.J. 408).

(36) *Forbes v. Hayes*, 11 C.W.N. colxiii, following *Maharam Dass v. Ajudhia*, 8 A. 452 and *Kadir Baksh v. Salig Ram*, 9 A. 474 and distinguishing *Nemai Chunder Ghose v. Ajahar Chowdhury*, 8 C.W.N. 178.

(37) *Nga Tha Win v. Nga San*, 20 Ind. Cas. 406=U.B.R. 1913, 166=14 Cr.L.J. 422. The Court said in the course of the judgment:—"The Judge appears to have treated the inquiry preliminary to the granting of sanction as if it were a civil suit itself between the applicant and respondent, and has not merely allowed the respondent to be examined and cross-examined upon oath, but has required the respondent to pay the costs of the inquiry. It is clear that although the respondent is not upon his trial upon a criminal charge, in being required to show cause why he should not be criminally prosecuted, he is in the position of a person accused of committing an offence. His examination,

It is improper to award costs, to a person who applies for sanction to prosecute under S. 195, Criminal Procedure Code. (38)

No order as to costs can be made either in favour of or against the applicant for sanction for prosecution under S. 195 of the Code of Criminal Procedure. (39)

Where the property of an absconding offender has been attached, or attached and sold by the Magistrate the costs of such attachment and sale may be deducted from the sale proceeds or otherwise satisfied before restoration of the property or the sale proceeds under S. 89 of the Criminal Procedure Code. (40)

When an order for the removal of a public nuisance has been made absolute under S. 136, S. 137 or S. 139 of the Code of Criminal Procedure "the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that, in case of

(3) Costs of attachment of property of absconding offender.

(4) Costs of enforcing order for removal of nuisance and realization of the same.

therefore, should not be on oath, nor should he be cross-examined, but any questions put to him should be put with the object of enabling him to explain the circumstances which appear to require explanation. Nor should the respondent be required to pay the applicant's costs. Though the inquiry is held by the Judge in his capacity as such, when the offence is committed in a civil Court, the inquiry is for the purposes of S. 195, Code of Criminal Procedure, and there is no authority for granting costs." *Nga Tha Win v. Nga San*, 20 Ind. Cas. 406 (408) = U.B.R. 1913, 166 = 14 Cr. L.J. 422.

(38) *Krishna Proshad Mandal v. Rabindra Nath Dinda*, 18 Ind. Cas. 99 = 13 Cr. L. J. 6. The Court said in the course of the judgment :—"A proceeding under S. 195 of the Criminal Procedure Code ought not to be treated as a proceeding between private parties. The person who applies for sanction presumably does so in the interests of the administration of public justice, and if that be his real point of view, he cannot very well claim costs from the party against whom he obtains the order. Besides, the grant of sanction does not establish the guilt of the person against whom the order is made; if ultimately it transpires that the person is innocent, the order for payment of costs by him to the party who obtained the sanction cannot very well be justified." *Krishna Proshad Mandal v. Rabindra Nath Dinda*, 13 Ind. Cas. 99 (101) = 13 Cr. L. J. 6.

(39) *Bishen Das v. Rahmat Khan*, 5 P.R. 1915, Cr.

(40) See S. 89 of the Code of Criminal Procedure (Act V of 1898) which runs as follows:—"If, within two years from the date of the attachment, any person whose property is or has been at the disposal of Government, under sub-S. (7) of S. 88, appears voluntarily or is apprehended and brought before the Court by whose order the property was attached, or the Court to which such Court is subordinate, and proves to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and that he had not such notice of the proclamation as to enable him to attend within the time specified therein, such property, or, if the same has been sold, the nett proceeds of the sale, or, if part only thereof has been sold, the nett proceeds of the sale and the residue of the property, shall, after satisfying thereout all costs incurred in consequence of the attachment, be delivered to him."

disobedience, he will be liable to the penalty provided by S. 188 of the Indian Penal Code. If such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other moveable property of such person within or without the local limits of such Magistrate's jurisdiction."⁽⁴¹⁾

(5) Costs incurred by way of Court-fees on complaint.

A petition of complaint of a non-cognizable offence or of wrongful confinement or wrongful restraint shall bear a stamp of eight annas.⁽⁴²⁾ And if the complaint of such an offence be not by written petition, the complainant shall pay a fee of eight annas on his examination by a Magistrate, that is to say, before issue of process. The Magistrate however is competent to remit such payment.⁽⁴³⁾

A complaint of a public servant as defined by the Indian Penal Code, and a complaint made to a police officer, the head of a village, or the village police in the Presidencies of Madras and Bombay are exempted from such payments.⁽⁴⁴⁾

A complaint of a cognizable offence unless it be of wrongful restraint or wrongful confinement requires no Court-fee.

If the accused has been convicted of a non-cognizable offence or of wrongful confinement or of wrongful restraint, the Court shall, in addition to the penalty imposed on him, order him to repay to the complainant the fee paid on his application or petition, *viz.*, eight annas, or the same amount paid on his examination;⁽⁴⁵⁾ and, when the complainant has paid fees for serving processes, also the amount paid therefor; all such fees are to be realised as if they were fines imposed by the Court.⁽⁴⁶⁾

(41) See S. 140 of the Code of Criminal Procedure.

(42) Act VII of 1870 (The Court Fees Act), Sch. II, Art. I, and S. 18.

(43) *Ibid.*, S. 18.

(44) Act VII of 1870 (The Court Fees Act), Sch. II, Art. I, and S. 19, cls. xvi, xvii.

(45) Court Fees Act, 1870, S. 18.

(46) Court Fees Act, 1870, S. 31. The following from Mr. Stephen's History of the Criminal Law of England may also be noted in this connection:—At one time in the History of English Criminal Law the whole business of originating and conducting prosecutions was left in private hands and so gave to the whole procedure its character of a private litigation. One circumstance that followed from this was the fact that till about a century ago private persons had to pay all the costs of every prosecution. "This was complained of by Lord Hale. (Quoted by Fielding.) "It is," he said, "a great defect in the law, to give Courts of justice no power to allow witnesses against

If the accused has been sentenced to fine, the Magistrate may, when passing judgment, order the whole or any part of the fine recovered to be applied, (a) to defray the expenses properly incurred by the prosecution, and (b) in compensation for the injury caused by the offence committed where substantial compensation is, in the Magistrate's opinion, recoverable by a civil suit.^(46-a)

S. 204, sub-S. 3, of the Code provides that

"When by any law for the time being in force any process fees or other fees are payable, no process shall be issued until the fees are paid, and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint."⁽⁴⁷⁾

(6) Costs incurred by way of process fees in Criminal Courts.

criminals their charges therein, to their great hindrance and loss," (Fielding's Works, Vol. X, p. 371-72.) Fielding in his essay on the causes of the increase of robberies, repeats and enforces this complaint. The extreme poverty of prosecutors, he says, is one cause of the escape of offenders. "This I have known to be so absolutely the case that the poor wretch who hath been bound to prosecute was under more concern than the prisoner himself. It is true the necessary cost on these occasions is extremely small: two shillings, which are appointed by Act of Parliament for drawing the indictment, being, I think, the whole which the law requires, but when the expense of attendance, generally with several witnesses, sometimes during several days together, and often at a great distance from the prosecutor's home—are summed up, and the loss of time added to the account, the whole amounts to an expense which a very poor person already plundered by the thief must look on with such horror that he must be a miracle of public spirit" if he prosecutes. The first scheme for the remedy of this evil was (a list may be seen in Chitty's Criminal Law, 821-24), to provide by statute rewards for successful prosecutions. But this system was replaced by a more reasonable one authorizing the Court to order payment of costs in cases of felony. Several statutes dealt with this subject successively. The first statute of importance was St. 18, Geo. 3, c. 19 (A.D. 1778) which was followed by St. 58, Geo. 3, c. 52 = (A.D. 1818). The Acts now in force on the subject are St. 7, Geo. 4, c. 64, St. 14 & 15, Vic. c. 55, and the (St. 24 & 25, Vic. cc. 96, 97, 98, 99, 100) five consolidation Acts of 1861. The result of these statutes is that the Court may allow costs to prosecutors in all cases of felony, and in all common cases of misdemeanour. The legislation on the subject is scattered, cumbrous, and in some points capricious, as the misdemeanours in respect of which costs may be given are chosen without much reference to principle. It would, however, be foreign to our purpose to go into minute detail on the subject." See Stephen's History of the Criminal Law of England (1883), Vol. I, pp. 498, 499.

(46-a) S. 545 of the Code of Criminal Procedure (Act V of 1898).

(47) See S. 204 of the Code of Criminal Procedure. With regard to process fees in criminal cases see the rules and orders collected in Annadurai Iyer's Code of Criminal Procedure, 2nd Ed., 1905, Vol. II, Appendix Q, pp. lxii—lxvi. "No process can issue unless the necessary fees have been paid, and if, after an order for the issue of process, such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint. If the complainant does not take out process against all the persons accused, any one of them may appear voluntarily and insist either that the complaint against him shall be proceeded with or dismissed. (*In re Lakshman Govind Nirgude*,

(7) Costs incurred in frivolous or vexatious accusations, compensation for.

If, in any case instituted by complaint as defined in the Code of Criminal Procedure, or upon information given to a police-officer or to a Magistrate, a person is accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits the accused and is satisfied that

B. 552.) The following scale of fees for processes to compel the attendance of persons accused in non-cognizable cases have been prescribed under the Court Fees Act (VII of 1870):—In Bengal and in Assam a fee of eight annas is charged for a summons in respect of one person or the first two persons residing in the same place, and four annas for every additional person named therein, (Cal. Gaz. 1879, p. 304, Assam Gaz. 1879, p. 596; Rules, &c., p. 115) and one rupee is charged for a warrant, and in Bengal, in certain districts, an additional fee of one-fourth is charged, if the process is to be served or executed at a distance of more than twenty-five miles, and one-half, if at a distance of more than 50 miles, from the issuing Court. In Madras, a fee of eight annas is chargeable for a summons, and an additional fee of four annas for each additional defendant, if applied for at the same time, and if he is resident in the same neighbourhood, and twelve annas for a warrant of arrest. But if the process has to be served or executed within a distance of six miles from the Court house, only half rates are chargeable. Ferry charges are also to be paid. (Mad. Gaz. 1890, Part I, p. 54; Rules, &c., No. 1.) In Bombay, in cases under Chapters XIX (Criminal Breach of Contract of Service), XX (Offences Relating to Marriage), and XXI (Defamation), Penal Code, a fee of four annas is chargeable for every summons and one rupee for every warrant of arrest, and half rates for processes in other cases. The fees in the latter class of cases may be remitted, if the Court is satisfied that the complainant has not the means of paying them. (Bom. Gaz., 1874, p. 580.) In the United Provinces, a fee of four annas is charged for every summons in respect of one person or the first person, and two annas for every other person, and double such rates for a warrant of arrest, and the Court has power to remit, as already stated in regard to Bombay (All. Rules, &c., No. 9.) In the Punjab, the rates of fees for a summons and warrant of arrest vary according to the class of the Court issuing it, one fee being payable for the first four processes, and an additional fee for each additional process, not exceeding a certain sum in the aggregate. The ordinary rate is four annas for a summons in the Court of the Tahsildar, and eight annas in the Courts of other Magistrates, and two rupees for a warrant of arrest. (Pan. Bk. Cir., p. 496.) In the Central Provinces, the same rates are chargeable for a summons and warrant of arrest as in Bengal, and discretion is given to remit such fees in whole or in part, if the Magistrate is of opinion that the complainant is unable to pay such fees. (Central Pro. Gaz., 1887, Part I, p. 43.) In Burma, a fee of one rupee is chargeable for a summons and two rupees for a warrant of arrest of an accused, and when the process has to be served or executed by travelling by boat, these fees may be increased by one-quarter. The same discretion of remitting such fees is given as in Bombay. (Lower Burma Cir., para 225.) It may be observed that some of the rules issued apply to processes in cognizable cases. The Court Fees Act (VII of 1870), S. 20, cl. ii, however, gives power to prescribe such fees only in non-cognizable cases. The High Court, Sessions Judge or District Magistrate may order further inquiry to be made into any complaint which has been dismissed under S. 204 (3) for non-payment of Court-fees—(S. 437). On conviction of the accused, he may be ordered to pay such fees in addition to any sentence passed (S. 31 (iii) Court Fees Act), and the amount if not paid is recoverable as a fine." (*Ibid.* iv.) See Prinsep's Code of Criminal Procedure, 14th Ed., 1907, Notes under S. 204, p. 256.

the accusation against him was frivolous or vexatious, the Magistrate may, in his discretion, by his order of discharge or acquittal, direct the person upon whose complaint or information the accusation was made to pay to the accused, or to each of the accused where there are more than one, such compensation, not exceeding fifty rupees, as the Magistrate thinks fit: Provided that, before making any such direction, the Magistrate shall—(a) record and consider any objection which the complainant or informant may urge against the making of the direction, and (b) if the magistrate directs any compensation to be paid, state in writing, in his order of discharge or acquittal, his reasons for awarding the compensation. Compensation of which a Magistrate has ordered payment shall be recoverable as if it were a fine: Provided that, if it cannot be recovered, the imprisonment to be awarded shall be simple, and for such term, not exceeding thirty days, as the Magistrate directs.⁽⁴⁸⁾

On the subject of reference to the High Court and the costs of such reference the Code of Criminal Procedure provides as follows:

“A Presidency Magistrate may, if he thinks fit, refer for the opinion of the High Court any question of law which arises in the hearing of any case pending before him, or may give judgment in any such case subject to the decision of the High Court on such reference and, pending such decision, may either commit the accused to jail, or release him on bail to appear for judgment when called upon.”⁽⁴⁹⁾

(8) Costs of reference by Presidency Magistrate to High Court.

When a question has been so referred, the High Court shall pass such order thereon as it thinks fit, and shall cause a copy of such order to be sent to the Magistrate by whom the reference was made, who shall dispose of the case conformably to the said order. The High Court may direct by whom the costs of such reference shall be paid.⁽⁵⁰⁾

When an accused person makes an application under S. 526, Criminal Procedure Code, for transfer of a criminal case, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the costs of the prosecution.⁽⁵¹⁾

(9) Costs, security for, in case of an application for transfer of Criminal case.

(48) See S. 250 of the Code of Criminal Procedure (Act V of 1898).

(49) See S. 432 of the Code of the Criminal Procedure (Act V of 1898).

(50) See S. 433 of the Code of Criminal Procedure (Act V of 1898).

(51) See S. 526 cl. (5) of the Code of Criminal Procedure (Act V of 1898).

(10) Costs incurred by way of expenses of complainants and witnesses.

Subject to any rules⁽⁵²⁾ made by the Local Government with the previous sanction of the Governor General in Council,

(i) Rules in Bengal.

(52) The following rules are in force in Bengal (See Cal. Gaz. 1895, Part I, p. 648). The Criminal Courts are authorised to pay, at certain specified rates (for which see Prinsep's Code of Criminal Procedure, 14th ed., 1907, pp. 679—687) the expenses (a) of complainants or witnesses, whether for the prosecution or for the defence, (Mad. Rules &c. No. 117) in cases in which the prosecution is instituted or carried on by, or under the orders, or with the sanction of, the Government or any Judge, Magistrate, or other public officer, or in which it shall appear to the presiding officer to be directly in furtherance of the interests of the public service; and (All. Rules, &c., No. 34) in all cases entered in column 5 of Sch. 2 appended to the Criminal Procedure Code, as not bailable; and (b), of witnesses in all cases in which they are compelled by the Magistrate of his own motion to attend under the provisions of S. 540 of the Code. If a witness is summoned at the instance of the complainant or the accused under S. 244, his expenses shall not be withheld from him except on the ground of failure to do his duty as a witness when summoned. As a general rule, the allowances to be paid to complainants and witnesses shall be a diet allowance calculated at the following rates:—(for which see Prinsep's Code of Criminal Procedure, 14th Ed., 1907, pp. 679—680). In addition to the above, charges for toll at ferries will be allowed at the authorised rates to the extent to which they may have been actually incurred. Other travelling expenses will be given only when the journey could not have been performed on foot, or in the case of persons whose age, position, and habits of life render it impossible for them to walk. In such cases, in addition to diet allowance and ferry tolls, travelling allowance shall be given at the following rates:—(for which See Prinsep's Code of Criminal Procedure, 13th Ed., 1907, p. 680). Notwithstanding the above rules—(1) Government servants when summoned to give evidence in their public capacity shall receive nothing from the Court. In this case they are entitled to travelling allowance under the Civil Service Regulations. Government servants when summoned to give evidence in their private capacity may be paid by the Court and may retain any travelling allowance due to persons of corresponding rank under these rules, but no diet allowance, and they shall not be entitled to any travelling allowance under the Civil Service Regulations. (2) To witnesses following any profession such as medicine or law, a special allowance shall be given according to circumstances. Officers will be held responsible that parties of witnesses are brought to Court together as far as possible, so as to save expense. The hire of more than one boat shall not be allowed in one case, unless the presiding officer is satisfied that the witnesses could not have arranged to come together. The number of days for which diet allowance should be granted will be determined by the officers ordering payment in each case. For this purpose, and for regulating the re-imbursement of tolls paid, a table shall be prepared and kept in each Court, showing the distance of each thana from the Sadar station and subordinate stations, the number of intermediate ferries to be crossed, and the authorised rates of charges for tolls at each of those ferries, the existence or absence of roads or waterways being also noted in the table. The following rules on the subject are in force in Madras. (Mad. Gaz. 1873, p. 1096; Rules &c., No. 4; Mad. Gaz. 1891, part I., p. 1065):—The Criminal Courts are authorised to pay at certain specified rates, the expenses of complainants and witnesses in cases in which the prosecution is instituted or carried on by or under the orders or with the sanctions of the Government, or of any Judge, Magistrate, or other public officer, or when it

(ii) Madras.

any Criminal Court may, if it thinks fit, order payment, on

shall appear to the Judge or Magistrate presiding over such Court to be directly for or in furtherance of the interest of public justice : also in cases entered in column 5 of Sch. II, appended to the Code of Criminal Procedure, as non-bailable; and in all cases in which the witnesses are compelled to attend by a Magistrate under the provisions of S. 540 of the Code. For the purposes of these rules, Europeans, East Indians and Natives shall be divided into three classes, and the Judge or Magistrate, before whom they are required to appear, either as complainant or as witnesses, shall be careful to fix the class with due regard to the station in life occupied by each complainant or witness. Travelling allowances and batta shall be paid at the rates specified below :—(for which see Prinsep's Code of Criminal Procedure, 14th Ed., 1907, p. 681.) The distance for which mileage, and the number of days for which batta should be allowed for the journey to and from the station at which the Court is held and for attendance at Court, shall be determined by the Judge or Magistrate ordering the payment in each case. All bills for travelling allowance and batta to complainants and witnesses attending before the Courts of Magistrates of the second or third class shall be scrutinised by the Magistrate of the Division in which such Courts are situated, before the charges included in them are finally passed. Whenever a Magistrate dismisses a case as frivolous or vexatious, under S. 250 of the Code of Criminal Procedure, no travelling allowance or batta shall be granted to the complainant. The Criminal Courts are authorised to pay the necessary and actual expenses of carriage to a witness travelling by road, in the case of persons whose sickness, age or habits of life render it impossible for them to walk, provided that the expenses incurred under this rule shall in no case exceed 8 annas a mile. To Natives or Europeans graded in the first class may also be allowed the actual costs of carriage hire to and from Court on the days of attendance in Court. The following rules are in force in Bombay (Bom. Gaz. 1864, Part. I, p. 204, Man. 394). Payment of the expenses of complainants and witnesses on the part of Government may be ordered :—By Courts of Session—In any case which comes before such Courts (2) by Magistrates—(a) In every case in which the offence or any of the offences charged against the accused is a non-bailable offence and (b) in cases in which the offence or all the offences charged against the accused is or are bailable, only if the prosecution has been instituted, or is carried on by, or under the orders of, or with the sanction of, Government, or any Judge, Magistrate or other Public Officer, or if the Magistrate thinks that the prosecution is directly in furtherance of the interests of the public service, or that the person to whom payment is to be made is in indigent circumstances. (a) European and East Indian witnesses in the mofussil, when summoned by a Criminal Court to give evidence, are to be allowed their actual expenses for carriage, when the same are not in excess of 6 annas a mile. They are also to be allowed a sum not exceeding Rs. 2-8-0 a day for subsistence if they demand the same. (b) European and East Indian witnesses coming from the mofussil to attend trials at the High Court are to be remunerated as follows :—(for which see Prinsep's Code of Criminal Procedure, 14th Ed., 1907, pp. 681, 682). (c) As a general rule Native witnesses of the better class, as Patels, Panderpeshas, Merchants, Vakils, etc. and persons of corresponding rank, as well as all witnesses who are in no way concerned in the case in which their evidence is given, but whose evidence is required for furthering the ends of justice (such as attesting witnesses to depositions and inquest reports, provided they can read and write) are to be allowed six annas a day as subsistence money and they are also to receive railway and other travelling expenses that have been actually incurred by them, provided the same be reasonable. (d) Native witnesses of the class of cultivators and menials who would not under ordinary circumstances voluntarily incur any expense on account of special lodging when away from home, are to be allowed subsistence money at

the part of Government, of the reasonable expenses of any

(iv) United
Provinces—
Oudh.

the rate of four annas a day, and are also to receive railway and other travelling expenses actually incurred by them, provided the same be reasonable. Peculiar cases (that is, cases not coming under the operations of Cls. (a), (b), (c) and (d), of r. 1) are to be dealt with according to their own merits, and at the discretion of the Court from which subsistence money or travelling allowance is demanded. When a witness lives in the same town or village in which the Court, before which he is required to give evidence, is situated, the Court may award him such sum not exceeding four annas a day as may compensate him for any loss he may have incurred by attendance at the Court. Subsistence allowance should be paid to witnesses day by day, as it may become due; payment should not be deferred until the conclusion of a trial (Bom. H. Ct. Cir. p. 42; Gaz. 1873, Part I, p. 693; *Ibid.* 1875, Part I, p. 101; Bom. H. Ct. Bk. Cir. p. 9; Gaz. 1884, Part I, pp. 204, 205). The following rules are enforced in the United Provinces;—(All. Man., p. 286). The Criminal Courts are authorised to pay at the rates specified below, the expenses of complainants and witnesses, first, in all cases, whether non-bailable or bailable, in which the prosecution is instituted or carried on by, or under the orders or with the sanction of Government or of any Judge, Magistrate, or other public officer; secondly, in all cases entered in column 5 of Sch. 2, appended to the Crim. Pro. Code as non-bailable, when it shall appear to the presiding officer to be directly in furtherance of the interests of the public justice; thirdly, in bailable cases, in which the presiding officer of the Court, is a Magistrate of the first class or in which the Magistrate of the District, on the recommendation of the Magistrate of the second or third class, considers that in the interests of public justice such payment is required; fourthly, in all cases in which the witnesses are compelled to attend by the Magistrate under the provisions of S. 540 of the Code. No payment shall be made by the Government to witnesses summoned at the instance of the complainant under S. 244 unless the prosecution appears to the Court or Magistrate to be in furtherance of the interests of public justice. The rates referred to in the foregoing rules are as follows:—(for which see Prinsep's Code of Criminal Procedure, 14th Ed., 1907, p. 682). Travelling expenses will be given only when the journey could not, with reasonable care and expedition, have been performed on foot, or in the case of persons whose age, positions and habits of life render it impossible for them to walk. In such cases, in addition to diet allowance, travelling allowance shall be given at the following rates:—(for which see Prinsep's Code of Criminal Procedure, 14th Ed., 1907, p. 683). For natives generally railway fare by lowest class. For Europeans, Eurasians and Natives of superior rank, second class railway fare; but the Court may in its discretion, award first class railway fare when the persons concerned, from their social position would ordinarily travel by that class. From the above rules are excepted—(a) Government servants, who shall receive no diet allowance, but shall be entitled to actual travelling expenses only to an amount not exceeding what they would be entitled to for the journey under the rules ordinarily applicable to officers in the department to which they belong. (b) Witnesses following any profession, such as medicine or law, to whom a special allowance shall be given according to the circumstances. The number of days which should be allowed for the journey to and from will be determined by the officer ordering the payment in each case. For this purpose, a table should be prepared and kept in each Court showing the distance of each thana from the Sadar station and subordinate stations, the number of intermediate ferries to be crossed, and the existence or absence of roads or waterways. Every payment made under the foregoing rules shall be entered in the prescribed form. The following rules are also in force in the Punjab:—(Pun. Bk. Cir. Vol. I, pp. 77-79). The Criminal Courts are authorised to pay, at the rates specified below, the expenses of complainants or witnesses (1) in cases in

(v) Punjab.

complainant or witness attending for the purposes of any

which the prosecution is instituted or carried on by, or under the orders, or with the sanction of, the Government, or any Judge, Magistrate, or any other public officer, or in which it shall appear to the presiding officer to be directly in furtherance of the interest of the public service ; (2) in all cases entered in column 5 of Sch. 2 appended to the Crim. Pro. Code as non-bailable ; (3) in all cases which are cognizable by the police ; and (4) of witnesses in all cases in which they are compelled by the Magistrate of his own motion to attend under S. 540 of the Code of Criminal Procedure. No payment shall be made by Government to witnesses summoned at the instance of the complainant under S. 244, unless the prosecution appear to the Court or Magistrate to be in furtherance of the interests of public justice, but under this section the Magistrate may require the complainant to pay their expenses. For rates of subsistence allowance, that is, allowance for each day's necessary absence from residence and attendance at Court (see Prinsep's Code of Criminal Procedure, 14th Ed., 1907, p. 683). When the journey is made otherwise than by rail, the necessary and actual expenses of carriage may be paid at the discretion of the Court : Provided, the expense incurred does not exceed 8 annas a mile, and provided that the journey could not have been made on foot, or in the case of persons whose age, position, or habits of life render it impossible for them to walk. To Natives in class (c) and Europeans in class (f), (for the division into which classes, see Prinsep's Code of Criminal Procedure, 14th Ed., p. 683), a further sum may be allowed to cover the costs of carriage hire to and from Court on the days of attendance at Court. The following rules are also in force in the Punjab :—All disbursements on account of the expenses of the complainants and witnesses attending criminal trial before the Chief Court will be made by the committing Magistrate and will be adjusted by him. The committing Magistrate will determine the class to which each complainant and witness belongs. Except for any special reason in any particular case, complainants and witnesses travelling at public expense will only be allowed to travel by road and charge accordingly, unless the journey can be accomplished more cheaply and expeditiously by rail. The committing Magistrate, when despatching complainants and witnesses to the Chief Court, will instruct them to report themselves to the Registrar of the Court on their arrival at Lahore, and will at the same time report to that officer—The name of each complainant and witness (b) the class to which he belongs, (c) the date of his departure to attend the Chief Court, (d) whether any, and, if so, what advances have been made to such complainant or witness to enable him to reach Lahore. When the trial in which the complainant and the witnesses have appeared in the Chief Court is concluded, the Registrar of that Court will intimate to the committing Magistrate the date of the arrival of the complainants and witnesses at Lahore, and the date on which it was possible for them to quit the station. The subsistence at Lahore will cease as soon after the conclusion of this trial as the means of quitting the station become available. The committing Magistrate may make reasonable advances to complainants and witnesses to enable them to reach Lahore ; and, when necessary, the Registrar of this Chief Court will make advances to them at Lahore, to enable them to return to their houses. Care should be taken in making these advances that a larger sum is not paid to any complainant or witness than he is entitled to receive under these rules, and before making advances to witnesses for the defence, the committing Magistrate should satisfy himself that such witnesses are material. Advances made by the Registrar of the Chief Court under the preceding rule will be recovered at once from the committing Magistrate who will include the amount of such advance in his bill. When all the expenses to which complainants and witnesses are entitled under these rules have been paid, the committing Magistrate will submit a bill for the same, supported by the necessary vouchers, to the Registrar of the Chief Court for counter-signature. The

inquiry, trial or other proceeding before such Court under this Code.⁽⁵³⁾

(11) Power of Court to pay expenses or compensation out of fine.

Whenever under any law in force for the time being a Criminal Court imposes a fine or confirms in appeal, revision or otherwise a sentence of fine, or a sentence of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—(a) in defraying expenses properly incurred in the prosecution; (b) in compensation for the injury caused by the offence committed, where substantial compensation is, in the opinion of the Court, recoverable by civil suit. If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.⁽⁵⁴⁾

(12) Costs of witness in criminal case.

A civil suit brought by a witness to recover costs incurred in appearing to give evidence in a proceeding under S. 145, Crim. Pro. Code, is maintainable.⁽⁵⁵⁾

(vi) Burma.
(vii) Assam.

Registrar's counter signature will be sufficient authority to support such charge in the public accounts. (See Prinsep's Code of Criminal Procedure, 14th Ed., 1907, S. 544, pp. 679—684.) For rules that are in force in Burma and Assam, see Prinsep's Code of Criminal Procedure, 14th Ed., 1907, Notes under S. 544, pp. 685—687.

(53) See S. 544 of the Code of Criminal Procedure (Act V of 1898).

(54) See S. 545 of the Code of Criminal Procedure. S. 545 enables a Court to appropriate a portion of any fine imposed to payment to a complainant for expenses incurred in the prosecution, or in compensation for the injury caused by the offence committed. If a Court convicts the accused person of a non-cognizable offence, or of wrongful confinement, or of wrongful restraint, regarding which a complaint has been made, it shall, in addition to the penalty imposed on the accused, order him to repay to the complainant the Court-fee paid on such complaint or on his examination, and also any Court-fees paid for serving processes—Court-Fees Act (VII of 1870), S. 31. Although no order for compensation under S. 545 can be passed unless a sentence of fine be passed, and it is then discretionary with the Court to pass such order, a complainant is, nevertheless, on the conviction of the accused for a non-cognizable offence, or for wrongful confinement or wrongful restraint, entitled to an order requiring the person convicted to repay him Court-fees already paid whatever may be the nature of the sentence passed. (*Queen-Empress v. Yamana Rao*, 24 M. 305; *Bhujanga*, Bom.H.Ct., Oct. 24, 1903; 5 Bom. L.R. 976.) On the other hand, when a Magistrate is satisfied that the accusation was frivolous and vexatious, he can under S. 250, by his order of discharge or acquittal, direct the payment to the accused, or to each of the accused, of such compensation, not exceeding fifty rupees, as he thinks fit. When an accused is discharged, or where no fine is imposed, no order for compensation can be passed under S. 545. (*In re Bastoo Dumaji*, 22 B. 717.) See Prinsep's Code of Criminal Procedure, 14th Ed., 1907, Notes under S. 545, p. 687.

(55) *Nemai Chandra Ghose v. Ajahar Chowdhury*, 8 C.W.N. 178 (179). The Court (Banerjee and Pargitter, JJ.) said:—"The learned Munsif vested with Small Cause Court powers, who heard the suit, was of opinion that it was not maintainable in the Civil Court, and that the order of the Criminal Court refusing to give the petitioner his costs operated as *res judicata* upon his claim. We are clearly of opinion that the

A witness in such a proceeding had asked for his costs in the Magistrate's Court and had been referred to the Civil Court. On his bringing a civil suit: *Held*—That the principle of *res judicata* did not apply in a matter like this and the suit was maintainable.⁽⁵⁶⁾

Such a suit may come under S. 70 of the Indian Contract Act.⁽⁵⁷⁾

principle of *res judicata* does not apply to this case. There was no adjudication of the question by the Court, there were no issues, no contesting parties and the principle of *res judicata*, we hold, does not apply in a matter like this. Then upon the question whether a civil suit would lie, we are of opinion that the answer should be in the affirmative, having regard to the circumstances of the case. The point is not altogether free from doubt. If the plaintiff had been cited to give evidence in a criminal case, strictly so called, different considerations might have applied to this case. For the duty of assisting a Court of justice in determining whether an alleged offence has been committed or not, and whether the person accused before it is guilty or innocent, is a public duty cast upon every member of society, for the performance of which he may not be entitled to any remuneration or even reimbursement of costs incurred by him except from the Crown. But the present case is not one of that nature and so we need not enter into a detailed discussion of the question. The case was one under S. 145 of the Code of Criminal Procedure, which was a *quasi civil* case being a dispute about possession of land, and according to the law of this country the successful party may recover his costs from his adversary in such a case (see S. 148, Crim. Pro. Code). That being so, the considerations that must govern this case are those that are applicable to civil cases. In regard to witness's right to bring an action for recovery of his costs incurred in giving evidence in civil cases, this is what Taylor says in his work on evidence, paragraph 1250. "In an action brought by a witness who in obedience to a subpoena, has attended a trial in a civil case for his costs and charges, the law as to what circumstances will support the claim is not very clear and the following propositions are therefore only submitted with some hesitation. First the witness can only maintain such an action against the party to the suit who has subpoenaed him, if an express or implied contract upon the subject can be shown," and this is the view that has been taken in the case of *Hallet v. Mears*, [13 East's Repts. of cases 15 (1810) and also in the case of *Pell v. Danbeny*, 5 Exchequer Report 955 (1850)]. In this latter case Baron Alderson observes, "The only question is whether there must be an express promise to pay the expenses or whether the promise is to be implied from the nature of the transaction. I think it is one party to receive a benefit, the other to confer it. If a person goes to another and by a subpoena desires the latter to serve him by giving evidence at a trial, he having a right to refuse unless his expenses are paid goes to the trial, it is upon the faith that what he does not require to be paid will be paid; and therefore it is very reasonable to imply promise to pay." These observations would also go to show that the case may well come under S. 70 of the Indian Contract Act. For these reasons we are of opinion that the suit was not barred by *res judicata*, nor was it open to any objection on the ground that such a suit is not maintainable. The decree of the lower Court is therefore set aside and the case sent back to that Court in order that it may try the case on its merits. The petitioner is entitled to his costs of this rule. *Nemai Chandra Ghose v. Ajahar Chowdhury*, 8 C.W.N. 178 (179-180).

(56) *Nemai Chandra Ghose v. Ajahar Chowdhury*, 8 C.W.N. 178 (179).

(57) *Ibid.*

It appeared that the accused had cross-examined all the prosecution witnesses before charge and immediately on the charge being framed they prayed that the prosecution witnesses be recalled and allowed to be cross-examined, on which the Bench Magistrates passed an order directing the accused to pay costs of witnesses whom they wanted to re-cross-examine. The petitioners failing to pay costs, there was no re-cross-examination, and the accused were convicted. The accused moved the High Court and obtained this Rule. *Held* (Pargiter and Woodroffe, JJ.)—That the case came under S. 256, Crim. Pro. Code and not under S. 257 (2), and the Magistrate had acted illegally in imposing the condition of costs on the application of the accused; the Magistrates should have recalled the prosecution witnesses free of charge for re-cross-examination by the accused.⁽⁵⁸⁾

(13) Costs of adjournment in criminal cases.

An order requiring the accused to pay the costs of an adjournment, is one which a Magistrate in his discretion may make under S. 344 of the Code of Criminal Procedure. Where such an order was found to be not unreasonable under the circumstances of the case, it was not disturbed by the High Court.⁽⁵⁹⁾

S. 344 of the Code dealing with proceedings in prosecution expressly empowers the Court to postpone or adjourn an enquiry upon such terms as it thinks fit. This clearly entitles the Court to award costs to the party who has been put to unnecessary expenses by the conduct of other side and to order that the same be paid up by the latter in whose favour the order for adjournment has to be made.⁽⁶⁰⁾

A Court, under S. 344 of the Crim. Pro. Code, is entitled to award costs as a condition precedent to adjourning a case and make the same payable by the party for whose benefit the case is adjourned.⁽⁶¹⁾

The Punjab Chief Court has however held that "Criminal Courts have no authority to order an accused person to pay costs of an

(58) Conviction set aside and refund of fine directed. See *Rasik Chandra Chackerbutty v. Emperor*, 2 C.L.J., Journal portion, p. 17n.

(59) *Sew Prosad Poddar v. The Corporation of Calcutta*, 9 C.W.N. 18 at p. 19. See also *Crown v. Shulldham*, 20 P.R. 1904, (Cr). But the more recent rulings of the Punjab Chief Court seem to hold the other way. See *Fatta v. The Crown*, 8 P.W.R. 1911; *Browne v. Chanda Singh*, 6 P. R. 1906 noted under "Adjournment costs" *supra*.

(60) *Mathura Prasad v. Basant Lal*, 28 A. 207=2 A.L.J. 831=A.W.N. 1905, 256=2 Cr.L.J. 803, following *Sew Prosad Poddar v. The Corporation of Calcutta*, 9 C.W.N. 18; discussing and doubting *King-Emperor v. Chhabraj Singh*, A.W.N. 1902, 59.

(61) *Ram Dayal v. Karan Singh*, A.W.N. 1905, 257, note=28 A. 209, note, referred to in *Mathura Prasad v. Basant Lal*, 28 A. 207=2 A.L.J. 831=A.W.N. 1905, 256.

adjournment consequent on his failure to appear on the date fixed for hearing.”⁽⁶²⁾

In a suit for damages for malicious prosecution, the plaintiff is entitled to recover the costs necessarily incurred by him in defending himself on the criminal charge.⁽⁶³⁾

Costs incurred in successful defence of malicious prosecution.

⁽⁶²⁾ *Browne v. Chanda Singh*, 6 P.R. 1906 (Cr.), followed in *Fatta v. Crown*, 8 P.W.R. 1911 (Cr.). Lal Chand, J., said in the course of the judgment:—“The question for decision in this case is the legality of the order awarding costs of adjournment against the petitioner accused, who was absent on the date of hearing. The order awarding costs was passed under S. 344, Crim. Pro. Code, on the authority of *Crown v. Shuldham* (20 P.R. 1904, Cr.). We think that the order is not justified by S. 344, Crim. Pro. Code, and that the authority cited is not applicable to the circumstances of the present case. *Crown v. Shuldham* dealt with a case where the complainant was absent on the date of hearing and adjournment was granted at the request of his pleader subject to payment of costs. It was held that the Magistrate under the circumstances was competent to impose terms as to payment of costs before granting adjournment. In the present case the petitioner, accused, was absent on the date of hearing. He was not represented by any pleader or counsel, and his previous application for adjournment had already been refused. The Court could not proceed with the trial or record evidence in the absence of the accused. It was therefore necessary to adjourn the case under any circumstances, and we think it would be entirely opposed to the spirit of S. 344 that the Magistrate could, under such circumstances, pass orders awarding costs in addition to the order of arrest of accused by warrant. The adjournment was altogether necessary and there seemed to be no other alternative. The question of imposing terms for adjournment could not therefore possibly arise. No authority was quoted to show that costs of adjournment could be awarded against an accused person, and it would be entirely opposed to the spirit of conducting criminal trials to impose any such terms, even when granting adjournments for the benefit and at the request of an accused person. As already pointed out the adjournment in the present case was necessary, as evidence could not be taken except in the presence of the accused, as required by S. 353, Crim. Pro. Code. We therefore hold that the order awarding costs passed in this case was illegal and we set it aside as such.” *Browne v. Chanda Singh*, 6 P.R. 1906 (Cr.).

⁽⁶³⁾ *Bunnomali Nundi v. Hurrydass Byragi*, 8 C. 710=11 C.L.R. 265. The Court (Prinsep and Bose, JJ.) said:—“The present appeal is really directed against the refusal of the Additional Judge to give any damages on account of legal expenses incurred on the part of the plaintiff in defending himself in the Criminal Court. The Additional Judge observes, that, in England, it is the rule to give the plaintiff the costs that he incurs in defending himself in a Criminal Court because in England “the damages are assessed by the jurors; but it does not appear that it has ever been acted on by Courts in India.” In this respect we would observe that the Judges in India have in such cases to assume the functions of both Judge and jury, and it has not so far as we know, been laid down that the plaintiff is not entitled to recover the expenses necessarily incurred by him in defending himself on a criminal charge. The law in this respect has been thus stated in *Mayne on Damages*, 3rd Ed., p. 78: where the “wrongful act of one person places another in a position in which he necessarily or reasonably has recourse to law, the costs incurred by the former will be recoverable from the latter.” Acting on this principle we think that the plaintiff is at least entitled to recover from the defendant the sum of Rs. 121 which was allowed to him in the first Court, that being the amount proved to have been paid to the pleader whom he retained to defend him.” *Bunnomali Nundi v. Hurrydass Byragi*, 8 C. 710=11 C.L.R. 265.

Ordinarily speaking, the plaintiff, in a successful action for malicious prosecution, is entitled to recover all costs necessarily incurred by him in his defence in the previous prosecution, but each case must be governed by its own circumstances.⁽⁶⁴⁾

A suit for damages for malicious prosecution will lie against a person who was the real prosecutor in the previous case, although his name did not appear on the record.⁽⁶⁵⁾

A brought a suit for malicious prosecution claiming damages on the ground that he had suffered pecuniary loss in consequence of the costs incurred in defending the prosecution. Subsequently A died while the suit was pending. The legal representatives of A then applied for, and obtained, leave from the Court to place their names upon the record in the place of A. At the hearing of the suit the question arose as to whether the cause of action survived. *Held*,

(64) *Rai Jung Bahadur v. Rai Gudor Sahoy*, 1 C.W.N. 537, referring to *Hicks v. Faulkner*, L.R. 8 Q.B.D. 167, and *Mitchell v. Jenkins*, 5 B. Ad. 595. The Court (Beverley and Amir Ali, JJ.) said :—" We now come to the question of damages. The plaintiff has proved damage and injury to himself. Ordinarily speaking, damages in this form of action are given on two bases—*first*, on the ground of a *solatium* for injury to the feelings of the party prosecuted; *secondly*, as a reimbursement for legitimate expenses incurred by him in his defence. The Subordinate Judge has awarded the plaintiff Rs. 2,000 as a *solatium*. Had he, as a judge of fact, been inclined to give more, probably this Court would not have interfered with his award; but sitting in appeal, we do not feel disposed to increase the amount given by him by way of a *solatium*. As regards the costs awarded to the plaintiff and included in the amount of damages, one or two observations are necessary. Each case must be governed by its own circumstances. Ordinarily speaking, the plaintiff, in a successful action for malicious prosecution, is entitled to recover all costs necessarily incurred by him in his defence in the previous prosecution. There may be a case of sufficient importance and intricacy, which may justify an accused to bring an eminent counsel and to pay him very heavy fees. That would be a matter for consideration in that special case in assessing damages. What we have to see in this particular case is whether the costs incurred by the plaintiffs were such as would bring the matter under the ordinary rules to which we have referred. Now we find that the learned counsel engaged in this case was paid 9,000 rupees—5,000 rupees being for the first day. Learned counsel may be perfectly entitled to demand and receive any fee which he may consider proper for the retention of his services, but it does not seem to us that the case against the plaintiff was of any such extraordinary character as would justify the Court in giving 9,000 rupees for costs. We think that the ends of justice would be fully met if we assess the costs at 6,000 rupees. The amount of damages, therefore, will be 8,000 rupees, instead of the 12,055 rupees awarded by the lower Court. We accordingly affirm the judgment of the Subordinate Judge, and modify the decree so as to reduce the damages to 8,000 rupees. Subject to this modification, the appeal is dismissed. The costs in this Court will be in proportion to the amounts decreed and dismissed. We do not interfere with the costs awarded in the Court below." *Rai Jung Bahadur v. Rai Gudor Sahoy*, 1 C.W.N. 537 (542, 543).

(65) *Rai Jung Bahadur v. Rai Gudor Sahoy*, 1 C.W.N. 537.

that the cause of action does not survive to the legal representatives of A, inasmuch as the pecuniary loss which A suffered by reason of expenses incurred in defending the prosecution is not an injury to his estate, and cannot be treated as separate and distinct from the original cause of action.⁽⁶⁶⁾

(66) *Krishna Behari Sen v. Corporation of Calcutta*, 31 C. 406, referring to *London v. London Road Car Company*, (1888) 4 T.L.R. 448, approved in *Ramchode v. Rukmany*, 28 M. 487. The Court (Henderson, J.) said :—" So far as the claim for damages is based upon the injury to the plaintiff's reputation, and upon the annoyance and trouble of mind caused to him, it is admitted that the plaintiffs are not entitled to pursue their claim. It is said, however, that the claim in respect of the pecuniary loss is an injury to the estate of the deceased, and that therefore the plaintiffs are entitled to go on with the suit, as if it had been a suit by the original plaintiff himself to recover the loss he had been put to by reason of defending himself against the prosecution. It is not contended that a suit for malicious prosecution is not a personal action. It is a personal action, and it appears to me that the Common Law rule of *actio personalis moritur cum persona* applies. In case of a malicious prosecution it has been said that there are three sorts of damages which may result—(1) damages to a man's fame, as if the matter of which the man is accused is scandalous : (2) damages where a man is put in danger of losing his life, limb or his liberty ; (3) damages to a man's property, as where he is forced to spend money in necessary charges to acquit himself of the crime of which he is accused, and that according to the circumstances he may sue for all or any of these different kinds of damages, but in each case the cause of action is the malicious prosecution. In the case of *London v. London Road Car Company*, (1888) 4 T.L.R. 448, the question as to survival of an action for the personal injuries after the death of the plaintiff before trial arose. The personal injuries were the result of an accident, and it was admitted that, under the general rule of law, an action for personal injury died with the person. There the plaintiff had claimed damages for loss of earnings and for various sums paid for medical expenses. In his judgment Lord Coleridge said that the action was for personal injuries, that is for injuries to the person, and the heads of damages relied upon (except as to one matter) resulted directly from those personal injuries. He went on to say : " No case showed that an action for personal injuries causing pecuniary loss could be continued after the death of the party injured, and the case of *Pulling v. The Great Eastern Railway Company*, (1882) L.R. 9 Q.B.D. 110, shewed just the contrary." In the case referred to by Lord Coleridge it was said : " None of the authorities go so far as to say that, where the cause of action is in substance an injury to the person, the personal representative can maintain an action merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury ;" and further on : " There is no decision which supports the proposition that because, in consequence of such injury, the person injured is put to expense, the case is brought within the category of cases to which the Statute of Edward III applies. Medical expenses are almost always made an element of damage in actions for injury to the person, but it has never before been suggested that the personal representative could maintain an action on the strength of such expenses." Act XII of 1855 has been referred to, but it is admitted that that Act, which deals with the maintenance of cases by executors, administrators or representatives of a deceased person for recovery of certain moneys, applies to cases where the person injured might in his lifetime have maintained, but had not instituted an action. S. 89 of the Probate and Administration Act has also been referred to. That section declares that " all demands whatsoever, and all rights to prosecute or defend any suit,

Costs against
Crown.

The general rule is "that the Crown neither receives nor pays costs except when they are provided for by some local statute or under exceptional circumstances."⁽⁶⁷⁾

In the case of *Louis v. The King* ⁽⁶⁸⁾ however looking to the exceptional nature of the case, their Lordships of the Privy Council directed the Crown to pay the successful appellant's costs of the appeal.⁽⁶⁹⁾

Costs
unnecessarily
incurred.

Although necessary costs incurred in possession proceedings may be allowed, yet additional costs incurred for extra fees and travelling and other expenses of a like nature incurred by reason of bringing pleaders or counsel from a distance ought not to be allowed.⁽⁷⁰⁾

Damages for
medical
attendance.

In a suit for damages for medical attendance, which the plaintiff alleged he had incurred owing to a wrongful assault by the defendants, and also for the costs of prosecuting the defendants and of defending himself on a charge brought against him by the defendants in the Criminal Court, *held*, (1) that the Judge was right in awarding as damages a fair and moderate sum for medical expenses; (2) that, as to the costs of the prosecution of the defendants in the Criminal Courts, there was no principle of law by which the plaintiff would be entitled to recover those costs, that he was not compelled to prosecute in the Criminal Court, nor to engage the services of counsel or vakils, that, if he chose to prosecute in the Criminal Court, unless the Statute entitled him to costs, he could not recover them; (3) that, as to the claim for costs for defending himself in the Criminal Court, it should fail as it was neither alleged nor proved that the prosecution was malicious or instituted without reasonable or probable cause.⁽⁷¹⁾

or other proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators, except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party." Now the matter complained of in this case is clearly a personal injury covered by that section. That being so the right of suit or rather the cause of action did not survive to the representatives of the plaintiff, and therefore the suit must be dismissed with costs on scale No. 2." *Krishna Behary Sen v. Corporation of Calcutta*, 31 C. 406 (408—410).

(67) *Vaithianatha Pillai v. Emperor*, 21 Ind. Cas. 369 (P.C.)=17 C.W.N. 1110=14 M.L.T. 263=(1913) M.W.N. 806=15 Bom. L.R. 910=25 M.L.J. 518=11 A.L.J. 881=18 C. L.J. 365.

(68) 26 M.L.J. 1 (P.C.)=18 C.W.N. 98.

(69) *Louis v. The King*, 26 M.L.J. 1 (P.C.)=18 C.W.N. 98.

(70) *Rajendra Naran Roy v. Mahomed Arzumand Khan*, 9 C.W.N. 887=1 C.L.J. 331.

(71) *Chandan v. Sumera*, 7 A.W.N. (1887) 104.

Sec. 10. Crown Costs—Costs of Government and Government Solicitor.

Crown costs—General rule as to.

Provisions of English Law—Attorney-General's costs—Crown Suits Act.

Provisions of the Indian Law—Code of Civil Procedure.

Costs of Advocate-General in India; and of Attorney-General in England.

Costs of Government-solicitor.

Cases where Government was awarded costs.

Cases where costs were awarded against Government.

Extent of Government's liability for fault of its officers.

Costs against Collector.

Costs on the Revenue side.

Crown costs—Rule of priority as to crown costs and crown debts.

It is the general rule both in England and in India that "the Crown neither receives nor pays costs except when they are provided for by some general, special or local statute or under exceptional circumstances."⁽¹⁾

Crown costs—
General rule
as to.

It has been said in a recent case that "In dealing with costs in cases between the Crown and a subject, the Privy Council would adhere to the practice of the House of Lords, and the rule would be that the Crown neither pays nor receives costs unless the case is governed by some local statute or there are exceptional circumstances justifying a departure from the ordinary rule."⁽²⁾

The Crown is not bound by an Act of Parliament unless specially named,⁽³⁾ or unless there is a necessary implication to be drawn from the Act, or from the legislation on the subject, that the Crown was intended to be bound, and since the authority to award costs is entirely dependant on statute⁽⁴⁾ it follows that the Court

(1) *Vaithinatha Pillai v. Emperor*, 21 Ind. Cas. 369 (P.C.) = 17 C.W.N. 1110 = 14 M.L.T. 263 = (1913) M.W.N. 806 = 15 Bom. L.R. 910 = 25 M.L.J. 518 = 11 A.L.J. 881 = 18 C.L.J. 365 = 14 Cr. L.J. 577 = 40 I.A. 193 = 36 M. 501 (*Johnson v. Reg.*, (1904) A.C. 817 = 73 L.J.P.C. 113 = 53 W.R. 207 = 20 L.T.R. 697, *approved*.) On the subject-matter of this section see Seton on Judgments and Orders, 6th Ed., 1901, Vol. I, p. 397 Vol. II, pp. 1306-1307, 1651; Daniell's Chancery Practice, 7th Ed., 1901, Vol. I, pp. 60, 61, 64; Morgan and Wurtzburg, pp. 204-208, 237, 238, 329, 336-339; Halsbury's Laws of England, Vol. X, pp. 125-128, 140, 152-155; Maw's Digest, Vol. V, cols. 233-237; Annual Practice Notes under O. LXV, r. 1; Yearly Practice, 1914, Notes under O. LXV, r. 1; Encyclopædia of the Laws of England, 2nd Ed., Vol. IV, Heading "Costs" and "Crown Debts" Marshall on Costs, pp. 540-547; Amir Ali's Civil Procedure Code, Notes under S. 79 and O. XXVII.

(2) *Johnson v. The King*, 9 C.W.N. Journal portion, p. 1.

(3) See *The Secretary of State v. The Bombay Landing & Shipping Co.*, 5 B.H.C. O.C.J. 23.

(4) See this point discussed in full in Ch. I, *supra*.

has no jurisdiction to order the payment of costs by or to the Crown except under a statute in which such jurisdiction as to Crown costs is expressly conferred, or where the question arises under a petition of right, or some analogous proceeding, or in exceptional cases where justice seems to require that the Crown should pay costs, or where the Crown is not unwilling to be treated as an ordinary litigant.⁽⁵⁾ "On the other hand, as incidental to departmental administration, there must be often litigation which does not affect any prerogative of the Crown, and as to which no good reason can be assigned for the denial of costs to the successful party.⁽⁶⁾

Provisions of
English law
—Attorney-
General's
costs—Crown
Suits Act

It has no doubt often been said that as the Sovereign, by reason of his prerogative, does not pay costs to a subject, so it is beneath his dignity to receive them; but many instances occur in the course of practice of the English Courts in which the Attorney-General receives costs.⁽⁷⁾

Thus, in the case of successful proceedings with respect to charities, the Attorney-General will usually be allowed his costs as between solicitor and client, ⁽⁸⁾ and in special cases his charges and expenses in addition.⁽⁹⁾

⁽⁵⁾ *Per* Lord Macnaghten in *Johnson v. R.*, (1904) A.C., at p. 824; see *Vaithinatha Pillai v. The King-Emperor*, (1913) 29 T.L.R. 709=29 Ind. Cas. 369 (P.C.); see, also, *The Secretary of State v. The Bombay Landing and Shipping Co.*, 5 B.H.C.O.C.J. 23 (approved in 12 C. 445 and followed in 5 B. 73; 25 M. 457, 492; and referred to in 10 B.H. C. 416; 11 B.H.C. 37; 2 B. 148; 31 B. 86).

⁽⁶⁾ *The case of Moore v. Smith*, (1859) 1 E. & E. 597, supports this view. *Per* Wright, J., *R. v. Archbishop of Canterbury*, (1902) 2 K.B. at p. 572. See, also, *Thomas v. Pritchard*, (1903) 1 K.B. 209; *Re Wood's Estate*, (1886) 31 Ch. D. 607; *Bowles v. Att. Gen.*, (1912) 1 Ch. 123, 137; *Re Cardwell*, (1912) 1 Ch. 779. The general question is also reviewed in *Johnson v. R.*, (1904) A.C. at p. 824; and see *Mews v. R.*, (1882) 8 App. Cas. at p. 353; *Middlesex, J. v. R.*, (1834) 9 App. Cas. at p. 786. See, also, *R. v. Archbishop of Canterbury*, (1903) 1 K.B. 289, C.A., where a defendant for whom the Treasury solicitor appeared was held entitled to his costs. In some cases a Court of summary jurisdiction has power to give costs for or against the Crown. *Thomas v. Pritchard*, (1903) 1 K.B. 209. Ss. 1, 2, of the Crown Suits Act, 1885 (18 & 19 Vict. C. 90), apply only to proceedings by the Attorney-General suing on behalf of the Crown (*R. v. Beadle*, (1857) 7 E. & B. 492), followed in an Irish case (*Re Madden*, (1902) 1 I.R. 63).

⁽⁷⁾ See Daniell's Chancery Practice, 7th Ed., Vol. I, 1901, p. 60.

⁽⁸⁾ *Moggridge v. Thackwell*, 13 Ves. 416; *Mills v. Farmer*, 19 Ves. 490; *A.G. v. Ld. Ashburnham*, 1 S. & S. 394. Where, on appeal to the H.L., the A.-G. unsuccessfully supported the judgment of the C.A. in favour of a charity, he was allowed his costs out of the estate: *Hunter v. A.-G.*, (1899) A.C. 309, 325.

⁽⁹⁾ *Re Dulwich College*, 15 Eq. 284; *A.-G. v. Kerr*, 4 Beav. 297. For forms of orders, see Seton, 1288, 1290.

By the English Crown Suits Act, 1855, ⁽¹⁰⁾ in all actions, and suits, and other legal proceedings since instituted on behalf of the Crown in Great Britain or Ireland, when the Crown succeeds, the Advocate-General or Lord Advocate is entitled to recover costs for the Crown as between subject and subject, such costs to be paid into the Exchequer. By S. 2, defendants are entitled to recover costs in like manner as between subject and subject, and the Commissioners of the Treasury are required to pay them out of any moneys to be voted by Parliament for that purpose. Costs can only be given to a party against the Crown in cases within the Act. ⁽¹¹⁾

With regard to the law in this country it must be noted that "the Civil Procedure Code ⁽¹²⁾ provides that suits against the Government may be brought against the Secretary of State. Under that section suits against the Government of the King in India may be instituted against the Secretary of State. In England there is no remedy against the Crown for a tort. In such a case the maxim that the King can do no wrong applies. Where the tort is committed by a Government Official, the remedy (if any) is against the individual and not against the head of the department : ⁽¹³⁾ In the case of contracts the remedy in England is by petition of right. That is the Law in England. In India, until 1858, the Government was vested in the East India Company. That Company exercised different functions. It was partly a trading company with the rights and liabilities of an ordinary commercial body. It also exercised sovereign power delegated to it by the Crown. In respect of its acts in the former capacity it could be sued. For its acts in the latter capacity it could not. In 1858 the East India Company came to an end and since then India has been governed directly by the Crown. By statute 21 and 22 Vict., c. 106, Ss. 1 and 2, the territories and revenues of India

Provisions of
the Indian
Law—Code
of Civil
Procedure.

(10) St. 18 & 19 Vic. c. 90, S. 1.

(11) See *Re Vernon*, (1901) 1 I.R. 1; for such order, see *A.-G. v. Hanmer*, 4 D. & J. 205, p. 1290; and as to costs payable by the Crown in a case as to succession duty, see the Crown Suits Act, 1861 (24 & 25 Vic., c. 92). The Act does not apply to charity cases, *A.-G. v. Dean and Canons of Windsor*, 8 H.L.C. 459. As to A.-G.'s costs, see *Corp. of London v. A.-G.*, 1 H.L.C. 471; *A.-G. v. Corp. of London*, 2 Mac. & G. 247, 273; *Re Bedford Char.*, 29 L.T. 5; Dan. 60. He is entitled to them as between solicitor and client: *Moggridge v. Thackwell*, 1 Ves. Jun. 475; 7 Ves. 36, 88; 13 Ves. 416; *Mills v. Farmer*, 19 Ves. 490; *A.-G. v. Ashburnham*, 1 S. & S. 394, 397, where there was no relator.

(12) S. 416 of Act XIV of 1882=S. 79 and O. XXVII, r. 1 of Act V of 1908.

(13) *Raleigh v. Goschen*, (1898) 1 Ch. 78.

were transferred to the Crown. In order, however, that no one should be deprived of any right or claim which he might have had against the East India Company, S. 65 of that Statute provided that the Secretary of State in Council as a body corporate⁽¹⁴⁾ might be sued in all cases in which the Company might have been sued. Thus, the Secretary of State in Council now stands in the position of the Company and can be sued in cases in which the Company would formerly have been sued. But it could not have been sued in respect of acts done by it as a sovereign power, but only in respect of acts which did not fall within that category. The liability of the Company is now the liability of the Secretary of State and the suits referred to in the Civil Procedure Code are suits in respect of acts of Government which are not acts of State, *i.e.*, which have no relation to the Government of the country. The act for which the Government was there held liable was not an act of Government as the ruling power. The distinction is clearly taken by Peacock, C.J., who says (see page 14): "But where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action will lie."⁽¹⁵⁾ In cases where a suit would lie against the Government of India, costs would be awarded to or against Government just as in ordinary cases.

Costs of
Advocate-
General in
India; and
of Attorney-
General in
England.

"The Advocate-General in the Presidency-towns corresponds with the Attorney-General in England."⁽¹⁶⁾ So far as the trusts are

(14) Not personally. See S. 68.

(15) See *Gould v. Stuart*, (1896) App. Cas. 575; *Vijaya Ragava v. Secretary of State for India*, 7 M. 466; *Ilberts' Government*, p. 161; see the same cited and discussed in *Jehangir M. Cursetji v. Secretary of State*, 27 B. 189 (196-197)=5 Bom. L.R. 80).

(16) *Advocate General of Bombay v. Adamji*, 30 B. 474 (1905). As to the office of Advocate-General, see Articles in 7 Madras Law Journal, pp. 61, 91, and Ganapati Iyer's Hindu Endowments, cxxv. "The Attorney-General is the chief Law Officer of the Crown, and a great Officer of State, appointed by Letters Patent, and he is *ex officio* head of the Bar for the time being. The history of the office is somewhat obscure, but it would appear to have been established about 1277, when an *Attornatus-Regis*—as the Attorney-General was originally styled—was appointed to protect the interests of the Crown, in cases affecting it, before the Courts. The appointment was formerly made "*quamdiu se bene gesserit*," but is now "*durante bene placito*." The Attorney-General superintends all proceedings at law or in equity affecting the royal prerogative, and is also the chief legal adviser of the various departments of Government. In the House of Commons he is not a member of the Cabinet, but, as a member of the Government, takes the principal charge of legal measures and

concerned he only represents the public, (17) and is bound by all acts and omissions of the manager which are not in themselves fraudulent. (18) The *de jure* managers and trustees of a public charity losing their right by limitation to oust the *de facto* trustee does not confer on the latter immunity from suit on the part of the Advocate-General. (19) He may, in the Presidency-towns, maintain a suit in his own name, or some relators may in such towns, with his sanction, sue. (20) And since the Code of 1877, it has been expressly enacted that the Advocate-General may sue. (21) A Bill filed by one Advocate-General does not abate by the fact that the latter leaves the country. (22) Though the Advocate-General may sue, it is not necessary that he should be made a party either as a

affairs. He prosecutes for the Crown in criminal matters and in revenue cases, and grants flats for writs of error. There are many legal proceedings which by statute cannot be initiated in English Courts without his sanction, *e.g.*, proceedings by any local authority to prevent the pollution of streams (Public Health Act, 1875, S. 69); prosecutions for an offence under the Public Bodies Corrupt Practices Act, 52 and 53 Vict. c. 69; and as to the recovery of penalties, see Public Health Act, 1875, S. 253; Public Health (Officers) Act, 1884, S. 2; Public Bodies Corrupt Practices Act, 1889, S. 4 (1). The Attorney-General, or, during the vacancy of the office of Attorney-General, the Solicitor-General may, in the exercise of his discretion, file an information for any misdemeanour whatsoever. In cases of libel, this procedure is confined to libels of so dangerous a nature as to require immediate action on the part of the law officers of the Crown. There is said to have been no *ex officio* information filed since 1887 (Blake Odgers' Libel and Slander, 4th ed., p. 433). The Attorney-General, as representative of the Crown in matters of criminal judicature, has power to enter a *nolle prosequi* (q. v.) and thereby to stay proceedings in any indictment or criminal proceeding, and he may do so *ex mero motu* without calling upon the prosecutor to show cause why that should not be done (*R. v. Allen*, 1862, 1 B. & S. 850). The Attorney-General is the only legal representative of the Crown in the Courts (*R. v. Austen*, 1821, 9 Price, 142.). But during the vacancy of the office the whole business and authority of the Attorney-General devolves upon the Solicitor-General (*R. v. Wilkes*, 1770, 4 Burr. 2527, 2554, 2570). As to his remuneration of and right to engage in private practice. Formerly, the law officers were entitled to accept private practices without restriction, but important, although tentative, modifications of this privilege were introduced by regulations embodied in Treasury Minutes of 5th December 1892 and 29th June 1894." See Encyclopædia of the Laws of England, Vol. I, 2nd Ed., pp. 624—627.

(17) *Advocate-General v. Bai Punjabai*, 18 B. 551, 561.

(18) *Ib.* (former suit by trustees; subsequent suit by Advocate-General barred).

(19) *Lakshmandas v. Jughul Kishore*, 22 B. 216.

(20) See *Attorney-General v. Brodie*, 4 M.I.A. 190; see also *Dhunooverbhai v. Advocate-General*, 1 Bom. L.R. 743; *Srinivasa v. Raghava*, 23 M. 28, 30.

(21) *Shri Ganesh v. Keshavray*, 15 B. 625, 636; *Hori Dasi v. Secretary of State*, 5 C. 228.

(22) *Strettel v. Palmer*, 2 Mor. Dig. 104.

plaintiff⁽²³⁾ or as a defendant, although if he be made a party defendant and appears by counsel he will be entitled to costs.⁽²⁴⁾ He is at liberty to intervene at any stage of the litigation⁽²⁵⁾ and is entitled to be heard.⁽²⁶⁾ There was, however, no public officer in the mofussil entitled to bring suits which the Advocate-General could, and can now, institute in the Presidency-towns."⁽²⁷⁾

But where the Advocate-General was made a party in a suit brought at the instance of a person, and instituted in the Mofussil, and the Advocate-General employed counsel, he was held entitled to get the costs of such counsel and other expenses of the suit.⁽²⁸⁾

Where a suit by the Advocate-General at the instance of relators was dismissed, and the Advocate-General did not appeal, the relators who were not parties to the suit were held incompetent to appeal on their own account; ⁽²⁹⁾ and consequently would not be entitled to costs.

In a suit brought by the Advocate-General at the instance of relators for the purpose of removing the defendants from the position of directors of a Mahomedan Mosque, and for administration of the property of the mosque, &c., the decree ordered that the defendants should have their costs taxed as between attorney and client out of the charity funds. The attorneys of the defendants accordingly brought in their bill of costs, and in taxation it was contended that they should be allowed out of the charity funds all the sums which the Taxing Master certified they should pay their attorneys. *Held*, that where the Taxing Master decided that certain items allowed

(23) *Lakshmandas v. Ganpatrav*, 8 B. 365, 367.

(24) *Hori Dasi v. Secretary of State*, 5 C. 228.

(25) *Advocate-General v. Muhammad Huseni*, 4 B.H.C. O.C.J. 203, 206-n. as to the bringing in of new relators and dismissal of the old, see *ib.* and as to death of relator, *Strettel v. Palmer*, 2 Mor. Dig. 104.

(26) *Attorney-General v. Brodie*, 4 M.I.A. 190, 200.

(27) *Rangasami Naickan v. Varadappa Naickan*, 17 M. 462 (465); *Brojomohun Dass v. Hurro Lall*, 5 C. 700; *Shri Ganesh v. Keshavray*, 15 B. 625, 636. It has been said that it is doubtful whether this statement is correct so far as regards the charitable institutions which were governed by Regs. XIX of 1810 and VII of 1817, and that the Collector must be regarded as such official. See Ganapathi Iyer's *Religious Endowments*, ccxvi.

(28) *Hori Dasi v. Secretary of State*, 5 C. 228.

(29) *Jan Mahomed v. Syed Nurudin*, 9 Bom. L.R. 996 (1907) = 32 B. 155.

against the defendants should not come out of the charity funds, his decision could not be disturbed.⁽³⁰⁾

(30) *Advocate-General of Bombay v. M.A.K. Jitaker*, 20 B. 301. Starling, J., said in the course of the judgment:—"This was a charity suit brought in regard to the funds of the Juma Masjid in Bombay. By the decree the first, second, third, fourth, sixth, seventh and eighth defendants were allowed their costs, taxed as between attorney and client, out of the mosque funds. Their attorneys sent in their bill to the Taxing Master for taxation, and he has disallowed certain items in the bill which amount in the whole to a large sum. Some of the items have been disallowed altogether as between the attorneys and their clients the trustees, and some have been allowed between the parties, but disallowed against the mosque funds. Objections have been taken to the disallowances by the Assistant Taxing Master, of all these items. And I have now to determine whether his certificate should be varied in any way. (After dealing with the items which had been disallowed as between attorney and client, His Lordship continued):—All the other items which have been allowed in favour of the attorneys as against the defendants have been either reduced in amount or disallowed entirely as against the mosque funds, and it is contended that as the defendants were ordered to have their costs, as between attorney and client, out of the mosque funds, they ought to be allowed all the sums which the Taxing Master certified they ought to pay their attorneys. The Acting Advocate-General as representing the charity said he thought the defendants were entitled to what they asked; as, although the expenditure was high, he did not think it excessive, and great good had been done by the defendants for the charity. He, however, only represents the charity officially, and it would be difficult to hold that his consent was sufficient to bind the charity and to release me from the duty of determining whether the Master was right in disallowing what he did. In deciding this question I am, therefore, under the disadvantage of not having heard any argument in support of the Taxing Master's decision. That trustees cannot always obtain from their *cestui que trustent* all that they pay the attorney they employ, is evident from the cases of *Johnson v. Telford*, 3 Russ. 477; *Allen v. Jarvis*, L.R. 4 Ch. 616 and *Brown v. Burdett*, 40 Ch. D. 244 (254); but the case which seems to me to govern the present case is *In re Brown*, L.R. 4 Eq. 464, referred to in *In re Robertson*, 42 Ch. D. 553 (558). In the former case, Lord Romilly, M.R., says: "If a person, being a trustee, chooses to employ a solicitor for the purpose of conducting the affairs of the trust, which, of course, the solicitor is well aware of, there is a distinction between his employing that same solicitor for exactly similar purposes with regard to which he is not a trustee. Suppose for instance that he is not a trustee, but simply a client, and that he says to the solicitor, 'I wish you would make for me, or procure for me, copies of such and such deeds, and I want to have them fully explained to me and I come to you for that purpose.' The solicitor tells him 'You can have them if you wish, but they are not at all wanted, they are of no species of use.' The client says 'Never mind, I require it to be done.' When the bill is taxed, and that fact is stated, the client cannot complain. But take the case where he is a trustee. 'There it is the duty of the solicitor to tell him very well, it shall be done, but you must understand that this is not required for the purposes of the administration of the trust; you cannot charge these costs against your *cestui que trust*, and I cannot put them into the bill of costs which will have to be paid out of the trust estate; therefore, if you require it to be done, you must pay for it personally, and you will understand it is a personal matter between you and me.' I think, therefore, it is the duty of the solicitor to tell the trustee. 'This is not wanted for the administration of the trust, and if you insist upon its being done, it is for your private convenience, and, therefore, cannot be charged against the trust estate.' So regarding it I have looked at this

It does not follow that because a charge is proper to be allowed between an attorney and client, that the client, if a trustee, should be allowed that charge out of the trust funds.⁽³¹⁾

Where the plaintiffs in a suit with respect to a religious endowment fail, the circumstance that the suit had been filed with the sanction of the Advocate-General would not entitle them to costs out of the fund, for it is no part of the duty of that officer to decide the case as a Judge, his duty being simply to leave the applicants for sanction to bring a suit, if an apparently good and *bona fide* grievance is shown.⁽³²⁾

Just as the Advocate-General in this country pays and receives costs under certain circumstances, so the Attorney-General pays and receives costs in English Courts.

Where collusion is suspected between the defendants and the relators, the Attorney-General attends by a distinct solicitor, and always receives his costs.⁽³³⁾

The Attorney-General in England just as the Advocate-General in this country constantly receives costs where he is made a defendant in respect of legacies given to charities.⁽³⁴⁾

Where he is made a defendant in respect of the immediate rights of the Crown in cases of intestacy he also receives his costs.⁽³⁵⁾

There is, however, no invariable practice of giving him his costs in all cases out of the fund, the subject-matter of the suit.⁽³⁶⁾

bill and I have no doubt that the client did order it all ; but then the application of the rule I have mentioned appears to me to be necessary, and then comes this question, which is properly a question for the Taxing Master to determine, is it proper or necessary or fit for the administration of the trust that certain things should be done ?" The Master of the Rolls then goes on to say that the question of *quantum* and *quoties* is one in which the opinion of the Taxing Master as to how much of the trustees' bill ought to be charged against the *cestui que trustent* ought to be accepted. I think I must follow this decision and refuse to disturb the decision of the Taxing Master that the items now under discussion ought not to come out of the mosque funds." See the judgment of Starling, J., in the *Advocate-General of Bombay v. M. A. K. Jitaker*, 20 B. 301.

(31) *Administrator-General of Bombay v. M. A. K. Jitaker*, 20 B. 301.

(32) *Chinnasami Mudali v. Advocate-General*, 17 M. 406.

(33) For form of order for costs of A.-G. appearing separately from relators, see *A.-G. v. Wyggeston Hospital*, 2 June, 1855, A. 1024 ; Seton. 1290.

(34) *Moggridge v. Thackwell*, 7 Ves. 36, 88 ; *Mills v. Farmer*, 19 Ves. 483, 490 ; *A.-G. v. Lewis*, 8 Beav. 179. See also *The Advocate-General of Bombay v. M. A. K. Jitaker*, 20 B. 301.

(35) See Daniell's *Chancery Practice*, 7th ed., Vol. I, 1901, p. 61.

(36) *Perkins v. Bradley*, 1 Ha. 219, 234.

In charity suits costs have been frequently awarded to the Attorney-General in interlocutory matters, independently of the relator.⁽³⁷⁾

It would appear that the principle that the Attorney-General never receives nor pays costs may be modified in this way, namely, "that the Attorney-General never receives costs in a contest in which he could have been called upon to pay them, had he been a private individual."⁽³⁸⁾

In an action by the Attorney-General without a relator, costs may be ordered to be paid by one defendant to another defendant; and where in a charity case some of the defendants supported the contention of the Attorney-General, they were allowed their costs as between solicitor and client, to be taxed and paid out of the fund; such costs as between party and party to be repaid by the defendants who opposed the proceedings.⁽³⁹⁾

In certain cases,⁽⁴⁰⁾ the King's Attorney-General may, as representing the interests of the Crown, be made a defendant to an action; but this is to be understood as only applicable to cases in which the interests of the Crown are incidentally concerned; for where the rights of the Crown are immediately in question, as in cases in which the King is in actual possession of the property in dispute, or where any title is vested in him which the action seeks to divest, an action will not in general lie, but the person claiming relief must apply to the King himself by Petition of Right.⁽⁴¹⁾

(37) *A.-G. v. Ld. Ashburnham*, 1 S. and S. 394; see, however, *Burney v. Macdonald*, 15 Sim. 6, 16.

(38) *A.-G. v. Corp. of London*, 2 Mac. and G. 247, 269; see, also, S. C. 12 Beav. 171, and 1 H.L.C. 471, and Ld. Cottenham's comments on the case, 2 Mac. and G. 271; *A.G. v. Drapers' Co.*, 4 Beav. 305; *Ware v. Cumberlege*, 20 Beav. 510; *Kane v. Maule*, 2 Sm. and G. 331; S.C., on app., 4 De G. M. and G. 565, 569. Provision has however been made by the 18 and 19 Vic. c. 90 for the payment of costs by or to the Crown, in proceedings instituted, after the passing of that Act, on its behalf (See *Morgan and Wurtzburg*, 336—9), and by the Customs Inland Revenue and Savings Banks Act, 1877 (40 and 41 Vic. c. 13, S. 5), in all proceedings at the suit of the Crown under the Customs Act the same rule as to costs is to be observed as in proceedings between subject and subject in matters relating to the revenue (*A.-G. v. Hammer*, 4 De G. and J. 205; *A.-G. v. Sittingbourne Ry. Co.*, 35 Beav. 268, 272; 1 Eq. 636, 640; and see *Bauer v. Mitford*, 9 W.R. 135. (Eng.). For form of order, see Seton, 1290.)

(39) *A.-G. v. Corp. of Chester*, 14 Beav. 338; *A.-G. v. Mercers' Co.*, 18 W.R. 448 (Eng.).

(40) See *post*, pp. 62—64.

(41) *Reeve v. A.-G.*, 2 Atk. 223, cited 1 Ves. S. 446; Ld. Red. 31, 102; *Ryves v. Duke of Wellington*, 9 Beav. 579, 600; *Felkin v. Ld. Herbert*, 1 Dr. & S. 608.

Costs of
Government
solicitor.

The Government Solicitor, who receives a monthly salary as such, receives no further payment from Government in respect of any costs of litigation to which Government is a party, except "out-fees" or actual payments made by him on behalf of Government, and pays no fees when he instructs the Advocate-General; but, under his arrangement with Government, he is entitled to retain the costs decreed to Government, if recovered, and he then pays to the Advocate-General the fees of counsel allowed by the taxing officer:

Held, that when a suit against Government is dismissed with costs, costs should be taxed in the usual way, and the taxing officer cannot enquire into the agreement as to remuneration of its law officers by Government.⁽⁴²⁾

(42) *Azimulla v. Secretary of State*, 15 M. 405. The following extract from the judgment in the case may also be noted: "Mr. Norton appears for the plaintiff and argues that as Government pay the Government Solicitor a fixed monthly salary to do its legal work, the Secretary of State, the defendant in this case, cannot be said to have incurred any costs: that as the Government Solicitor cannot recover from the Government the items mentioned in the bill of costs Government cannot recover them from the plaintiff, and that the principle upon which the Court ought to proceed in fixing costs is to ascertain what was the actual damnification caused to the successful party and to award to him the sum which he is actually out of pocket. Mr. Norton's argument proceeds on the assumption that the plaintiff is entitled to the benefit of any arrangement entered into by the Government with the solicitor, whose services the Government see fit to retain by the payment of a monthly salary. I do not think that he is. The principle applicable in cases like the present appears to be that laid down in the case relied on by the Advocate-General—*Raymond v. Lakeman*, (34 Beav. 584). In that case the taxing master allowed a Company which employed standing solicitors as a fixed salary such costs as the Company *would be bound to pay* to their solicitors. It was argued before the Court that as the standing solicitors were paid a fixed salary, the Company had no right to charge the unsuccessful party more than their own standing solicitors could have charged them. The Master of the Rolls maintained the order of the taxing master, holding that the unsuccessful party could not have the benefit of any private arrangement between the solicitor and the company as to costs. The case appears to me on all fours with the present case. The unsuccessful party, the plaintiff, has been ordered to pay to the defendant the costs incurred by him. The defendant asserts that costs have been incurred by the employment of a solicitor to receive the summons, to instruct counsel, put in written statement, etc. It is not denied that the costs, which the present defendant claims to recover from the plaintiff, are such as any other defendant must have incurred in defending the suit and would be bound to pay to his solicitor. But it is argued that unless the Government Solicitor proves that he can recover the costs from Government, Government cannot recover them from plaintiff. This is entirely beside the question, which is one between plaintiff and defendant, not one between plaintiff and the Government Solicitor as Mr. Norton suggests. The plaintiff has no right to assume that the defendant has not expended those sums, nor is he entitled to call upon the defendant to prove the nature of the contract between him and his solicitor. The case of *Barnes v. Atwood*, 5 C. B. 164, is not really in point, as there the taxing officer had been induced by false affidavits to allow a larger sum as expenses to Commissioners than had actually been paid. It is true that Mr. Norton's whole argument proceeded

Assuming that the arrangement between the Government and its solicitor is that the latter should receive a salary and in addition the costs awarded to Government, this arrangement cannot affect a third party condemned in costs; neither is it illegal or contrary to public policy. ⁽⁴³⁾

Similarly it has recently been held by the Bombay High Court that "where in a suit on the Original Side of the High Court of Bombay, to which the Secretary of State for India is a party, costs are awarded to him, the Government Solicitor is entitled to have his bill of costs taxed in the ordinary way against the losing party notwithstanding the fact that the Government Solicitor is a salaried officer of Government." ⁽⁴⁴⁾

In a suit for a certificate of administration under Act XXVII of 1860, Government did not apply for any such certificate, or oppose the plaintiff's suit. But having been made a defendant by the plaintiff, and obliged to make an answer it was *held* that it was not liable to be cast in costs. ⁽⁴⁵⁾

Cases where Government was awarded costs.

A Collector who was unnecessarily made a party to a suit, and who might have had damages awarded against him if he had not appeared, ought to have his costs of appearance. ⁽⁴⁶⁾

In the first Court, the Government obtained their costs; the opposite party appealed, but did not make the Government a respondent. On appeal, the decree of the first Court was reversed. *Held*, that the Government, not having been made a party to the appeal, were entitled to recover their costs to the first Court. ⁽⁴⁷⁾

The plaintiff, as *ijaradar*, claimed a sum of money as compensation for land taken compulsorily for the purposes of a railway,

on the assumption that the bill of costs put in by the defendant in this case represents absolutely fictitious transactions as between the Government Solicitor and the Government. But it is unnecessary to consider that question. The only question is, has the defendant incurred any, and if so, what costs? The answer is, the defendant has employed a solicitor who has done certain acts and is entitled to charge for his time and work, and the defendant is liable to remunerate the solicitor. Whether Government chooses to do by a fixed salary and whether the costs if recovered go to the Government Treasury or into the solicitor's pocket, is not a matter into which the taxing officer is competent to enquire." *Azimulla Sahib v. Secretary of State*, 15 M. 405 (410, 411).

(43) *Muhammed Alim Oollah Sahib v. Secretary of State for India*, 17 M. 162.

(44) *P. Nusservanji v. S. S. Wartenfels*, 18 Bom. L.R. 118.

(45) *The Government v. Musst. Sanoola*, 3 W.R. 23.

(46) *The Collector of the 24 Pergunnahs v. C.J. Wilkinson*, 12 W.R. 444.

(47) *Government v. Lalji Sahi*, 1 B.L.R. S.N. 23-a.

and which had been awarded, and was lying in deposit; a farmer of the lands under him claimed a portion of the same sum, as compensation for the residue of his lease. *Held* that the farmer was entitled to such compensation: and that in apportioning the costs of a suit brought to try the question, in which the ijaradar was plaintiff, and the Government and the farmer defendants, the farmer was entitled to receive from the ijaradar the costs of his demand to the extent to which it was established, and the plaintiff to receive of the farmer the costs applicable to an excess in the demand of the farmer beyond that which he succeeded in establishing, and that Government was entitled to receive the costs which it had incurred from both parties, in the proportion in which each had failed in establishing his claim. (48)

The plaintiff brought a suit against Government for recovery of a *vatan* but the suit was dismissed under S. 4 of the Bombay Revenue Jurisdiction Act. (49) The District Judge, however, refused to give the defendants costs, on the grounds that he did not approve of the policy of the Government in passing the Act, and that he doubted the power of the Legislature to pass the Act. *Held*, reversing the order, that the reasons assigned by the District Judge were no valid reasons for ordering the defendant to bear his own costs in an action in which he had been successful and in which he had not been guilty of any improper conduct. (50)

Cases where
costs were
awarded
against
Government.

In circumstances respecting the enforcement by Government of their claim to resume *Ghatwally* lands, the Judicial Committee, in reversing the decree of the Special Commissioners, decreed all the costs incurred in the proceedings in India, and in the Privy Council to be paid by the Bengal Government. (51)

(48) *Nuzeroodeen Ahamed v. The Railway Commissioners*, Marsh 91=1 Hay 157. The Court said in this case as to the appeal of Government as to costs, it is quite clear that Government must, under the general rule, receive its costs from the losing party. *Nuzeroodeen Ahamed v. The Railway Commissioners*, Marsh, 91 (93)=1 Hay 157.

(49) Bom. Act X of 1876.

(50) *The Secretary of State for India v. Venkatesh Govind Deshpande*, 2 Bom. L.R. 125 (126).

(51) *Rajah Lelanund Singh Bahadur v. The Government of Bengal*, 4 W.R. 77, P.C.=6 M.I.A. 101=1 Suther. 248=1 Sar. 505. Decree appealed from reversed, with all the costs a purchaser had been put to in the proceedings in India and upon appeal. The costs of the execution-creditor ordered to be paid by the purchaser, and charged by him in his cost against the Government. *Sumbhoo Lall Girdhurlal v. The Collector of Surat*, 4 W.R. 55, P.C.=8 M.I.A. 1=1 Suther. 387=1 Sar. 713.

The Government, in this case, having persisted in their claim after several decisions against them by their own officers acting as Judges, were adjudged liable to pay all the costs of the case (52).

The act of the survey authorities in demarcating lands is a necessary and legal act, and Government cannot be saddled with costs unless it can be proved that its officers are wilful wrong-doers. A mere allegation of the plaintiff, to the effect that the defendant had colluded with the survey officers, is no reason for saddling the Government with costs (53).

Upon the application of the Collector, who was a party to a suit, an inquiry was held by the Subordinate Judge into the conduct of a Civil Court Ameen, who had made a local investigation in the suit. The Ameen was acquitted and the Collector ordered to pay his costs, including vakeel's fees. *Held* that, as in the case of miscellaneous proceedings, the Civil Court was competent to award such costs against the Collector (54).

(52) *Raja Lelanund Sing v. Government of Bengal*, 4 W. R. (P.C.) 77 = 6 M.I.A. 101. Their Lordships of the Privy Council said in the course of the judgment:—"With respect to the costs of the proceedings which have taken place, their Lordships do not doubt that the Bengal Government, in bringing forward this claim, have acted under a sense of public duty; but it is an attempt to disturb upon insufficient grounds a settlement which subsisted without dispute for about forty years, during all which time the right to disturb it, if it exists at all, existed with as much force as when the proceedings were instituted. It has been persisted in after several decisions against the Government by their own officers acting as Judges; the decree in their favour has been finally obtained upon grounds different from those on which it was originally sought, and the appellant has been exposed to a long and most expensive litigation. Under these circumstances their Lordships think that they should do but imperfect justice if they did not humbly recommend to Her Majesty that the respondents should be ordered to repay to the appellant all the costs which they have received from him under orders of the Judges below, and should also be ordered to pay to him all his own costs of these proceedings, including the costs of the present appeal. *Raja Lelanund Sing v. Government of Bengal*, 4 W.R. (P.C.) 77 (86) = 6 M.I.A. 101.

(53) *Collector of Moorshedabad v. Rammohinee Dossee*, 1 Hay 520. See, also, cases noted under "Judicial Officer's liability"—*infra*.

(54) *In the matter of the Collector of Tirhoot*, 14 W.R. 390. The Court said in the course of the judgment:—"When an Officer like a Civil Court Ameen finds himself charged with misconduct or with a criminal offence, the prosecutor or promovent being no less a person than the Collector, he is quite justified in having himself defended by Counsel. It is reasonable that the party who takes the responsibility of bringing forward and pressing such charges, and fails to substantiate them, should be made to pay the costs thereof." *In the matter of the Collector of Tirhoot*, 14 W.R. 390 (391).

Costs on the
Revenue
side.

The costs of all proceedings and interlocutory matters on the Revenue side are to be adjudged as between subject and subject, and costs follow the event unless otherwise ordered (55).

Crown costs
—Rule of
priority as to
Crown costs
and Crown
debts.

When costs are awarded to the Crown, then it becomes a debt due to the Crown; (56) and, as such, would, under certain circumstances, be entitled to priority over other debts (57).

It is a principle recognised by the laws of many countries that claims of the Crown or State are entitled to precedence, *e.g.*, the Hindu, Roman, and French Codes, the Laws of Spain, the United States of America, Scotland, and England (58).

A judgment-debt due to the Secretary of State for India is entitled to the same precedence as a debt due to the Crown, and the reason is that such debt is vested in the Crown, and when realized falls into the State Treasury (59).

The Crown has the first claim to the proceeds of a pauper suit to the extent of the amount of the Court-fee that would have been payable at the institution of the suit had the plaintiff not been a

(55) *Att-Gen. v. Countess Blucher de Wahlstatt*, (1864) 3 H. & C. 374, 390; *Edinburgh Life Assurance Co. v. Lord Advocate*, (1910) A. C. 143, 164.

(56) As to what are Crown debts, see *Judah v. Secretary of State for India*, 12 C. 445, *infra*.

(57) See for instance S. 33 of the Provincial Insolvency Act (III of 1907) which gives priority to crown debts over other debts in the distribution of the assets of the insolvent.

(58) *The Secretary of State for India v. The Bombay Landing and Shipping Company*, 5 B.H.C.O.C. 23; approved in *Judah v. Secretary of State*, 12 C. 445; followed in *Balkrishna Vasudev v. Madhavray Narayan*, 5 B. 73; *Bell v. Municipal Commissioners of Madras*, 25 M. 457 (492); referred to in *Abdul Gani v. Krishnaji Bhikaji*, 10 B.H.C.R. 416; *Balaji Narayan v. Ramchandra Ganesh*, 11 B.H.C.R. 37; *In re Ratansi Kalianji*, 2 B. 148; *Lalubhai Bapubhai v. Mankuvarbai*, 2 B. 388 (F.B.); *Wagji Korji v. Tharia Topan*, 3 B. 58; *Sakharamsadas Shiv v. Sitabai*, 3 B. 353; *Motilal Virchand v. Collector of Ahmedabad*, 31 B. 86 (F.B.); *Jehangir v. Secretary of State*, 6 Bom. L.R. 131. But see *Ramachandra v. Pitchaikanni*, 7 M. 434.

(59) *The Secretary of State for India v. The Bombay Landing and Shipping Co.*, 5 B.H.C.R.O.C. 23. But see *Ramachandra v. Pitchaikanni*, 7 M. 434, where the Madras High Court has taken a somewhat different view on the question of the priority of Crown debts. The paramount rights of Government in respect of debts due to the Crown are not transferred to the alienees of Government revenue. The Regulations contain certain special provisions for enabling superior holders to realize their dues from their tenants: but there is not to be found in them any provision which can be construed as making those dues a paramount charge upon the land. If an inamdar fails to recover his rents by any of the special processes provided in the Regulations, and is obliged to go into the Civil Court and obtain a decree for arrears, the sale of the land in execution of such a decree has the same effect (and no more) as a sale of the land in execution of a decree for any other debt. *Balaji Narayan Kolathkar v. Ramachandra Ganesh Kelkar*, 11 B.H.C.R. 37.

pauper; and the Code of Civil Procedure does not preclude the Crown or its representative from urging its prerogative (60).

Where land is sold under the provisions of S. 10 of the Madras Abkari Act, 1864, for arrears due by an Abkari renter, it has been held by the Madras High Court ⁽⁶¹⁾ that the purchaser at

(60) *Ganpat Putaya v. The Collector of Kanara*, 1 B. 7. Where a decree in a pauper suit is in favour of the plaintiff, the Government may realize the Court-fee as the first charge on the property the subject of the suit, by proceedings in execution, and need not bring a separate suit to recover it. *Ram Das v. The Secretary of State for India*, 18 A. 419 (421). There is nothing in Civ. Pro. Code, O. XXXIII, r. 10, which precludes the Crown from urging its prerogative, and insisting on its right to precedence over all other creditors. *Gayanoda Bala Dassee v. Butto Krishito Bairage*, 33 C. 1040 (1045) = 10 C.W.N. 857. Where a suit by a pauper was dismissed and costs directed to be paid to the defendant, who attached the plaintiff's property and brought it to sale, the Crown would be entitled to be paid first, out of the proceeds of such sale, the amount of the Court-fee leviable on the suit if the plaintiff was not allowed to sue as a pauper. *Gulsari Lal v. The Collector of Bareilly*, 1 A. 596 (597). The Court-fee due to Government will be a first charge upon the property covered by the probate, granted to an executor *in forma pauperis*. *In the matter of the Will of Dawubai Haji Khan Hubib Khan*, 18 B. 237 (240). The prior right of the Crown as creditor is liable to exception in the case of lien-holders, and where Government is declared to have first charge on property, it can only sell such rights as the person indebted to it possesses. *Dost Muhammad Khan v. Mani Ram*, 29 A. 537 (540) (F.B.) = A.W.N. (1907) 157 = 4 A.L.J. 720. *Per* Bashyam Aiyangar, J. The canon of interpretation of statutes that the prerogative rights of the Crown cannot be taken away except by express words or necessary implication, is as applicable to the statutes passed by the Indian Legislatures as to Parliamentary and Colonial Statutes. *Bell v. The Municipal Commissioners for the City of Madras*, 25 M. 457 (493, 494, 500) = 12 M.L.J. 208. The rule of construction according to which the Crown is not affected by any statute unless there are words in it to that effect, applies to India. *The Secretary of State for India v. Mathurabhai*, 14 B. 213 (218). See, also, *Motilal Virchand v. The Collector of Ahmedabad*, 31 B. 86 (F.B.) (89, 91) = 8 Bom. L.R. 904 = 2 M.L.T. 13. The rule that a statute does not bind the Crown, unless it is named in it expressly or by necessary implication, is subject to the proviso that the Crown may waive its prerogative in that respect and intervene where its rights and revenue are affected and take the benefit of any particular Act, though it be not named therein. *The Government of Bombay v. Eusufali Salebhai*, 12 Bom. L.R. 84 (45).

(61) See *Ramachandra v. Pitchaikanni*, 7 M. 434; followed in *Ibrahim Khan Sahib v. Rangasami Naicken*, 28 M. 420 (421); relied on *Muthusamier v. Sree Sree Mehanithi Swamiyar Avergal*, 19 Ind. Cas. 694 (699) = 13 M.L.T. 498 (505); approved in *Chinnasami Mudali v. Thirumalai Pillai and the Right Honourable the Secretary of State for India*, 25 M. 572 (575); referred to in *Raman v. Hassan*, 9 M. 247 (249); *Kadir Mohideen Marakaykar v. N.V. Muthukrishna Aiyar*, 26 M. 230 (233); *The Secretary of State for India v. Pisipathi Sunkarayya*, 34 M. 493 (494) = 8 Ind. Cas. 414 = 20 M.L.J. 794 (795) = 8 M.L.T. 323. The Court, Turner, C.J. and Muthusami Aiyar, J. said in the course of the judgment:—"The next question is whether as a Crown debt the arrear of Abkari Revenue takes precedence of the hypothecation debt. The late East India

the sale does not take the land free of all encumbrances as in the case of a sale for arrears of land-revenue under the provisions of the Revenue Recovery Act.⁽⁶²⁾

A sale for arrears of Abkari Revenue of immoveable properties belonging to the defaulter under S. 28 of Act I of 1886, has not the effect of discharging encumbrances created prior to the sale.⁽⁶³⁾

The substantive provisions of the Revenue Recovery Act⁽⁶⁴⁾ that a sale for recovery of arrears of land-revenue frees the land from all encumbrances and from all favourably rented leases, do not apply to a sale under the Local Boards Act.⁽⁶⁵⁾

In determining whether or not a debt falls under the denomination of a Crown-debt, the question is not in whose name the debt stands, but whether the debt, when recovered, falls into the coffers of the State.⁽⁶⁶⁾

Company was only a corporation with limited powers of sovereignty delegated to it, and in the Courts was treated as a subject. That the right of Government to priority to a mortgagee was not recognized in the mufassal is shown by the express language of the Act which declares the land revenue to be a first charge on the land—an unnecessary provision, if by common law every debt due to the Crown was a first charge on the land. With every respect for the learned Judges who have held otherwise, (See *Collector of Moradabad v. Muhammad Daim Khan*, 2 A. 196) we hesitate to import into places outside the Presidency towns the doctrine of the common law of England relating to Crown-debts with all its inconveniences to purchasers, but it is not necessary, for the purpose of this appeal, to consider whether debts due to Government in this country have the same preference over private debts as Crown-debts in England. In the case before us the hypothecation was in 1874, and the Abkari Revenue fell into arrear in a subsequent year, and even in England the lien of the Crown attached only from the time when the owner of the land became a debtor to the Crown, and since 1839 the common law has been greatly modified by statute for the protection of purchasers." See *Ramachandra v. Pitchaikanni*, 7 M. 434 at p. 436.

(62) Madras Act II of 1864 (Revenue Recovery).

(63) *Ibrahim Khan Sahib v. Rangasami Naicken*, 28 M. 420. Their Lordships, Benson and Boddam, JJ., said:—that "to hold that a sale of the land for an arrear of abkari rent would have the effect of discharging all prior encumbrances, would open a wide door to fraud on bona fide mortgagees." *Ibrahim Khan Sahib v. Rangasami Naicken*, 28 M. 420 at p. 422.

(64) Ss. 32 and 42.

(65) *Muthusamier v. Sree Sree Methanilhi Swamiyar Avergal*, 19 Ind. Cas. 694 at p. 695 = 13 M.L.T. 498.

(66) *Judah v. Secretary of State*, 12 C. 445 (following *Secretary of State v. Bombay Landing and Shipping Company*, 5 B.H.C.O.C. 28).

Sec. 11. Damages, Suit for.

Suit for damages against common carriers, costs in.

Suit for damages for collision—where both ships were at fault.

Suit for damages for assault—Criminal prosecution—Costs.

Suit for damages for bringing a suit or intervening in execution proceedings.

Suit for damages—Vendor and purchaser—Costs.

Suit for damages—Costs of appeal in.

Nominal damages awarded—Costs.

IN a suit for damages for injury sustained on account of the wrongful acts or omission or gross negligence of a Railway Company or other common carrier when the plaintiff substantially succeeds, it has been laid down that costs should be allowed as between attorney and client, so as not to exhaust the damages or the larger portion thereof.⁽¹⁾

The owners of cargo on board the H, sued the owners of the steamship S. for damages resulting from a collision which occurred

(1) *E.I.Ry. Co. v. Kally Dass Mookerjee*, 26 C. 465=2 C.W.N. 609=3 C.W.N. 781; (following *Narayan Jetla v. Municipal Commissioners of Bombay*, 16 B. 254; *Sorabji Ratanji v. Great Indian Peninsula Railway Co.*, 7 B.H.C.R. (O.C.) 119, Note; and *Ratanbai v. Great Indian Peninsula Railway Co.*, 7 B.H.C.R. (O.C.) 120, Note=8 B.H.C.R. (O.C.) 130. In the case of *Sorabji Ratanji v. The Great Indian Peninsula Railway Co.*, 7 B.H.C. (O.C.) 119—Note, Westropp, C.J., said "The defendants must pay the costs of the suit as between solicitor and client." His Lordship added that he made such order as to costs, that the plaintiff and other persons interested might have the amount allotted to them without deduction and not as any special mark of disapprobation of the conduct of the defendants. In the case of *Ratanbai v. The Great Indian Peninsula Railway Co.*, 7 B.H.C. (O.C.J.) 120—Note, the same learned Judge said "The defendants must pay the plaintiff her costs between solicitor and client and simple interest at 6 per cent. per annum on the amount of this judgment." In *Vinayak Raghunath v. The Great Indian Peninsula Railway Co.*, 7 B.H.C. (O.C.J.) 113 at p. 119 the Court (Westropp, C.J.) said "costs of this suit to be paid to the plaintiff by the defendants as between solicitor and client." In the case of *Ratanbai v. The Great Indian Peninsula Railway Co.*, 8 B.H.C. (O.C.J.) 130 at p. 135, in dismissing an appeal by the plaintiff as to the sufficiency of damages awarded, the Court (Sargent, J.) said "The appeal must therefore be dismissed with costs, unless the Company consent to waive them, which, as this is the first case, in which the application of the Act (XIII of 1855) has been fully discussed, we think they might do with great propriety." On the subject-matter of this Chapter in general, see yearly Practice, 1914, p. 1068; Annual Practice, Notes under O. LXV, r. 1; Pollock on Torts, 10th Ed., 1916, pp. 416, 417. With regard to costs in actions for damages against Railways and such other common carriers, see, also, the section relating to carriers in the Ruling Cases; Macnamara on Carriers; Preston's Manual of Railway Law, 1892; Leey's Edition of Hodges on Railways; Balfour Browne and Theobald, Law of Railways; Robertson's Tramways and Light Railways; Oxley's Light Railways. The English "Light Railway (Costs) Rules, 1897;" High Court decisions on Indian Railway Cases, by Mr. M. Tiruvenkatachariar, 2nd Ed., 1912, St. R. & O. Rev. 1904, Vol. XI "Railway" p. 78 referred to in the Encyclopædia of the Laws of England, 2nd Ed., Vol. XII, heading "Railway" p. 285.

Suit for damages against common carriers, costs in.

Suit for damages for collision—Where both ships were at fault.

between the H. and the S. The Court found that both vessels were to blame for the collision.⁽²⁾ *Held*, on the authority of The City of Manchester, ⁽³⁾ that in such suit each party should bear their own costs.

Suit for
damages
for assault—
Criminal
prosecution
—Costs.

A person who is assaulted can pursue his civil in addition to his criminal remedy; "but if punishment in person has been resorted to, that must always be an important element in mitigation in subsequently estimating the amount of penalty to be inflicted in pocket." The contention that, in suits for compensation, the plaintiff should be awarded costs upon the full amount claimed in the plaint, though, as a matter of fact, he has been held entitled to recover a much less sum, is wholly untenable. The equitable order in such cases is to allow the plaintiff only costs on the amount decreed as compensation. (4)

(2) *Ookerda Poonsey v. Steamship "Savitri,"* 10 B. 408.

(3) 5 Prob. Div. 221.

(4) *Misir Ramji v. Jiwan Ram and Kidar Nath v. Misir Ramji*, 1 A.W.N. (1881), 131. Straight, J. observed that, in view of the circumstance that the defendants had been prosecuted by the plaintiff for the assault for which he now sought compensation, and had undergone very severe punishment for their offence, the damages awarded were excessive. It was not incompetent, of course, for a person situated as the plaintiff was to pursue his civil in addition to his criminal remedy; but if punishment in person was resorted to, that must always be an important element in mitigation in subsequently estimating the amount of penalty to be inflicted in pocket. In the present case the plaintiff's claim for Rs. 50,000 would, even if he had not taken criminal proceedings, have been a grossly exorbitant one. Seeing, however, that Kidar Nath and Ganesh had suffered twelve, and Jiwan Ram and Gauri Sahai six months rigorous imprisonment, such a demand seemed to indicate a vindictive attempt on the part of the plaintiff to misuse the machinery of the law for his own purposes of revenge and to make it an engine of oppression. The decree of the Court of first instance should be modified, the damages awarded being reduced to Rs. 1,500. As to the question of costs, the pleader for the plaintiff had contended that the practice of this Court and of the late Sudder Court was to allow the plaintiffs their costs upon the full amount claimed in their plaint, though as a matter of fact they had been held entitled to recover a much less sum. There was, no doubt, authority for this contention, but, with great respect to the Judges who decided the cases quoted, it seemed that such a principle for universal application in suits for compensation was a wholly untenable one, and to adopt it would, in reality, be neither more nor less than to inflict upon defendants additional damages under the name of costs. If the plaintiff in the present suit, though successful, found himself out of pocket, he had no one to blame but himself for having put his damages at an unreasonably extravagant figure. The equitable order to make would be that in this Court each party should pay their own costs, and that in the Courts below the plaintiff should receive his costs on Rs. 1,500. Stuart, C.J. observed that the only difficulty he had felt was, whether the plaintiff should be allowed so large a sum as Rs. 1,500 after his proceedings in the Criminal Court. This sum would, however, be considerably reduced by the operation of the proposed order as to the costs, of which he approved. *Misir Ramji v. Jiwan Ram and Kidar Nath v. Misir Ramji*, 1 A.W.N. 131 (132).

An action cannot be maintained for recovery of damages caused to the plaintiff by reason of the defendant having filed a suit against him or by reason of the defendant having intervened in execution proceedings to which the plaintiff and another person were parties. The only remedy provided for in law is the power given to the Court to compensate him by an order for costs in such suit or proceedings.⁽⁵⁾

The respondent and a certain other person sold and conveyed certain land to the appellants, and the appellants obtained possession of such land. Subsequently the respondent's brothers sued the appellants for possession of a portion of such land, alleging that it belonged to them. They obtained a decree for possession of such portion and the cancelment of the conveyance so far as it related to such portion. Thereupon the appellants instituted the present suit against the respondent, claiming, by way of damages, the value of such portion, and also by way of damages, the costs incurred by them in defending the suit brought against them by the respondent's brothers. They alleged that the respondent had acted fraudulently, in that knowing that he was entitled only to a certain share of such land, he had concealed such fact from them and had conveyed to them the whole thereof. The lower appellate Court held that the appellants were not entitled to recover the costs incurred by them in defending the suit brought by the respondent's brothers against them, as the respondent had not been guilty of fraud or concealment in the matter. In second appeal the appellants contended that they should have been awarded the costs incurred by them in the previous litigation. The Court (Oldfield and Brodhurst, JJ.), observed that there was no reason to interfere or to make the respondent liable for the costs incurred by the appellants in defending the suit brought for the recovery of the property.⁽⁶⁾

Although in a suit for damages the amount was materially reduced on appeal, the respondent may, under proper circumstances, be entitled to the costs of the appeal. Where the respondent was successful on all points except the *quantum* of damages he was held to be entitled to the costs of the appeal.⁽⁷⁾

(5) *Hasomal v. Chimanmal*, 7 S.L.R. 104 (105) (referring to *Gold Mining Co. v. Eyre*, (1883) 11 Q.B.D. 674, p. 690). *Prabha Shankar v. Govind Lal*, 1 B. 467.

(6) *Kesho Rawat v. Raghunandan Misr*, 1 A.W.N. 160 (161).

(7) *The "Englishman," Limited v. Lala Lajpat Rai*, 14 C.W.N. 719 (714).

Nominal
damages
awarded—
Costs.

Where a suit for damages was partially decreed on a finding of nominal damages, and costs on the amount undecreed, were awarded to the defendant with interest, *held* that there was no good reason for such a course, and no ground of justice for saddling the plaintiff with defendant's costs.⁽⁸⁾

"Actions for merely trifling trespasses were formerly discouraged in England by statutes providing that when less than 40s. was recovered no more costs than damages should be allowed except on the judge's certificate that the action was brought to try a right, or that the trespass was "wilful and malicious;" yet a trespass after notice not to trespass on the plaintiff's lands was held to be "wilful and malicious," and special communication of such notice to the defendant was not required.⁽⁹⁾ But these and many other statutes as to costs were superseded by the general provisions of the Judicature Acts, and the rule that a plaintiff recovering less than 10£ damages in an action "founded on tort" gets no costs, and if he recovers 10£ or over but less than 20£ he gets costs only on the County Court scale, unless by special certificate or order; ⁽¹⁰⁾ and they are now expressly repealed.⁽¹¹⁾

The Court is therefore not bound by any fixed rule; but it might possibly refer to the old practice for the purpose of informing its discretion. It seems likely that the common practice of putting up notice boards with these or the like words: "Trespassers will be prosecuted according to law" words which are, "if strictly construed, a wooden falsehood,"⁽¹²⁾ simple trespass not being punishable in Courts of criminal jurisdiction—was originally intended to secure the benefit of these same statutes in the matter of costs. At this day it may be a question whether the Court would not be disposed to regard the threat of an impossible criminal prosecution

(8) *Mussamut Bibee Moseehun v. Mussamut Bibee Munoorun*, 24 W.R. 69. See, also, cases noted at p. 139, *supra*, where the question is more fully discussed.

(9) See *Bowyer v. Cook*, (1847) 4 C.B. 236, 16 L.J. C.P. 177; *Reynolds v. Edwards*, (1794) 6 T.R. 11, even where the defendant had intended and endeavoured to avoid trespassing; but this was doubted by Pollock, C. B. in *Swinfen v. Bacon*, (1860) 6 H. & N. 184, 188; 30 L.J. Ex. 33, 36, 123, R. R. 445, 449, Cp., *Gayford v. Chouler* (1898) 1 Q.B. 316; 67 L.J. Q.B. 404, on the Malicious Injuries to Property Act (English Statute). On this subject, see Pollock on Torts, 10th Ed., 1916, pp. 416, 417.

(10) County Courts Act, 1888, S. 116 (substituted for like provisions of the repealed Acts of 1867 and 1882): see "The Annual Practice," 1915, p. 2119 *sqq.*

(11) 42 and 43 Vict. C. 59.

(12) F. W. Maitland, "Justice and Police," p. 13,

as a fraud upon the public, and rather a cause for depriving the occupier of costs than for awarding them.” (13)

S. 12. Debenture-holder's Action.

What is a debenture, and who is a debenture-holder.

Order of priority in which the costs of a debenture-holder's action are paid.

Charge in favour of plaintiff's solicitor on property recovered in debenture-holder's action.

Claim of creditor advancing money to manager.

Costs of preservation.

Costs of debenture-holder's action when debentures do not rank *pari passu*.

Costs of defendants.

Costs incident to a winding-up petition.

(i) General rules.

(ii) Notice of support.

(iii) When petitioner's costs rank above the costs of the liquidator.

(iv) When petitioner ordered to pay costs.

(v) Costs of second petition.

Priority of debentures over liquidator's costs of carrying on business.

Priority of solicitor's lien over debenture-holder's charge.

Costs of application for review.

Receiver's right to retain costs properly incurred by him.

“ALTHOUGH the instruments called debentures may be described with comparative ease, a judicial definition of a debenture—or at any rate an accurate one—has not yet been obtained, and is perhaps not urgently required.” (1) Of course, the word “debenture” imports

What is a debenture, and who is a debenture-holder.

(13) At all events the threat of spring-guns, still not quite unknown, can do the occupier no good, for to set spring-guns is itself an offence. Several better and safer forms of notice are available; a common American one, “no trespassing,” is as good as any. “Nothing on earth,” said Sir Walter Scott, “would induce me to put up boards threatening prosecution, or cautioning one's fellow-creatures to beware of man-traps and spring-guns. I hold that all such things are not only in the highest degree offensive and hurtful to the feelings of people whom it is every way important to conciliate, but that they are also quite inefficient.” Lockhart's *Life of Scott*, vii, 377, Ed. 1839.

(1) See Companies Act VII of 1913, S. 2 (4). On the subject-matter of this section see *Encyclopædia of the Laws of England*, 2nd Ed.—Vol. IV, Heading—Debenture, specially, p. 406; Paul Frederick Simonson on *Debentures and Debenture Stock*, 4th Ed. 1913, pp. 270-274; 294-295; Reference may also be made to Buckley's *Treatise on the English Companies Act*; Chadwyck Healey on *Companies*; Lindley on *Companies*; Palmer's *Company Precedents*; Manson on *Debentures*; Chitty's *Statutes*—Title “Company”; Steibel's *Company Law*.

an acknowledgment of a debt.⁽²⁾ But a mere acknowledgment of a debt does not satisfy a lawyer's or a commercial man's idea of what a debenture is. He associates the term with a company of some kind, and most debentures or securities are given by company; but debentures are often granted by clubs, and occasionally by individuals."⁽³⁾ A precise definition of the term debenture being impracticable, it may be useful to shortly describe an ordinary limited company's debenture in a form which has met with approval. "The instrument is under the seal of the company, and on the face of which contains a covenant to pay principal and interest, a charge on all and some of the property of the company, and a statement that it is issued subject to the conditions endorsed upon it. These conditions vary with circumstances, but, taking a form which is a fair sample, the conditions state that the debenture is one of a series of a certain limited number, each for a like amount of principal, that all those of the series rank *pari passu* as a first charge, and that such charge (except as regards the property included in the trust-deed, if any) is to be a "floating security" but so that the company is not to create any charge in priority on certain property—generally its freeholds and leaseholds. Provision is also made for registration of the debentures, the non-recognition of equities,⁽⁴⁾ transfers, payment of interest by warrant, the requirements to be observed in case of joint-holders, acceleration of payment of principal in certain events, *e.g.*, falling into arrear as to interest, and winding-up, facility as to the service of notices, and the time and mode of re-payment of the principal moneys secured. Power is also given to appoint a receiver, his powers being defined and provision being made as to the disposal of the moneys which come to his hands."⁽⁵⁾ It is under the power conferred by such instrument that receivers are generally appointed by the debenture-holders.

The following order in which the plaintiff debenture or debenture stock holder's and other costs are paid under the

(2) See the note to *Levy v. Abercorris Slate and Slab Co.*, (1887), 37 Ch. D. 260, and the judgments of Chitty, J., in that case, and in *Edmunds v. Blaina Furnaces Co.*, (1887), 36 Ch. D. 215.

(3) See *Encyclopædia of the Laws of England*, Vol. IV, 2nd Ed., pp. 382-388. The word "Debenture" occurs in the Indian Companies Act VII of 1913 and also in other Indian Acts.

(4) *In re Goy & Co.*,⁵(1900) 2 Ch. 149.

(5) See *Encyclopædia of the Laws of England*, Vol. IV, 2nd Ed., pp. 388, 389 and also *Author's Law of Receivers in the Lawyer's Companion Series*, pp. 458, 459.

practice of Courts in England is given by Simonson in his book on Debenture and Debenture Stock.⁽⁶⁾

"The costs and expenses hereinafter specified are payable in priority to the debenture or debenture stock holder's charges in the following order out of the moneys produced by the sale of the property comprised in the debenture or debenture stock holder's securities :—

Order of
priority
in which the
costs of a
debenture-
holder's
action are
paid.

(1) The costs properly incurred by the plaintiff or plaintiffs in realising the assets of the company comprised in the debenture or debenture stock holder's charges including the costs of an abortive attempt to sell.⁽⁷⁾ The assets must be realised by some one, in order that they may be distributed, and whoever has realised them and brought the proceeds under the control of the Court has really constituted the fund, which has to be distributed for the benefit of the receiver and every one else, who is entitled.^(7-a) It may not always be easy to decide, whether certain costs are comprised in the costs of realisation; the following are costs of realisation: An annual sum payable by a ferry company to the conservators of the Thames by way of rent, auctioneer's fees, and the fees for the survey necessary for preparing conditions of sale and so on.⁽⁸⁾

(2) The balance due to the receiver or receiver and manager including the remuneration and his costs in the suit.

(3) The costs, charges and expenses of the trustees of the trust-deed in cases, in which there is a trust-deed.⁽⁹⁾

(4) The plaintiff's costs in the action, and in case, another debenture or debenture stock holder was substituted as plaintiff in the place of the original plaintiff, the costs of the original and the substituted plaintiff rank *pari passu*.⁽¹⁰⁾ If the assets charged in

(6) 4th Ed., (1913) pp. 270-271.

(7) *Batten v. Wedgwood Coal and Iron Co.*, 28 Ch. D. 317.

(7-a) *In re Marine Mansions*, 4 Eq. 601, 611; *Perry v. Oriental Hotels Co.*, 12 Eq. 126, 134; *In re Professional Life Assurance Co.*, 3 Ch. 167, 175; *Re Regents Canal Iron Works Co.*, 3 Ch. Div. 411, 427; *In re Staffordshire Gas and Coke Co.*, (1893) 3 Ch. 523, 528; *Lathom v. Greenwich Ferry Co.*, 72 L.T.R. 790, 793 W.N. (1895) 77.

(8) *Lathom v. Greenwich Ferry Co.*, *ubi supra*.

(9) For form of order where the company and the trustees appear by the same solicitors as defendants in a debenture or debenture stock holder's action and the company's costs are not allowed, see *Mortgage Insurance Corporation v. Canadian Agricultural Coal Co.*, (1901) 2 Ch. 377, 382.

(10) *Batten v. Wedgwood Coal and Iron Co.*, 28 Ch. D. 317 followed in *Strapp v. Bull, Sons & Co.*, (1895) 2 Ch. (C.A.) 1.

favour of the class of debenture or debenture stock holders, on whose behalf the proceedings are taken, are *insufficient* to satisfy the sums so charged and belong *exclusively* to such holders, the plaintiff in such proceedings is entitled to costs as between *solicitor and client*. He is entitled to costs as between solicitor and client, because he has been instrumental in securing, for the benefit of such class, assets, which belong exclusively to such class and it is inequitable, that such assets should be distributed among such class without completely indemnifying the plaintiff, and such a complete indemnity can only be given by allowing costs as between solicitor and client.⁽¹¹⁾ If, on the other hand, the assets charged in favour of the class of debenture or debenture stock holders, on whose behalf the proceedings are taken, are either sufficient to satisfy the sums so charged or *are not exclusively* the property of such class, the plaintiff will only be entitled to *party and party costs*; for in such last-mentioned cases the debenture or debenture stock holders can only be entitled to party and party costs as against the company and any other persons, who are interested in such assets."⁽¹²⁾

Charge in favour of plaintiff's solicitor on property recovered in debenture-holder's action.

Where the assets charged realise more than the amount due to the debenture or debenture stock holders and the plaintiff in the proceedings is therefore only entitled to party and party costs, the Court has jurisdiction by virtue of S. 28 of the Solicitors Act, 1860 (23 and 24 Vic., Cap. 127) to give to the solicitor employed in such proceedings a charge upon the property recovered or preserved through his exertions for his "taxed costs, charges and expenses of or in reference to such....proceedings." However, as this statute was passed for the benefit of solicitors (and not of their clients), the Court will, as a rule, only exercise it, if it can be shown that the plaintiff in the proceedings, in which the property has been recovered, is unable to pay the costs or part of them.⁽¹³⁾

(11) *Re New Zealand Midland Ry. Co., Smith v. Lubbock*, (1901) 2 Ch. (C.A.) 357; *Re A. Boynton Ltd.*, (1910) 1 Ch. 519, 525, *Re London United Breweries Ltd.*, (1907) 2 Ch. 511, 516.

(12) *Re New Zealand Midland Ry Co., Smith v. Lubbock*, (1901) 2 Ch. (C.A.) 365, 370; *Re Queen's Hotel Co. Cardiff Ltd.*; *Re Vernon Tin Co.*, (1900) 1 Ch. 792. See Simonson on Debentures and Debenture Stock, 4th Ed., pp. 270, 271.

(13) This power was exercised in a recent case of *Re W. C. Horne & Sons., Ltd., Horne v. Same Co.*, (1906) 1 Ch. 271, following *Harrison v. Cornwall Minerals Ry., Co.*, 32 W.R. 748 (Eng.); 53 L.J. Ch. 596. A solicitor, acting for the plaintiff in a debenture-holder's action and a receiver and manager appointed therein, took various proceedings for the benefit of the debenture-holders with the sanction of the Court and in the result

"If a receiver and manager appointed by the Court in a debenture or debenture stock holder's action in the course of performing his functions as manager borrows money for the purpose of carrying on the business of the company without pledging his personal credit and the amount eventually realised turns out to be insufficient to satisfy (i) the costs of realisation of the assets, (ii) the remuneration of the receiver and manager, and (iii) the moneys so borrowed, in such a case the costs of realisation and the remuneration of the receiver will rank above the claim for the moneys lent."⁽¹⁴⁾

Claim of creditor advancing money to manager.

"The question, how far the costs of the preservation (as distinguished from the costs of the realisation) of the property comprised in the debenture or debenture stock holder's securities will have priority over the debentures or debenture stock, is one of some difficulty. In the case of *Perry v. Oriental Hotels Company*,⁽¹⁵⁾ the Court treated the costs of the preservation of the property, which is comprised in the debenture-holder's securities, on a level with the charges of realisation and decided that, though as between the debenture-holders and the company the costs of the preservation of the property charged with such securities are payable by the company, yet, if the assets of the company are not sufficient to meet the costs of preservation, the liquidator of the company is entitled as against and in priority to the debenture-holders to be paid such costs out of the property charged. This case was, however, not followed in *Lathom v. Greenwich Ferry Company*,⁽¹⁶⁾ and does not appear to have been acted upon in other cases. Though it was not necessary for the decision, James, L.J., seems to suggest in *ex parte Grissell*,⁽¹⁷⁾ that the costs of preservation will, if incurred for the purpose of repairing the property, paying rates and taxes, which would be necessary to prevent any forfeiture or putting a person in to take charge of the property, have priority over the debenture-holder's

The costs of preservation.

property was recovered and the funds paid into Court were sufficient to pay the debenture-holders in full and to leave a large balance. The plaintiff in the action being unable to pay the difference between the party and party costs and the solicitor and client costs, the Court declared that the solicitor was entitled to a charge on the balance for such difference. See *Simonson on Debentures and Debenture Stock*, 4th Ed., 1913, p. 272.

(14) *Re A. Boynton Ltd., Hoffman v. Same Co.*, (1910) 1 Ch. 519.

(15) 12 Eq. 126.

(16) 72 L.T.R. 790, W.N. (1895) 77.

(17) 3 Ch. Div. 411, 427.

charge. In such a case the costs of preservation come under the head of salvage.⁽¹⁸⁾

Costs of debenture-holder's action when debentures do not rank *pari passu*.

"If a holder of debentures or debenture stock not forming part of a series ranking *pari passu* takes proceedings to enforce his securities and it eventually turns out, on the whole of the property of the company being sold, that he is not entitled to any share of the proceeds of sale, such proceeds having been entirely absorbed by the holders of debentures or debenture stock ranking above him, yet, if the proceedings taken by the plaintiff have in the opinion of the Court been for the benefit of the persons interested in such proceeds, the plaintiff will be entitled to the costs of the action other than such (if any) as have been incurred by him in support of his own security only".⁽¹⁹⁾

Costs of defendants.

"The defendant company in a debenture or debenture stock holder's action is not entitled to costs, unless the action fails; neither are the holders of second or third debentures, who have been made defendants in such an action, entitled to their costs, but they must look to the surplus assets of the company, if there is any such surplus after satisfying the claims of the first debenture or debenture stock holders in respect of their securities and costs."⁽²⁰⁾

Costs incident to a winding up petition.

(i) General rules as to costs of winding up petition.

"The following are the general rules laid down by Lord Lindley, ⁽²¹⁾ as to the payment of the costs incident to a winding-up petition:—

1. The costs of a petition, on which a winding-up order is made, are borne by the company; these costs include the costs of the petitioner and of the company, and the costs of all other persons, if any, properly served with the petition. ⁽²²⁾

2. The costs of a petition, which is dismissed, are borne by the petitioner, unless the Court is of opinion, that the petition was justifiable, in which case the dismissal will be without costs. If

(18) *In re Staffordshire Gas and Coke Co.*, (1893) 3 Ch. 523, 528. This case is overruled by *in re Bolton & Co.*, (1895) 1 Ch. (C.A.) 333, but not on this point. See also *re W.C. Horne & Sons Ltd.*, (1906) 1 Ch. 271. See Simonson on Debenture and Debenture Stock, 4th Ed., 1913, p. 273.

(19) *Carrick v. Wigan Tramway Co.*, W.N. (1893) 98, following *Batten v. Dartmouth Harbour Commissioners*, 45 Ch. D. 612.

(20) *Re Clayton Engineering Co. Ltd.*, *Boddington v. Same Co.*, (1904) W.N. 28.

(21) See Lindley, pp. 889-890; see S. 141 (2) of the Companies Consolidation Act, 1908.

(22) *In re Humber Iron Works Co.*, 2 Eq. 15.

dismissed with costs, such costs include those of the company, and of all persons, if any, served with the petition.⁽²³⁾

3. With respect to persons, who appear to support or oppose a petition, although not served with it, the usual practice is: (A) to allow one set of costs to those contributories and one set to those creditors, who upon reasonable grounds (without being served) appear on the petition and support the view, which ultimately prevails, *i.e.*, support a successful or oppose an unsuccessful petition. Thus in a recent case, ⁽²⁴⁾ in which debenture-holders, who were the plaintiffs in an action against a company to enforce their securities, had given notice of opposition to a petition by a creditor for a compulsory winding-up order and on the hearing of the petition a supervision (and not a compulsory) order was made, the Court held the debenture-holders entitled to their costs; (B) to give no costs to those who (not being served) support an unsuccessful or oppose a successful petition; but (C) to make a petitioner pay the costs of persons, who appear to answer and succeed in refuting unfounded charges made against them.

Persons intending to appear at the hearing of the winding-up petition, must clearly state in their notice to the company, whether they will support or oppose the petition, or, if the company is in voluntary liquidation, whether they intend to support the compulsory winding up or a voluntary winding up under supervision. Unless this is clearly stated, the persons so appearing will not be allowed their costs.⁽²⁵⁾

“ Where the assets are deficient even for the payment of costs, (iii) When the costs of the petition to wind up are entitled to priority over the other costs, and even over those of the liquidator.” (26)

The petitioner is the person, who has brought the matter before the Court and obtained the order to wind up, and his costs are a first charge upon the estate.⁽²⁷⁾

(23) *In re Marlborough Club Co.*, 1 Eq. 216.

(24) *In re Dore Gallery, Limited*, 35 Sol. Jo. 480; W.N. (1891), p. 98. As to the priority of debenture and debenture stock holder's charge over costs of obtaining winding-up order, see *in re Anglo-Austrian Printing Co., Brabourne v. Same*, (1895) 2 Ch. 891. See Simonson on Debenture and Debenture Stock, 4th Ed., 1918, pp. 293-294.

(25) *Woodrow v. Hooper & Co., Ltd.*, 37 Sol. J. 286; (1893) W.N. 38.

(26) See Lindley, p. 1166; *In re New York Exchange Co.*, (1898) 1 Ch. 371; *In re Freehold Land and Brick-making Co.*, 9 Eq. 367, 369.

(27) *In re Audley Hall Cotton Spinning Co.*, 6 Eq. 245.

"Where, however, on the petition of a creditor an order is made continuing the voluntary winding up of a company under the supervision of the Court, the costs of the liquidator incurred previously to the order are payable in priority to the petitioner's costs of obtaining the order, but the petitioner's costs are payable in priority to the costs incurred by the liquidator subsequently to the order." (28)

(iv) When petitioner ordered to pay costs.

If a creditor knows before he presents his petition for a winding-up order, that such order will be utterly useless to him, the petition will be dismissed with costs. (29)

"Where the petition for a compulsory winding-up presented by a creditor, to whom the company owed £80, was opposed by creditors to the extent of £20,000, who had held a meeting, at which a resolution for voluntary liquidation had been passed, and the Court was satisfied, that that was the best course, the Court dismissed the petition; and, as what the Court considered a reasonable offer had been made by the company to the petitioner after the presentation of the petition, the order only gave the petitioner his costs up to the time, when such offer was made." (30)

(v) Costs of second petition.

If two petitions are presented and the second petition is beneficial to the creditors, the second petitioner will be entitled to his costs. (31)

Priority of debentures over liquidator's costs of carrying on business.

"The liquidator of a company, which has charged all its assets (including uncalled capital), in favour of debenture or debenture stock-holders, should not carry on the business of such company, unless his expenses are provided for; for the costs of carrying on the business of a company are not payable as costs of preservation out of the property comprised in the debenture or debenture stockholder's securities. The costs of carrying on the business of a company, even though such business ultimately realises more than it would have realised, had the business not been carried on, are not costs of preservation, which the liquidator of the company can

(28) *In re New York Exchange*, (1893) 1 Ch. 371.

(29) *In re Chapel House Colliery Co.*, 24 Ch. Div. 259.

(30) *In re Langley Mill Steel and Ironworks Co.*, 12 Eq. 26.

(31) *In re Commercial Bank of South Australia*, 33 Ch. D. 174.

claim to have recouped out of the assets charged in favour of the company's debenture or debenture stock-holders⁽³²⁾.

Hence, if debentures or debenture stock charged on the assets of a company are outstanding, when such company is ordered to be wound up, the liquidator should not carry on the business himself, but should get a debenture or debenture stock-holder to commence a debenture or debenture stock-holder's action⁽³³⁾.

In such a case the liquidator is generally appointed receiver and manager and his expenses would thus be provided for.⁽³⁴⁾

"Debentures or debenture stock, which constitute a floating charge on the assets of a company, will not prevent a solicitor employed by such company from acquiring a solicitor's lien on the deeds and papers of the company. Neither will a proviso (frequently inserted in debentures) stating, that *the company shall not* be at liberty to *create* any mortgage or charge in priority to the debentures, interfere with a solicitor's lien on the documents of the company, which has issued such securities. So long as the debenture continues to be a floating security, the debenture-holder cannot interfere with the company's business being carried on in the ordinary way or prevent the solicitor employed by the company in the ordinary course of its business from acquiring the ordinary solicitor's lien. The lien, being a right given by general law, has been held *not* to be a charge or, at any rate, not a charge *created by the company*. Hence a solicitor is not precluded by such a proviso from asserting his lien in priority to the debenture-holders⁽³⁵⁾.

Priority of
solicitor's
lien over
debenture-
holder's
charge.

But a solicitor to a company, who acts both for the company and the debenture or debenture stock-holders of the company, may not set up against such holders his lien for costs (due to him by the

(32) *Ex parte Grissell*, 3 Ch. Div. 411; *In re Omerod, Grierson & Co.*, W.N. (1890) 217; *In re Marine Mansions Co.*, 4 Eq. 601. As to how far the costs of realisation and preservation rank above the debenture or debenture stock-holders' charge, see Simonson on Debenture and Debenture Stock, 4th Ed. 1913, Bk. II, Ch. III, S. v. (4).

(33) Simonson on Debentures and Debenture Stock, 4th Ed., 1913, p. 328.

(34) See Simonson on Debentures and Debenture Stock, 4th Ed., 1913, pp. 328 (329).

(35) *Brunton v. Electrical Engineering Corp.*, (1892) 1 Ch. 434. This case was held not to fall within the authority of *In re Snell*, 6 Ch. D. 105; *In re Mason and Taylor*, 10 Ch. D. 729. As to solicitor's right against receiver to retain costs paid by company to solicitor, see *Re British Tea Table, Pearce v. Same & Co.*, 101 T.L.R. 707.

company) on the title-deeds, which were originally held by him as solicitor for the company but subsequently as solicitor for the holders; for, if the company and the debenture or debenture stock-holders had been represented by separate solicitors, it would have been the duty of the solicitor acting on behalf of the debenture or debenture stock-holders to see, that his clients obtained possession of the title-deeds, and, as the solicitor acting for both parties must be presumed to have performed his duty to both his clients, he will be taken to have retained possession of the title-deeds on behalf of the debenture or debenture stock-holders and will therefore not be allowed to assert his lien on such title-deeds for costs due to him by the company.”⁽³⁶⁾

Costs of
application
for receiver.

The Court has a discretion ⁽³⁷⁾ to deal with the costs of a motion for a receiver (or a receiver and manager) at the time of the application or the costs may be ordered to be costs in the action. ⁽³⁸⁾

The costs of a motion for a receiver (or a receiver and manager) are sometimes reserved until the hearing, ⁽³⁹⁾ even though the application is refused.⁽⁴⁰⁾

Receiver's
right to
retain costs
properly
incurred by
him.

“The receiver (or receiver and manager) is entitled to retain out of the funds collected by him his costs, charges and expenses properly incurred in the discharge of his ordinary duties and in extraordinary services, which have been sanctioned by the Court”.⁽⁴¹⁾

“Sometimes, however, if a receiver (or receiver and manager) is successful, he may be entitled to be indemnified as to the costs incurred by him in bringing or defending an action, even though he has not previously obtained the sanction of the Court.”⁽⁴²⁾

But, as a general rule, a receiver (or receiver and manager) should not incur extraordinary expenses without the sanction of the Court.⁽⁴³⁾

⁽³⁶⁾ *In re Snell*, 6 Ch. D. 105.

⁽³⁷⁾ R.S.O. O. XLV, r. 1 (English Rules).

⁽³⁸⁾ *Tillett v. Nixon*, 25 Ch. D. 238.

⁽³⁹⁾ *Chaplin v. Young*, 6 L.T.R. 97.

⁽⁴⁰⁾ *Cooper v. Crusswell*, 12 W.R. 299 (Eng.).

⁽⁴¹⁾ *Malcolm v. O'Callaghan*, 9 M. & C. 52, 59; *Re Glasdir Copper Mines Ltd.* (1906) 1 Ch. (C.A.) 365. See, also, *Boehm v. Goodal*, (1911) 1 Ch. 155.

⁽⁴²⁾ *Bristowe v. Needham*, 2 Ph. 190. But a receiver is not entitled to an indemnity against costs incurred by him in defending an action charging him with fraud while acting as receiver. (*Re Dunn, Brinklow v. Singleton*, (1904) 1 Ch. 648.

⁽⁴³⁾ See *Ex parte Isard*, 23 Ch. Div. 75, 80.

Section 13. Divorce and other Matrimonial Proceedings.

Provisions of the Code of the Civil Procedure applied to proceedings in matrimonial suits under Divorce Act.

Provisions of the Indian Divorce Act regarding power of Court to order adulterer to pay costs.

Provisions of the Indian Divorce Act and the English Acts as to Court's power to award costs—Difference between.

Principles of English Law to be followed in the matter of awarding costs.

Husband's liability for wife's costs.

Husband's liability, extent of :—

- (i) Not limited to estimated costs for which security was given.
- (ii) Husband may be directed to pay costs even though no security has been given.
- (iii) Wife's costs to be kept within narrow limits.

Husband's liability for wife's costs—Reason of the rule as to :—

- (i) Wife's property being given to husband by the rule of the English Common Law.
- (ii) Wife being wholly occupied in house-hold duties, and consequently being unable to acquire any property.
- (iii) Wife's necessities to be supplied by the husband.
- (iv) Wife's poverty not to be a bar to justice being done.
- (v) Wife's solicitor acting honestly to be protected from loss.

Husband's liability for costs, exceptions to the rule as to :—

- (i) Misconduct of solicitor.
- (ii) Wife possessed of sufficient separate property.

Husband's liability for costs—Application of the rule as to :—

- (i) Where wife is unsuccessful.
- (ii) Where husband apparently unable to pay costs.
- (iii) Where guilty wife is successful on counter-charges.
- (iv) Where new trial granted.
- (v) Where jury disagree.
- (vi) Where wife is possessed of separate property.

Husband's liability, limits for the application of the rule as to :—

- (i) Suit brought by parent in his own interest.
- (ii) Wife delaying her application for costs.
- (iii) Wife's suit must be *bona fide*.
- (iv) Wife failing in first suit—Costs of second suit.
- (v) Wife should be without property of her own.

Husband's liability for wife's costs—Rule as to, to what classes of persons applicable :—

- (i) Non-applicability of rule to Mahomedans.
- (ii) Applicability of rule to Parsis.
- (iii) Applicability of rule where parties are domiciled abroad.

Husband restrained by injunction.

- Husband dying *pendente lite*—Order for costs against his executors.
- Husband's liability for costs—Application when made.
- Husband (petitioner) failing to comply with order to give security for wife's costs.
- Husband (respondent) failing to comply with order to give security for wife's costs.
- Husband paying money to meet wife's costs, disposal of.
- Husband paying wife's costs—How such costs are taxed.
- Taxation of wife's costs, practice as to.
- Taxation, discretion of Registrar, in the matter of.
- Taxation—Practice of English and Indian Courts, in the matter of.
- Taxation, review of order relating to.
- Expenses of witnesses.
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- Attorney's lien for wife's costs.
- Solicitor's costs.
- Solicitor guilty of misconduct.
- Solicitor must satisfy himself as to reasonableness of wife's defence.
- Solicitor neglecting to get usual order for wife's costs.
- Costs where husband unable to pay.
- Costs where wife sues *in forma pauperis*.
- Costs in case of withdrawal of suit.
- Costs of wife in case of cross-suits.
- Costs where parties are partially successful.
- Costs where suit is by father of minor husband in such father's own interests.
- Costs where suit is by lunatic husband's committee.
- Costs where suit is by next friend of minor husband.
- Costs, guardian's liability for.
- Costs allowed to the wife, items of :—
 - (i) Costs incurred by way of counsel's fees.
 - (ii) Costs of commission to examine witness.
 - (iii) Costs of journey to procure information.
 - (iv) Costs of witnesses how far allowable.
 - (v) Costs of wife's proctor.
 - (vi) Costs of wife on appeal.
 - (vii) Costs of new trial.
 - (viii) Costs where husband's petition dismissed on ground of collusion.
 - (ix) Costs of guilty wife.
- Costs, not allowed to wife, items of :—
 - (i) Costs of application for time.
 - (ii) Costs of motion to examine husband on a petition for alimony.
 - (iii) Costs of unsuccessful opposition to motion for further particulars.
 - (iv) Costs of unnecessary appearance of wife.
 - (v) Costs of application to Court which should be made in Chambers.
 - (vi) Costs of obtaining information.
 - (vii) Costs of appeal.

- (viii) Motion to convert petition for dissolution into one for judicial separation.
- (ix) Unsuccessful application for particulars.
- (x) Unsuccessful application for access to children.
- (xi) Costs of unsuccessfully making or opposing an interlocutory application.
- (xii) Costs of preventing decree "*nisi*" from being made absolute.
- (xiii) Unsuccessful appeal against an interlocutory order.
- (xiv) Costs of special jury.
- (xv) Costs of unnecessary appearance.
- (xvi) Costs of unfounded charges.
- (xvii) Costs of application to correct an unexplained mistake.
- (xviii) Costs not applied for until judgment given against her.
- (xix) Costs incurred previous to filing of petition.
- (xx) Costs of wife having separate property.
- (xxi) Costs of wife not suing "*bona fide*."
- (xxii) Costs of wife on intervention.
- (xxiii) Costs of wife evading service of decree for restitution of conjugal rights.
- (xxiv) Costs of parties governed by Succession Act—Operation of S. 4 of the Act.

Costs ordered to be paid by wife to husband in certain cases.

Costs against wife if she has separate estate.

Costs, co-respondent's liability for, when arises :—

- (i) Adultery must be established.
- (ii) He must have known that respondent was a married woman.
- (iii) Wife's conduct—She ought not to be profligate.
- (iv) Husband to be free from guilt.
- (v) Co-respondent's adultery must have been uncondoned.

Costs payable by co-respondent, amount of.

Costs against co-respondent—Practice.

Costs of inquiry before Registrar—Apportionment of damages.

Costs, when co-respondent not liable to pay :—

- (i) Where wife lives as prostitute apart from husband.
- (ii) Where co-respondent is ignorant of the fact of wife's marriage.
- (iii) Where wife leads an abandoned life.
- (iv) Where co-respondent honestly believes wife's marriage to be void.
- (v) Where husband is guilty of condonation or connivance.
- (vi) Where the jury do not agree at first trial.

Co-respondent—When condemned in part only of the costs.

Co-respondent and wife—When both condemned in costs.

Co-respondent and petitioner charged with collusion—Costs of Queen's Proctor.

Co-respondent, when allowed costs.

Co-respondent, when ordered to pay his own costs.

Costs, order as to—Review.

Costs in case of judicial separation—Return to cohabitation—Withdrawal of suit.

Provisions of the Code of the Civil Procedure applied to proceedings in matrimonial suits under Divorce Act.

S. 45 of the Indian Divorce Act⁽¹⁾ enacts that "Subject to the provisions contained in the Divorce Act all proceedings under that Act between party and party shall be regulated by the Code of Civil Procedure".⁽²⁾

Under this provision, Courts, in the exercise of their matrimonial jurisdiction, have and exercise the same discretion which they exercise in other cases, relating to costs, and which is conferred on them by the Code of Civil Procedure.⁽³⁾

Provisions of the Indian Divorce Act regarding powers of Court to order adulterer to pay costs.

Under S. 35 of the Divorce Act Courts have power to order the adulterer to pay the costs of a suit for divorce or judicial separation.⁽⁴⁾

Provisions of the Indian Divorce Act and the English Acts as to Court's power to award costs—Difference between.

Act IV of 1869, which deals about divorce, contains no exhaustive provisions giving the Court a general power over costs, such as that conferred on the English Court by S. 51 of 20 & 21 Vict., c. 85; but the omission is probably only due to the fact that the power is fully given by the Code of Civil Procedure, by which all

(1) Act IV of 1869.

(2) See Act IV of 1869 (Divorce), S. 45.

(3) See S. 35 of the Code of Civil Procedure (Act V of 1908). On the subject-matter of this section, see Macrae on the Law of Divorce in British India, Calcutta, 1871, pp. 150—160; Authors' Statute Law relating to Marriage and Divorce in British India, published in the Lawyer's Companion Series, 1912, pp. 913—935 (from which much that is contained in this section is taken); Encyclopædia of the Laws of England, 2nd Ed., Vol. IX, heading, "Marriage," pp. 9—23; Dixon on Divorce, 4th Ed., 1908, pp. 251—294; Lush on Husband and Wife, 3rd Ed., 1910, pp. 295—300; 321—323; 428—432; 505—512; Rattigan on the Law of Divorce in British India, 1897, pp. 187—199; 362—383; Browne and Powles on Divorce, 7th Ed., 1905, pp. 208—228; 509—571; Oakley's Divorce Practice, pp. 241—278; Gwynne Hall, pp. 291—357; Yearly Practice, 1914, p. 1080; Annual Practice, notes under O. LXV, r. 1; Maw's Digest, Vol. VII, Cols. 954—981; 1302—1303; 1826—1832; 1874—1875; Halsbury's Laws of England, Vol. XVI, pp. 428—430; 513; 523; 547—550; 580—584; see, also, Geary on Marriage, Passim; Foote, Private International Law, 3rd Ed., 1904; Westlake, Private International Law, 4th Ed.; Dicey's Conflict of Laws; Story's Conflict of Laws; Cripp's Church and Clergy, 6th Ed.; "Marriage Commission Report, Parliamentary Papers (1868). See, also, *Phillips v. Batho*, 17 C.W.N. cclxi (journal portion).

(4) See S. 35 of the Indian Divorce Act (IV of 1869). The section runs as follows:—
"Whenever in any petition presented by a husband, the alleged adulterer has been made a co-respondent, and the adultery has been established, the Court may order the co-respondent to pay the whole or any part of the costs of the proceedings: Provided that the co-respondent shall not be ordered to pay the petitioner's costs—
(1) if the respondent was at the time of the adultery, living apart from her husband

proceedings under Act IV of 1869 are, subject to the provisions of the Act itself, to be regulated.⁽⁵⁾

The Courts administering the Divorce Act are directed to act and give relief on principles and rules similar to those on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. ^{Principles of English Law to be followed in the matter of awarding costs.} ⁽⁶⁾

It has been the rule in England, and it has been followed in this country also, that a wife should not be precluded by want of means from establishing her case either as petitioner or respondent, and it is usual for the wife to apply pending the hearing that the husband should make a deposit or give security for the estimated costs that might be incurred by his wife.⁽⁷⁾ ^{Husband's liability for wife's costs.}

In a case, where there were pending a suit by the wife for judicial separation and a suit by her husband for divorce, it was held that the wife, whose property was retained by her husband, was entitled to her costs.⁽⁸⁾

In a suit for divorce instituted by a husband against his wife, the Court has a discretion to make the husband pay the wife's costs already incurred, and to give security for her future costs.⁽⁹⁾ Such relief will not be granted by the Indian Courts, unless special circumstances are shown calling for it.⁽¹⁰⁾

A wife, without property of her own, seeking a divorce, is entitled to have provision made by her husband for the payment of her costs in the suit.⁽¹¹⁾

and leading the life of a prostitute, or (2) if the co-respondent had not, at the time of the adultery, reason to believe the respondent to be a married woman. Whenever any application is made under S. 17, the Court, if it thinks that the applicant had no grounds or no sufficient grounds for intervening, may order him to pay the whole or any part of the costs occasioned by the application."

(5) See *Macrae on Divorces*, 1871, p. 150. See, also, S. 45 of the Divorce Act (IV of 1869). See, also, S. 35 of the Divorce Act (IV of 1869).

(6) See *Macrae on Divorce*, 1871, p. 150. See S. 7 of the Divorce Act (IV of 1869). *W. G. Mayhew v. Sarah Anna Mayhew*, 19 E. 293. S. 7 runs as follows:—"Subject to the provisions contained in this Act the High Courts and the District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which in the opinion of the said Courts, are, as nearly as may be, conformable to the principles and rules on which the Court for divorce and matrimonial causes in England for the time being acts and gives relief." Divorce Act (IV of 1869), S. 7.

(7) *Ellen Thomas Boyle v. William Mc. Cormack Boyle*, 7 C.W.N. 565 (566).

(8) *Georgucopulas v. Georgucopulas*, 29 C. 619.

(9) *W. G. Mayhew v. Sarah Anna Mayhew*, 19 B. 293 (296).

(10) *Natal v. Natal*, 9 M. 12 (13).

(11) *Ibid.*

Rule 158 (as amended 14th July, 1875) of the English Rules and Regulations in divorce cases which govern the practice of the Court in England, ought, having regard to section 7 of the Indian Divorce Act IV of 1869, to govern the practice of Indian Courts.⁽¹²⁾

The husband, in a suit for dissolution of a marriage, will be required (following the English rule) to deposit in Court the necessary costs of the wife, where she has not got separate property sufficient for her support and for the costs of suit.⁽¹³⁾

Husband's liability, extent of

(i) Not limited to estimated costs for which security was given.

The husband's liability extends not merely to the estimated costs for which he has already given security, but to all costs actually incurred by the wife.⁽¹⁴⁾

At one time in England, it was held, that, under rule 159 of the English Divorce Court Rules, the discretion of the Judge to allow costs at the hearing to the wife was limited to the amount for which the security had been given or deposit made by the husband; but in *Robertson v. Robertson*,⁽¹⁵⁾ it was decided that, where the wife was allowed costs, and where there were no improper proceedings taken on her behalf, she should be entitled to the actual costs incurred by her.⁽¹⁶⁾

(ii) Husband may be directed to pay costs even though no security has been given.

"If an order can be made allowing costs in addition to the amount for which security has been given, there is no reason why in cases where no security has been given or deposit made, an order should not be passed directing the husband to pay all costs reasonably incurred by his wife."⁽¹⁷⁾

(iii) Wife's costs to be kept within narrow limits.

The costs of the respondent (wife) ought to be kept within the narrowest possible limit consistent with her being able to place her case fairly before the Court. No extravagances in the way of costs can be allowed against the husband (petitioner).⁽¹⁸⁾

(12) *W. G. Mayhew v. Sarah Anna Mayhew*, 19 B. 293.

(13) *Thomson v. Thomson*, 14 C. 580.

(14) *Flower v. Flower*, L.R. 9 P. 132; 42 L.J. P. & M. 45; see, also, *Hall v. Hall*, 1891, P. 302; *Robertson v. Robertson and F.*, 6 P.D. 119; *Jones v. Jones*, L.R. 2 P. 333; 41 L.J. P. & M. 21, 53.

(15) L.R. 6 P.D. 119.

(16) See the same cited in *Ellen Thomas Boyle v. William Mc Cormack Boyle*, 7 C.W.N. 565 (567).

(17) *Ellen Thomas Boyle v. William Mc Cormack Boyle*, 7 C.W.N. 565 (567).

(18) *Per Farran, J.*, in *W.G. Mayhew v. Sarah Anna Mayhew*, 19 B. 293 (296).

The foundation of the practice which prevailed in the Ecclesiastical Court of requiring the husband to give security for the costs of the wife in a matrimonial suit was the absolute right which the law formerly gave the husband upon marriage to the whole of the wife's personal estate and to the income of her real estate, leaving her destitute of all means to conduct her case.⁽¹⁹⁾

The principle on which the husband is, as a rule, liable for the wife's costs is, that the husband is presumed to have the whole of the wife's property; but on this presumption being rebutted by proof that the wife has separate property, *cessante ratione cessat lex*.⁽²⁰⁾ But it is not sufficient to show that she has separate property sufficient for her own support; it must further be proved that she has enough also for the payment of her costs.⁽²¹⁾

In the case of *Young v. Young* ⁽²²⁾ Pigot, J., said: "Were the matter not concluded by authority, I should give effect to another consideration not referred to, that, inasmuch as the wife, in discharge of her duties as mistress of the household, is wholly occupied, it is impossible for her to acquire any property, and I should have thought that consideration might fairly be used to influence the Court in determining whether in cases such as these the wife might not be entitled to obtain the necessary costs from her husband apart from any question of right to her property."⁽²³⁾

The foundation of the rule is that a wife can bind her husband for necessaries, and a suit, brought with reasonable and probable cause, will be considered a necessity.⁽²⁴⁾

It has been the rule in England that a wife should not be precluded by want of means from establishing her case as petitioner or respondent.⁽²⁵⁾ It has been held that the same rule holds good here, and that similar considerations apply to this country also.⁽²⁶⁾

(19) *Per* Pontifex, J., in *Proby v. Proby*, 5 C. 357 (362).

(20) *Wells v. Wells*, 38 L.J. P. & M. 72; *Holmes v. Holmes*, Poynter 260.

(21) *Belcher v. Belcher*, 1 Curt. 444; *Wilson v. Wilson*, 2 Hagg. Cons. Rep. 203.

(22) 23 C. 916, Note.

(23) *Per* Pigot, J., in *Young v. Young*, 23 C. 916, Note.

(24) See Argument of Counsel in *Fowle v. Fowle*, 4 C. 260 (269)=3 O.L.R. 484; citing *Jones v. Jones*, L.R. 2 P.&D. 331; *Brown v. Ackroyd*, 5 E. & B. 819.

(25) *Boyle v. Boyle*, 7 C.W.N. 565 (566)=30 C. 631; see, also, *Robertson v. Robertson*, L.R. 6 P.D. 119; (*Otway v. Otway*, L.R. 13 P.D. 141, F.)

(26) *E. T. Boyle v. W. M. Boyle*, 7 C.W.N. 565 (566)=30 C. 631.

In a case where it is shown that a wife has no means of her own she is not precluded from obtaining costs from her husband on the dismissal of her petition for divorce against him, simply because she had failed to apply pending the hearing that the husband should make a deposit or give security for her estimated costs.⁽²⁷⁾

(v) Wife's solicitor acting honestly to be protected from loss.

It is not just that a wife should be left without the means of putting her case fairly before the Court, or that a practitioner should run the risk of losing the proper remuneration for his labours, if he takes up a case which he honestly believes to be genuine, but which may after all turn out to be unfounded.⁽²⁸⁾

The reasons for this rule have been stated as follows: "If the question of costs were a question solely between husband and wife, it would be reasonable that a husband who had successfully rebutted a charge brought against him by his wife should not be obliged to pay her costs. But unfortunately in the vast majority of cases the wife has no means of her own. She has to find an attorney to take up her case for her, and if she could not obtain from her husband the means of employing him she would be powerless, and however good a cause she might have for taking proceedings she would be unable to enforce her rights. Therefore it is necessary to take into consideration the position of the attorney, and provision is made for his payment by enabling the wife to call upon the husband to give security for the costs of the hearing to the amount that may be fixed by the registrar. The course was taken in this case, and the amount of security was fixed at £60; and the wife's attorney undertook the litigation on her behalf, in the anticipation that he would be allowed his costs out of that sum for which security had been given. By not allowing the costs, the Court would be depriving the attorney of that which he looked to, and had a right to look to, as his security in conducting the litigation on the wife's behalf. It is plain that the Court is not absolutely bound to give the wife her costs, but it would only be justified in refusing them in cases when it appeared that the attorney had done something wrong, or that he had instituted proceedings without reasonable ground, that is, when he had the means of seeing,

(27) *Ellen Thomas Boyle v. William McCormack Boyle*, 7 O.W.N. 565 = 30 C. 631.

(28) See Browne and Powles on Divorce, cited in *W. G. Mayhew v. Sarah Anna Mayhew*, 19 B. 298 (295); *Georgucopulas v. Georgucopulas*, 29 C. 619 (621).

before instituting the suit, that it was one which ought not to be instituted. When such a case arises, I will disallow the wife's costs, and thus cause the punishment to fall on the attorney.....It would be in the highest degree prejudicial to the interests of the women who are litigants in this Court to cast upon the attorneys whom they consult the dangerous responsibility of coming to a conclusion in doubtful cases as to what is likely to be the finding of the Court upon the facts submitted to them. If I were to disallow these costs I should say in effect that the wife's attorney ought to have come to the conclusion that the charge of cruelty could not be made out. But the attorney ought not, I think, to be compelled to stake his chance of remuneration upon his judgment upon such a question." (29)

"On principle it is plain that the whole foundation of the rule depends on the liability of the husband to pay the necessary and fair costs of the wife's defence. I take it that that rule is founded on the old English law, which gave the whole personal property of the wife to the husband, and gave him also the income of her real estate; so that, in the absence of a settlement (which, as we all know, is a comparatively modern introduction), she was absolutely penniless, and, therefore, the Ecclesiastical Court not only provided for the costs of her defence but also gave her alimony *pendente lite* so as to provide for her maintenance. Of course the husband may say 'it is a hardship on me to have to pay the costs of my wife's false defence to a charge of adultery, or the costs of a false counter-charge against myself of adultery or cruelty.' No doubt it is a hardship, but what would the wife have to say in answer? Suppose the wife had brought him £10,000, or £20,000, or £50,000, would not she have a right to say, 'You have taken all my property from me, and am I to be left defenceless and not able to meet your false charge of adultery?' Of course it is manifest that there must be money provided for the wife to defend herself, and who is to take up the defence? Only a solicitor, who must look for payment, not to the wife, who has nothing, but to the husband; and, therefore, it was quite right to secure him that payment by getting money paid into Court, and finally by payment of the proper costs incurred when the suit was heard. Now, as was observed by the learned Judge in the case of *Flower v. Flower*, it is not the solicitor's fault

if the wife is wrong. If he himself conducts the litigation properly, if he fairly investigates the charges and sees a reasonable foundation for a defence, he is not to lose his costs and the fair remuneration for his labour, because he is not successful. No solicitor would engage in the practice of the profession on the terms of not getting paid whenever he was unsuccessful; and, therefore, unless he himself has been guilty of misconduct, there is no reason for depriving him of his costs. It appears to me, therefore, that where the defence is fairly and reasonably conducted, the solicitor ought to be paid in full his costs, that is, his costs properly incurred.....I have given that what I believe to be the true view of the origin of the liability of the husband; but I am not obvious to the nobler view, if I may so express it, held in the House of Lords, that no gentleman, indeed, no man of right feeling, would wish that his wife should not have the means of fairly investigating and fairly defending herself against so odious a charge as that of adultery. Really, if there had not been, as I do believe there is, the common and pecuniary reason for fixing the husband with costs, I think that that reason ought to be sufficient to all right-minded men.”(30)

Husband's liability for costs, exceptions to the rule as to (i) Misconduct of solicitor.

To the general rule as laid down above, there are two exceptions: “If the wife's solicitor is guilty of misconduct,—if he either knowingly promotes a case which it must be clear to anybody has no foundation at all, so that he is countenancing improper litigation, or if he takes steps which are merely oppressive or obviously unnecessary, or if he crowds a case with absurd evidence, all these are reasons why, if he so misconducts himself, the costs of the wife should be disallowed either in whole or in part.” (31)

(ii) Wife possessed of sufficient separate property.

A wife, who is possessed of sufficient separate property of her own, is not entitled to burden the husband with the costs of a suit in which she has been unsuccessful, even though security for her costs may have been given by him.(32) In such a case, she may herself be condemned in costs.(33)

(30) *Per* Jessel, M. R., in *Robertson v. Robertson*, 6 P.D. 119.

(31) *Ash v. Ash*, (1893) P. 222; *Wilson v. Wilson*, L.R. 2 P. 435; *Hough v. Hough*, 71 L.T. 703.

(32) *Heal v. Heal*, L.R. 1 P. 300; 36 L.J. P. & M. 62.

(33) *Milne v. Milne and Flower*, L.R. 2 P. 202.

This rule as to the husband's liability for wife's costs holds good even if the wife be unsuccessful.⁽³⁴⁾

Husband's liability for costs—
Application of the rule as to
(i) Where wife is unsuccessful

The Court would make an order for the taxation and payment of the wife's costs in a matrimonial suit against the husband, notwithstanding his apparent inability to pay them.⁽³⁵⁾

(ii) Where husband apparently unable to pay costs.

In one case, where a guilty wife succeeded in establishing counter-charges against her husband, the Court gave her costs.⁽³⁶⁾

(iii) Where guilty wife is successful on counter-charges.

Where a new trial is granted on application of the wife, the Court will not usually impose upon her the terms as to payment of costs, if she has no means, but the husband must pay the costs of both parties.⁽³⁷⁾

(iv) Where new trial granted.

Where a jury disagreed, the Court gave the wife her full costs over and above the amount deposited in Court.⁽³⁸⁾ The same rule holds good not only as to the costs of the lower Court, but also as to the reasonable costs of the appeal.⁽³⁹⁾

(v) Where jury disagreed

"The rule has always been that an order as to costs pending the hearing ought not to be made against the husband if the wife is possessed of means (technically styled separate property) sufficient to enable her to pay her own costs in the first instance, the reason for the continuance of the rule, whatever may have been its origin, being that, it is not considered just either that a wife should be left without the means of putting her case fairly before the Court, or that a practitioner should run the risk of losing the proper remuneration for his labours if he take up a case which he honestly

(vi) Where wife is possessed of separate property.

(34) *Fowle v. Fowle*, 4 C. 260 (281)=3 C.L.R. 484; *Jones v. Jones*, L.R. 2 P. & D. 331, cited in argument *Fowle v. Fowle*, 4 C. 260 (269)=3 C.L.R. 484.

(35) *Ward v. Ward*, 1 S. & T. 484; 29 L.J.P. 17.

(36) *Caldecott v. Caldecott*, 29 L.T. 699.

(37) *Nicholson v. Nicholson*, 3 S. & T. 214; 32 L.J.P. 127; 9 L.T. 118.

(38) *Hurley v. Hurley*, (1891) P. 367; 61 L.J. 14; 65 L.T. 353.

(39) *Fowle v. Fowle*, 4 C. 260 (281)=3 C.L.R. 484; *Jones v. Jones*, L.R. 2 P. & D. 331, cited in argument in *Fowle v. Fowle*, 4 C. 260 (269)=3 C.L.R. 484.

believes to be genuine, but which may, after all, turn out to be unfounded.”⁽⁴⁰⁾ It is a rule of public policy.⁽⁴¹⁾

“The relative incomes of husband and wife may be taken into account by the judge when exercising his discretion as to whether he will allow the wife her costs already incurred *pendente lite*, and he is not bound to refuse the application because the wife has separate property the amount of which is much more than sufficient for the payment of her costs.”⁽⁴²⁾

The question whether the wife should or should not have her costs depends to a considerable extent upon the property which the wife may have.⁽⁴³⁾ If it appears that the woman retains her property in spite of her marriage, she will not be entitled to her costs from her husband.⁽⁴⁴⁾

Husband's liability, limits for the application of the rule as to (i) Suit brought by parent in his own interests.

As the presumption is only based on the rule of English law that a woman's property by marriage passes to her husband, it follows as a consequence, that, where the husband is not the petitioner, as in suits brought by a parent in his own interest to have the marriage of minors declared null and void, the wife's costs cannot before the hearing be taxed against the petitioner.⁽⁴⁵⁾

(ii) Wife delaying her application for costs.

Again, if the wife delay her application for costs until after the trial, and the decision be against her, she cannot then have her costs, because the Court never awards costs to a party whose delinquency has been established.⁽⁴⁶⁾

(iii) Wife's suit must be *bona fide*.

The wife's costs when taxed *de die in diem* are generally payable to the wife or her attorney out of the fund in Court; but if the Court has reason to suspect that the suit has been instituted *mala fide*, it will order the sum deposited to be retained in the registry to abide the event of the hearing.⁽⁴⁷⁾

(40) Browne and Powells on Divorce, 5 Ed., p. 342.

(41) *Per* Farran, J., in *W. G. Mayhew v. Sarah Anna Mayhew*, 19 B. 293.

(42) *Allen v. Allen*, (1894) P. 134, cited in *W. G. Mayhew v. Sarah Anna Mayhew*, 19 B. 293.

(43) *Per* Stephen, J., in *Georgucopulas v. Georgucopulas*, 29 C. 619 (621).

(44) *Ibid.*

(45) *Wells v. Cottam and Wells*, 3 Sw. & Tr. 364.

(46) *Keats v. Keats and Montesuma*, 1 Sw. & Tr. 359; 28 L.J. P. & M. 57.

(47) *Rogers v. Rogers*, 4 S. & T. 92; 34 L.J.P. & M. 87.

If a wife brings a suit on one ground and fails, and she then brings a second suit seeking different relief and succeeds, her husband will only be condemned in one set of costs.⁽⁴⁸⁾

(iv) Wife failing in first suit—Costs of second suit.

As has already been stated, only a wife without property of her own seeking a divorce is entitled to have provision made by her husband for the payment of her costs in the suit.⁽⁴⁹⁾

(v) Wife should be without property of her own.

“At first there was some difference in principle between giving this relief to a woman seeking a divorce, and doing so in the case where the woman is the defending party. Upon consideration there is no reason for any such distinction. The English Divorce Courts have always given it in both cases and the reason, *viz.*, that otherwise the wife will, as a rule, be unable to continue the proceedings applies equally to both cases. The rules passed by the Courts for divorce and matrimonial causes in England under the English Divorce Act provide for the taxation of costs of a wife, who is petitioner or respondent, before the hearing as a matter of course, and for the registrar's ordering the husband to pay or give security for the costs of, and incidental to, the hearing.”⁽⁵⁰⁾ If she has property, that property of course will be available for her costs, and in that case the Courts here would probably refuse to make any order that the husband pay her costs until the suit has been decided, as is done by the English Courts when the wife has separate property. But when the wife has no separate property, the same reason for the practice requiring her husband to provide for her costs, namely, her inability otherwise to continue the proceedings still remains.⁽⁵¹⁾ She is not certainly, unless she has property, in a position to meet her husband on equal terms, and is, therefore, likely to be at a disadvantage, and this inequality between the contending parties is the reason for the practice in question.⁽⁵²⁾

In a case of judicial separation the Court, whilst expressing a strong opinion that the wife's charges against her husband were of

(48) *Ditchfield v. Ditchfield*, (1869) L.R. 1 P. & D. 729; cf. *Butler v. Butler*, (1890) 15 P.D. 32, 136, C. A.

(49) *Natal v. Natal*, 9 M. 12; distinguishing *Proby v. Proby*, 5 O. 357.

(50) *Natal v. Natal*, 9 M. 12.

(51) *Ibid.*

(52) *Natal v. Natal*, 9 M. 12 (14).

a trumpety character, refused to deprive her of the usual order, although she had a small separate estate, in the absence of any suggestion of improper conduct against her solicitor.⁽⁵³⁾

Husband's liability for wife's costs.

(i) Non-applicability of rule to Mahomedans.

The English law which makes the husband in divorce proceedings liable *prima facie* to the wife's costs, except when she is possessed of sufficient separate property, does not apply to divorce proceedings between Mahomedans.⁽⁵⁴⁾

(ii) Applicability of rule to Parsis.

The common law of England applies to Parsis who inhabit the town and the island of Bombay.⁽⁵⁵⁾ Under that common law, the wife is entitled to pledge her husband's credit and defend herself at his cost in any action that he may file against her for dissolution of his marriage with her. It is not necessary that the wife should be successful in the proceedings.⁽⁵⁶⁾ The costs of the wife payable by the husband are not limited to the amount paid into the Court secured by the husband for that purpose.⁽⁵⁷⁾ The solicitors of the wife must make all efforts to secure their costs from their real debtor, the husband, before they can be allowed to apply for a charging order against the wife's property recovered or preserved in the suit through their exertion.⁽⁵⁸⁾ The foundation for the common law rule is that where the wife finds it necessary to protect herself and her interest, more especially if she is attacked by her husband, she ought to have the means to do so and is, therefore, entitled to pledge her husband's credit for all proper and reasonable costs.⁽⁵⁹⁾

(iii) Applicability of rule where parties are domiciled abroad.

Where the parties are domiciled abroad (Greece) and the law of that country is not before the Court, it was held that S. 7 of the Act applies, and that the Court should act on the general principles of English Law.⁽⁶⁰⁾

Husband restrained by injunction.

In this case, the husband against whom an order had been made for depositing his wife's costs became entitled to a legacy. The Court granted an injunction to restrain him from receiving the legacy until the order as to costs was complied with.⁽⁶¹⁾

(53) *Aires v. Aires*, 65 L.T. 859.

(54) *A. v. B.*, 21 B. 77.

(55) *Pyane & Co. v. Pirooashah*, 13 Bom. L.R. 920 (932).

(56) *Ibid.*

(57) *Ibid.*

(58) *Ibid.*

(59) *Ibid.*

(60) *Georgucopulas v. Georgucopulas*, 29 C. 619 (621); following *Mayhew v. Sarah Anna Mayhew*, 19 B. 293.

(61) *Gillet v. Gillet*, 14 P.D. 158; 58 L.J.P. 84; 61 L.T. 401.

Where a husband died during proceedings for divorce, the Court made an order for the wife's costs against his executors.⁽⁶²⁾

Husband dying *pendente lite*—Order for costs against his executors.

Any application in the matter of costs must be made at least before the decree is finally settled.⁽⁶³⁾

Husband's liability for costs—Application when made.

The Court has no power to make any order as to costs which are for the first time asked for after the decree absolute.⁽⁶⁴⁾ It is, however, too late to ask for costs against any party after a decree has been made absolute.⁽⁶⁵⁾

Where the husband is the petitioner, and fails to comply with an order to deposit or give security for his wife's costs, all proceedings in the suit will be stayed on the application of the wife until such sum is deposited or secured.⁽⁶⁶⁾

Husband (petitioner) failing to comply with order to give security for wife's costs.

The subsequent bankruptcy of the husband is no sufficient ground to cancel or vacate an order to secure such costs.⁽⁶⁷⁾ But in certain cases, it has been held that, if it be proved that the husband is a man of no means, the Court will refuse to stay the proceedings upon the application of the wife.⁽⁶⁸⁾

Where an order has been made for payment by the husband, in a suit for dissolution of marriage, of the costs the wife is likely to incur in the suit, the proceedings will not be stayed if the husband has no means to deposit the costs.⁽⁶⁹⁾

Where, in a suit for dissolution of marriage by a husband, the wife applied for an order to stay proceedings until her costs were paid by her husband, and the husband's affidavit showed that he was a man without means, an enquiry as to means was directed.⁽⁷⁰⁾

(62) *Cunningham v. Cunningham*, (1897) 77 L.T. 405. See, also, *Townson v. Townson*, (1898) 67 L.J.P. 68; 78 L.T. 54.

(63) *Macrae on Divorce*, 1871, p. 160.

(64) *Wait v. Wait and Flower*, 40 L.J.P. & M. 30.

(65) *Wait v. Wait*, (1871) L.R. 2 P. & D. 228.

(66) *Keats v. Keats and Montezuma*, 28 L.J. P. & M. 138, note; *Hepworth v. Hepworth*, 2 S. & T. 414.

(67) *Morris v. Morris*, 15 L.T. 545.

(68) *Walker v. Walker*, 1 Curt. 560; see, also, *Thomson v. Thomson*, 14 C. 580.

(69) *Thomson v. Thomson*, 14 C. 580.

(70) *Ibid.*

Husband
(respondent)
failing to
comply with
order to give
security for
wife's costs.

Where the husband is the respondent and has failed to comply with an order to deposit, or give security for, a sum sufficient to cover his wife's costs, the order can be enforced against him in the manner provided by the Code of Civil Procedure for the execution of a money decree. Civ. Pro. Code, 1882, S. 220.⁽⁷¹⁾ Such failure may amount to contempt of Court.⁽⁷²⁾

Husband
paying money
to meet wife's
costs, disposal
of.

The money paid into Court by the husband to meet his wife's costs is primarily liable for the payment of those costs when taxed, although the co-respondent may have been condemned in all the costs, and the husband is unable to obtain them from him.⁽⁷³⁾

Where the husband had died before the hearing, the Court ordered that the costs incurred by the wife's solicitors for the hearing, should be taxed and paid to them out of the sum deposited by the husband in the registry to meet his wife's costs, with leave to the solicitors of the husband's executors to attend the taxation.⁽⁷⁴⁾

Husband
paying wife's
costs—How
such costs are
taxed.

The wife is generally entitled to have her costs taxed and paid by her husband from day to day, whether she be petitioner or respondent.⁽⁷⁵⁾

Taxation of
wife's costs,
matrimonial
practice as to.

The mode in which costs are taxed against a husband in matrimonial suits are the same as in other causes.⁽⁷⁶⁾ The Court has power to order the wife's costs to be taxed from time to time against the husband in a suit for dissolution of marriage.⁽⁷⁷⁾

Taxation,
discretion of
Registrar, in
the matter of.

The taxation of costs is in the discretion of the Registrar, and the Court will not interfere with his discretion in respect of particular items allowed or disallowed, unless it can be shown that the taxation proceeded on an erroneous principle.⁽⁷⁸⁾

Taxation—
Practice of
English and
Indian
Courts,
in the matter
of.

In England such costs are taxed as between party and party.⁽⁷⁹⁾ In India such costs are taxed, as a general rule, as between attorney and client.⁽⁸⁰⁾

(71) S. 36 and O. XX, r. 6 of the present Code (Act V of 1908).

(72) *Bats v. Bats*, 14 P.D. 17, C.A.

(73) *Evans v. Evans and Robinson*, 28 L.J. P. & M. 136.

(74) *Hall v. Hall*, 3 Sw. & Tr. 390.

(75) See *Macrae on Divorce*, 1871, p. 150.

(76) *Suggate v. Suggate*, 1 S. & T. 497.

(77) *Weber v. Weber and Pyne*, 1 S. & T. 220; cited in Argument in *Kelly v. Kelly and Saunders*, 3 B.L.R. App. 5.

(78) *Cooke v. Cooke*, 3 S. & T. 374.

(79) *Allen v. Allen and D'Acry*, 2 S. & T. 107.

(80) *Kelly v. Kelly and Saunders*, 3 B.L.R. App. 6.

The proper mode of reviewing an order as to taxation of costs is by moving for a rule to show cause why the taxation should not be reviewed, and not by an act on petition.⁽⁸¹⁾ Taxation, review of order relating to.

The number of witnesses whose expenses will be allowed is a question for the discretion of the Registrar.⁽⁸²⁾ He should allow the expenses only of such of them as there was reasonable ground for calling.⁽⁸³⁾ Expenses of witnesses.

The reasonable expenses of journeys and inquiries taken and instituted for the purpose of procuring information may also be allowed.⁽⁸⁴⁾ Expenses of reasonable journeys.

An attorney who has acted for a wife in a matrimonial suit, has a lien for his costs, not only on the fund paid into Court by the husband to meet his wife's costs, but also, if his costs exceed the sum so paid in by the husband, upon the alimony paid into his hands on behalf of the wife.⁽⁸⁵⁾ The wife's attorney or proctor will have a lien on the sum to the full extent of the costs.⁽⁸⁶⁾ Attorney's lien for wife's costs.

Monies deposited by a husband (respondent) as security for his wife's costs of a petition constitutes a fund paid in for the benefit of her attorney who would be entitled to have it applied for his benefit whatever the result of the petition, provided that he has been in no way to blame, and that rule would apply to monies deposited by a respondent appealing from the decision of the lower Court as security for the costs of the appeal in accordance with the Rules of the Bombay High Court.^(86 a)

"The costs of a solicitor employed by a married woman to institute proceedings on her behalf against her husband, to obtain a judicial separation, can only be recovered against the husband, when the necessity for such proceedings has been made out in point of fact."⁽⁸⁷⁾ Solicitor's costs.

(81) *Dickens v. Dickens*, 28 L.J. P. & M. 94.

(82) *Allen v. Allen and D'Acry*, 2 S. & T. 107.

(83) *Ibid.*

(84) *Ibid.*

(85) *Bremner v. Bremner and Brett*, L.R. 1 P. & D. 254 ; 36 L.J. P. & M. 11 ; *Kelly v. Kelly and Saunders*, 3 B.L.R. App. 4.

(86) *Kelly v. Kelly and Saunders*, 3 B.L.R. App. 4 (5).

(86-a) *Nusserwanjee Pestonjee Ardesir Wadia v. Eleonora Nusserwanjee Pestonjee Ardesir Wadia*, 38 B. 125 at p. 126 = 15 Bom. L.R. 593 = 20 Ind. Cas. 492.

(87) *Taylor v. Hailstone*, 52 L.J. Q.B. 101.

Solicitor
guilty of mis-
conduct.

When the husband has been ordered by the Registrar to give security for his wife's costs up to a certain amount, costs to that amount are always allowed her, whether she be successful or not, unless her solicitor has been guilty of some misconduct, or has instituted the suit knowing that it was without reasonable ground.⁽⁸⁸⁾

Solicitor
must satisfy
himself as to
reasonable-
ness of wife's
defence.

A solicitor acting for a wife is not entitled to rely on his client's instructions, but, to entitle him to look to the husband for payment of his costs, he must fairly investigate her defence, and satisfy himself as to its reasonableness.⁽⁸⁹⁾

Solicitor neg-
lecting to get
usual order
for wife's
costs.

If a solicitor does not follow the usual course and get an order against the husband for his costs whilst he is acting for the wife, he cannot do so after he has ceased to act for her. He will then be left to his ordinary remedy.⁽⁹⁰⁾

Costs where
husband
unable to
pay.

The Court will make an order, prior to the hearing, for the taxation and payment of the wife's costs against the husband, notwithstanding his apparent inability to pay them.⁽⁹¹⁾

Costs where
wife sues in
forma pau-
peris.

If the wife obtain a decree, she is entitled to costs, though she sued *in forma pauperis*.⁽⁹²⁾

Costs in case
of withdrawal
of suit.

A husband will not be allowed to withdraw his petition before the hearing except upon payment of his wife's taxed costs.⁽⁹³⁾

Costs of wife
in case of
cross-suits.

In cross-suits, where both husband and wife fail, she may have full costs, except, perhaps, in so far as her defence was a joint one with the co-respondent.⁽⁹⁴⁾

Costs where
parties are
partially suc-
cessful.

Where the parties have been only partially successful, they may have to pay their own costs.⁽⁹⁵⁾

Costs where
suit is by
father of
minor hus-
band in such
father's own
interests.

In a suit for nullity of marriage, instituted by the father of a minor husband, in such father's own interest, the minor and his *de facto* wife being made co-defendants, the wife's costs will not be taxed either against the petitioner or the minor husband.⁽⁹⁶⁾

(88) *Flower v. Flower*, L.R. 3 P. & D. 132; 42 L.J.P. 45; 29 L.T. 253. See, also, *Kay v. Kay*, (1904) P. 382.

(89) *Walker v. Walker*, (1897) 76 L.T. 236.

(90) *Nairne v. Nairne*, (1902) 71 L.J. P. & M. 37; 85 L.T. 649.

(91) *Ward v. Ward*, 1 Sw. & Tr. 484.

(92) *Afford v. Afford*, 30 L.J. P. & M. 174.

(93) *Pearce v. Pearce*, 30 L.J. P. & M. 182.

(94) *Burroughs v. Burroughs and Silcock*, (1862) 31 L.J. (P.M. & A.) 124.

(95) *Duplany v. Duplany*, (1892) P. 53, 57.

(96) *Wells v. Cottam*, f. c. *Wells*, 3 S. & T. 593; 34 L.J. P. & M. 12.

"But under the Indian Divorce Act it is not (apparently) open to the parent of either party to a marriage to sue for a decree of nullity of such marriage otherwise than in the interests of the husband or wife."⁽⁹⁷⁾

If the husband is a lunatic, and a suit is brought on his behalf by his committee, or other person entitled to his custody, such committee or other person must give the usual security for the wife's costs.⁽⁹⁸⁾

Costs where suit is by lunatic husband's committee.

In a suit instituted on behalf of a minor husband by his next friend, the latter must file an undertaking in writing to be answerable for the costs of the proceeding and must also either deposit, or give security for, a sum sufficient to meet the wife's costs of the hearing.⁽⁹⁹⁾

Costs where suit is by next friend of minor husband.

Where a guardian or next friend represents a wife who is a minor, he may, if he acts without due caution, render himself personally liable.⁽¹⁰⁰⁾

Costs, guardian's liability for.

Counsel's fees for advising on the sufficiency of an answer which is not a mere traverse of the charges in the petition are allowed.⁽¹⁰¹⁾

Costs allowed to the wife, items of, (i) Costs incurred by way of counsel's fees.

Where a commission to examine witnesses is applied for either by the husband alone,⁽¹⁰²⁾ or, by the husband and wife jointly, the Court will order the husband to advance such a sum of money as the Registrar may think sufficient to defray the wife's expenses of the commission.⁽¹⁰³⁾ It seems that, where the commission is sought solely by the wife, she may sometimes have the costs thereof taxed against her husband, even though it be merely vexatious and unnecessary.^(104 & 105) The only remedy, apparently, against this is for the husband, at the time of the application for the commission, to prove that the evidence sought to be taken is not material or necessary, when the Court will refuse to issue the commission; though it will not enquire into such circumstances of its own

(ii) Costs of commission to examine witness.

(97) *Rattigan on Divorce*, 1897, p. 266.

(98) *Smith v. Morris*, 3 Ad. 67.

(99) *Beavan v. Beavan*, 2 S. & T. 652; 31 L.J. P. & M. 166.

(100) *Brown v. Brown*, (1850) 2 Rob. Eccl. 302.

(101) *Heepworth v. Heepworth*, 30 L.J. P. & M. 253.

(102) *Hood v. Hood*, 2 Sw. & Tr. 112, note.

(103) *Bailey v. Bailey and Della Rocca*, 2 Sw. & Tr. 112; 30 L.J. P. & M. 49.

(104 & 105) See *Macqueen on Divorce*, 2nd Ed., p. 222.

motion, leaving that to the affidavit of the applicant's solicitor.⁽¹⁰⁶⁾ A commission will also be refused if there has been unreasonable delay in asking for it.⁽¹⁰⁷⁾

(iii) Costs of journey to procure information. Where a journey to procure information was necessary to prove the case, the costs of the journey should be allowed as a necessary expense to the wife.⁽¹⁰⁸⁾

(iv) Costs of witnesses how far allowable. "The numbers of witnesses called to prove any particular fact, whose expenses must be allowed, is a question for the discretion of the Registrar, who should allow the expenses of all those whom there was a reasonable ground for calling."⁽¹⁰⁹⁾

(v) Costs of wife's proctor. "The wife's proctor, at any stage of the proceedings, may apply to have his costs paid out of the fund in Court."⁽¹¹⁰⁾

Notwithstanding the dissolution of the marriage had been decreed with cost against the co-respondent, the wife's proctor could have recourse to the sum paid into Court.⁽¹¹¹⁾

(vi) Costs of wife on appeal. Where a wife appeals against the decision of the Court dismissing her petition, she is entitled even then to security from her husband for the costs of appeal.⁽¹¹²⁾

Courts would, as a general rule, make no provision for the costs of a wife on her appeal from a decision by which she has been found guilty of adultery.⁽¹¹³⁾

A wife will not be allowed the costs of her unsuccessful appeal against an interlocutory order.⁽¹¹⁴⁾

(vii) Costs of new trial. Even where the wife asks for a new trial, the Court, in granting the order, cannot impose upon her the payment of costs, if she have no means, but the husband must pay the costs of both parties.⁽¹¹⁵⁾

(106) *Stone v. Stone and Appleton*, 34 L.J. P. & M. 33.

(107) *Ibid.*

(108) *Allen v. Allen and D'Arcy*, 30 L.J. P. & M. 9; 2 Sw. and Tr. 107.

(109) *Macrae on Divorce*, 1871, p. 153.

(110) See *Macrae on Divorce*, 1871, p. 151.

(111) *Evans v. Evans*, 28 L.J. P. & M. 138; cited in *Kelly v. Kelly and Saunders*, 3 B.L.R. App. 5 (6).

(112) *Jones v. Jones*, L.R., 2 P. 333. See, also, *Fowle v. Fowle*, 4 C. 260.

(113) *Olway v. Olway*, 13 P.D. at pp. 153—156.

(114) *Thompson v. Thompson and Sturmfalls*, 2 S. & T. 402.

(115) *Nicholson v. Nicholson and Ratcliffe*, 3 Sw. & Tr. 214; 32 L.J. P. & M. 127.

In such cases alimony *pendente lite* continues without further order.⁽¹¹⁶⁾

In a case where the husband's petition for dissolution was dismissed on the ground of collusion with his wife, the respondent, the Court ordered the wife's costs to be paid by the husband.⁽¹¹⁷⁾

(viii) Costs where husband's petition dismissed on ground of collusion.

If the wife be found to be living in adultery with the corespondent, or is separated from her husband under such circumstances that she does not pledge his credit, even then, there can be no reason for refusing her, her costs *pendente lite*, though alimony *pendente lite* might be refused under such circumstances.⁽¹¹⁸⁾ Further, under the above circumstances, she is entitled to such costs, only up to the time when her guilt is proved; and after that she is not, as an ordinary rule, entitled to costs, though the case may be still said to be pending.⁽¹¹⁹⁾

(ix) Costs of guilty wife.

Costs of an application by the wife for further time to answer to the petition will not be allowed.⁽¹²⁰⁾

Costs, not allowed to wife, items of,
(i) Costs of application for time.

Costs of a motion for the husband to attend and be examined on the wife's petition for alimony after he has answered on oath thereto will not be granted to the wife, if the result of his examination is to establish the truth of his answer.⁽¹²¹⁾

(ii) Costs of motion to examine husband on a petition for alimony.

The wife will not be allowed the costs of an unsuccessful opposition by her to a motion for further particulars of the charges in her petition for dissolution of marriage.⁽¹²²⁾

(iii) Costs of unsuccessful opposition to motion for further particulars.

(116) *Nicholson v. Nicholson and Ratcliffe*, 3 Sw. & Tr. 214; 32 L.J. P. & M. 127.

(117) *Todd v. Todd*, L.R. 1 P. & D. 121.

(118) *Gordon v. Gordon and DeSaran*, 3 B.L.R. App. 13.

(119) *Whitmore v. Whitmore*, 35 L.J. P. & M. 51.

(120) *Harding v. Harding and Lance*, 2 S. & T. 549; 31 L.J. P. & M. 76. See, also, *Heepworth v. Heepworth*, 30 L.J. P. & M. 253; *Frebout v. Frebout and Pennney*, 30 L.J. P. & M. 214.

(121) *Ibid.*

(122) *Ibid.*

(iv) Costs of unnecessary appearance of wife.

Nor will the wife be allowed the costs of appearing on a motion, if such appearance is unnecessary, though she may have received notice to appear from the other side.⁽¹²³⁾

(v) Costs of application to Court which should be made in Chambers.

If an application be made in Court which should be made in chambers, the extra expense is disallowed.⁽¹²⁴⁾ So, too, are the costs of a wife's application for time disallowed, especially if necessitated by her own laches.⁽¹²⁵⁾

(vi) Costs of obtaining information.

The mere fact that a solicitor had reasonable grounds for believing, upon information obtained, that proceedings ought to be taken, is not sufficient to render the husband liable for costs incurred in obtaining such information, unless it appears to the Court that there was any necessity for such proceedings.⁽¹²⁶⁾

(vii) Costs of appeal.

In a very early case the Court refused to allow the wife's costs of appeal to be taxed against her husband.⁽¹²⁷⁾

(viii) Motion to convert petition for dissolution into one judicial separation.

The wife's costs of a motion to convert a petition for dissolution of marriage into one for a judicial separation will not be granted.⁽¹²⁸⁾

(ix) Unsuccessful application for particulars.

The wife's costs of an unsuccessful application for particulars, will be disallowed.⁽¹²⁹⁾

(x) Unsuccessful application for access to children.

The wife's costs of unsuccessful application for access to children will not be allowed.⁽¹³⁰⁾

(xi) Costs of unsuccessfully making or opposing an interlocutory application.

A wife who unsuccessfully makes or opposes an interlocutory motion is not entitled to costs of such motion.⁽¹³¹⁾

(123) *Harding v. Harding and Lance*, 2 S. & T. 549; 31 L. J. P. & M. 76. See, also, *Heepworth v. Heepworth*, 30 L. J. P. & M. 253; *Frebout v. Frebout and Penney*, 30 L. J. P. & M. 214.

(124) *Higgs v. Higgs and Hopkine*, (1862) 32 L.J. (P.M. & A.) 64.

(125) *Harding v. Harding and Lance*, (1862) 2 Sw. & Tr. 549.

(126) *Taylor v. Hailstone*, 52 L.J. Q.B. 101.

(127) *Thompson v. Thompson*, 2 S. & T. 404.

(128) *Cartledge v. Cartledge*, (1862) 4 Sw. & Tr. 249.

(129) *Heepworth v. Heepworth*, (1861) 30 L.J. P. & M. 253.

(130) *Ibid*.

(131) *Heepworth v. Heepworth*, 30 L.J. P. & M. 253; *Forster v. Forster and Berridge*, 3 Sw. & Tr. 151.

The costs of an attempt on her part to prevent a decree *nisi* pronounced against her from being made absolute, will not be allowed her. (132 & 133)

(xii) Costs of preventing decree "*nisi*" from being made absolute.

The costs of an unsuccessful appeal against an interlocutory order will not be allowed to the wife. (134)

(xiii) Unsuccessful appeal against an interlocutory order.

Where the wife applies to have the cause tried by a special jury, the Court sometimes refuses her the costs of special jury. (135)

(xiv) Costs of special jury.

The wife will not be allowed the costs of appearing on a motion if such appearance be unnecessary, even though she may have received notice to appear from the opposite side, *e.g.*, where she appears, having nothing to say, on a motion to make a decree *nisi*, for dissolution of her marriage absolute. (136)

(xv) Costs of unnecessary appearance.

Costs of allegations which have no prospect of success are incurred at the risk of the party making them. (137)

(xvi) Costs of unfounded charges.

The costs of an application to correct an unexplained mistake in a petition for alimony will not be allowed. (138)

(xvii) Costs of application to correct an unexplained mistake.

If it be shown that the wife have separate property of her own, or if she have omitted to have her costs paid before the hearing and judgment have passed against her, her husband is not liable for her costs. (139)

(xviii) Costs not applied for until judgment given against her.

In a petition for judicial separation brought by a wife, no costs should be allowed to her for expenses incurred previously to the filing of the petition. (140)

(xix) Costs incurred previous to filing of petition.

A wife, who has sufficient separate property of her own, should be left to pay her own costs. (141)

(xx) Costs of wife having separate property.

(132 & 133) *Stoate v. Stoate*, 2 S. & T. 384; 30 L.J.P. 173; 5 L.T. 138.

(134) *Thompson v. Thompson and Sturmffells*, 2 Sw. & Tr. 402.

(135) *Scott v. Scott*, 32 L.J.P. & M. 40

(136) *Frebowt v. Frebowt and Penny*, 30 L.J.P. & M. 214.

(137) *Kay v. Kay*, (1904) P. 382; 73 L.J.P. 108; 91 L.T. 360.

(138) *Harker v. Barker*, (1868) 37 L.J. P. & M. 11.

(139) See *Macrae on Divorce*, (1871) pp. 150, 151.

(140) *Dickens v. Dickens*, 2 Sw. & Tr. 103.

(141) *Wells v. Wells and Cottam*, 33 L.J.P. & M. 72.

Thus, a wife who is in receipt of an ample allowance from her husband or from his estate, is not as a rule, entitled to have her costs *pendente lite* paid by him.⁽¹⁴²⁾

(xxi) Costs of wife not suing "*bona fide*."

If the Court has reason to believe that the wife's suit is not instituted *bona fide* but for the purpose of obtaining costs from the husband, it will refuse to make this order, and will direct that the sum paid in the registry by the husband to meet his wife's costs remain there to abide the event of the hearing.⁽¹⁴³⁾

A woman who was wilfully married to her deceased husband's brother, although she is entitled to a decree of nullity, will probably not be allowed costs.⁽¹⁴⁴⁾

If the wife's solicitor has not acted *bona fide* for her protection, the Court may refuse to make an order for her cost.⁽¹⁴⁵⁾

(xxii) Costs of wife on intervention.

It is not the practice of the Court to order the husband to give security, or pay a sum of money, for his wife's costs incidental to an intervention of the Queen's proctor.⁽¹⁴⁶⁾

Where the name of a woman is by mistake, included in an allegation of adultery, if she intervenes as a respondent, the petition may be amended, and she may be allowed her costs properly incurred.⁽¹⁴⁷⁾

But where insufficient particulars have been given partly by the fault of both sides, probably no order as to the costs of a necessary adjournment will be made.⁽¹⁴⁸⁾

(xxiii) Costs of wife evading service of decree for restitution of conjugal rights.

Where a wife evaded service of a decree for restitution by remaining out of the jurisdiction, the Court, on being satisfied that she had a sufficient separate income, condemned her in the costs of the proceedings.⁽¹⁴⁹⁾

"Where a husband and wife were living apart under a deed of separation, under which the husband covenanted to pay the wife a weekly allowance in the payment of which he had been on one

(142) *Woodgate v. Taylor*, 30 L.J. P. & M. 197, note.

(143) *Rogers v. Rogers*, 4 Sw. & Tr., 82; 34 L.J. P. & M. 87.

(144) *Aughtie v. Aughtie*, (1810) 1 Phillim 201; *Andrews v. Ross*, (1888) 14 P.D. 15.

(145) See Laws of England, Vol. XVI, pp. 429 and 540.

(146) *Gladstone v. Gladstone*, L.R. 3 P. 260.

(147) *Harding Cox v. Harding Cox*, (1908) 24 T.L.R. 634.

(148) *Bancroft v. Bancroft and Rumney*, (1864) 3 Sw. & Tr. 610.

(149) *Miller v. Miller*, L.R. 2 P. & D. 13.

occasion three days late ; the Court held that this was not a sufficient breach of covenant to debar him from the right to set up the deed in answer to his wife's petition for restitution, and refused to make the usual order for the wife's costs.⁽¹⁵⁰⁾

In a suit by a wife for judicial separation from her husband both being governed by the Indian Succession Act on the ground of cruelty on the part of the husband, it was held, that the Courts should not, except under exceptional circumstances, order the husband to give security for his wife's costs.⁽¹⁵¹⁾

(xxiv) Costs of parties governed by Succession Act—Operation of S. 4 of the Act.

Where the husband and wife are subject to the provisions of S. 4 of the Indian Succession Act, 1865, the husband will not be ordered to give security for the wife's costs.⁽¹⁵²⁾

The foundation of the practice which prevailed in the Ecclesiastical Courts was the absolute right which the law formerly gave the husband upon marriage to the whole of the wife's personal estate and to the income of the real estate, leaving her destitute of all means to conduct her case. But this state of the law has been completely altered by S. 4 of the Indian Succession Act.⁽¹⁵³⁾

The foundation of the practice in the Ecclesiastical Courts having been displaced with respect to persons subject to the Indian Succession Act, the practice itself ought no longer, as a general rule, to be followed.⁽¹⁵⁴⁾ Even in the Ecclesiastical Courts the practice was not an absolute one, but was subject to exceptions, as in the case where the wife had separate property of her own, or where it was proved that the husband had no means of his own.⁽¹⁵⁵⁾ Even in the English Divorce Court, at least since the publication of the rules and orders of 1865, there has been a

(150) *Kunski v. Kunski*, (1899) 68 L.J.P.M. 18.

(151) *Proby v. Proby*, 5 C. 357 = 5 C.L.R. 1. But see, also, *Thomas v. Thomas*, 23 C. 913; *W. G. Mayhew v. Sarah Anna Mayhew*, 19 B. 293; *Natal v. Natal*, 9 M. 12; *Williams Parry Jahans v. Alexandra Louis Jahans*, 6 C.W.N. 414; *Broadhead v. Broadhead*, 5 B.L.R. App. 9; *Ellen Thomas Boyle v. William McCornack Boyle*, 7 C.W.N. 565.

(152) *Proby v. Proby*, 5 C. 357. But see, also, *Thomson v. Thomson*, 14 C. 580; *Thomas v. Thomas*, 23 C. 913; *Young v. Young*, 23 C. 916, note.

(153) *Proby v. Proby*, 5 C. 357. But see *Broadhead v. Broadhead*, 5 B.L.R. App. 9.

(154) *Proby v. Proby*, 5 C. 357 (362) referred to in *Thomas v. Thomas*, 23 C. 913, not followed in *W. G. Mayhew v. Sarah Anna Mayhew*, 19 B. 293, and distinguished in *Natal v. Natal*, 9 M. 12; *Thomson v. Thomson*, 14 C. 580 (583); *A. v. B.*, 21 B. 77; *Georgucopulas v. Georgucopulas*, 29 C. 619 (621); *E. T. Boyle v. W. M. Boyle*, 7 C.W.N. 565 = 30 C. 631.

(155) *Ibid.*

discretion to refuse the wife her costs, even in a case where a deposit of estimated costs had been made by the husband under the order of the Court.⁽¹⁵⁶⁾

In a suit for divorce between persons subject to the Indian Succession Act, the mere fact that the wife has no means of her own is not such a special circumstance as will justify the Court in ordering the husband to pay in advance or give security for his wife's general costs of the action.⁽¹⁵⁷⁾

In the case of *Mayhew v. Sarah Anna*,⁽¹⁵⁸⁾ Farran, J., said :—
“ It does not appear to me that the provisions of S. 4 of the Succession Act,⁽¹⁵⁹⁾ affects the rule as to costs which ought to be applied to the case. The rule has always been that an order as to costs pending the hearing ought not to be made against the husband, if the wife is possessed of means (technically styled separate property) sufficient to enable her to pay her own costs in the first instance. The reason for the continuance of the rule (whatever may have been its origin) is ‘ that it is not considered just either that a wife should be left without the means of putting her case fairly before the Court, or that a practitioner should run the risk of losing the proper remuneration for his labours if he take up a case which he honestly believes to be genuine, but which may after all turn out to be unfounded.’ It is a rule of public policy.”⁽¹⁶⁰⁾

Costs ordered
to be paid by
wife to hus-
band in cer-
tain cases.

The Divorce Court has power to condemn the wife in her husband's costs, and has in several cases made the order accordingly.⁽¹⁶¹⁾

In one case the wife had, in answer to a petition for restitution of conjugal rights, raised charges against her husband, which were abandoned on her behalf at the trial, and she was possessed of an income of £760 in her own right. In such circumstances the wife was made to pay her husband's costs.⁽¹⁶²⁾

As a general principle, where no blame could attach to the husband for her misconduct, a wife who has property should be

(156) *Jones v. Jones*, L.R. 3 P. & D. 333, referred to in *Proby v. Proby*, 5 C. 357 (362).

(157) *Williams Parry Jahans v. Alexandra Louis Jahans*, 6 C.W.N. 414.

(158) 19 B. 293 (295).

(159) Act X of 1865.

(160) *Per Farran, J.*, in *Mayhew v. Sarah Anna Mayhew*, 19 B. 293 (295), citing *Browne and Powles on Divorce*, 5th Ed., p. 342.

(161) *Miller v. Miller*, L.R. 2 P. & D. 13.

(162) *Ibid.*

liable for the costs.⁽¹⁶³⁾ But if the order to pay costs would deprive her of the means of subsistence, the Court will not make the order.⁽¹⁶⁴⁾

Where the Court granted an application by the wife that her suit for judicial separation might be dismissed, and that she might substitute for it a petition for dissolution, made it a condition precedent that she should pay the costs of the suit for judicial separation⁽¹⁶⁵⁾.

If a suit be decided against a wife who has separate estate, including even an allowance under a separation deed, she may be condemned in costs.⁽¹⁶⁶⁾ But she will not be so condemned in costs if her separate estate be very small.⁽¹⁶⁷⁾

If the husband be responsible for her misconduct, the wife, though possessed of separate estate, would not be made liable for costs.⁽¹⁶⁸⁾

A co-respondent against whom adultery is established (though, it seems, not otherwise), may be ordered to pay the whole or any part of the costs of the proceedings.⁽¹⁶⁹⁾

Costs against wife, if she has separate estate.

Costs, co-respondent's liability for, when arises.
(i) Adultery must be established.

But it is not the practice to make such an order, unless it be proved that he knew, before the adultery was committed, that the respondent was married.⁽¹⁷⁰⁾

(ii) He must have known that respondent was a married woman.

He may escape liability for costs if the wife's conduct has been profligate to the husband's knowledge, before the adultery.⁽¹⁷¹⁾

(iii) Wife's conduct. She ought not to be a profligate.

(163) *Milne v. Milne*, L.R. 2 P. & D. 202.

(164) *Carstairs v. Carstairs, Billson and Dickinson*, 33 L.J. P. & M. 170.

(165) *Lewis v. Lewis*, 29 L.J.P. & M. 123.

(166) *Hyde v. Hyde and Feilgate*, (1888) 59 L.T. 523; *Millward v. Millward and Andrews*, (1887) 57 L.T. 569; *Holmes v. Holmes*, (1755) 2 Lee 90.

(167) *Aires v. Aires*, (1892) 65 L.T. 859.

(168) *Milne v. Milne*, (1871) L.R. 2 P. & D. 202.

(169) Matrimonial Causes Act 1857 (St. 20 & 21 Vict., C. 85), S. 34.

(170) *Teagle v. Teagle and Nottingham*, (1858) 78 L.T. 391; and see *Bilby v. Bilby*, (1902) P. 8; *Newby v. Newby and White*, (1897) 77 L.T. 142; *Badcock v. Badcock and Chamberlain*, (1858) 1 Sw. & Tr. 189.

(171) *Boyd v. Boyd and Collins*, (1859) 1 Sw. & Tr. 562; *Nelson v. Nelson*, (1868) L.R. 1 P. & D. 510.

A co-respondent found guilty may escape by being condemned only in the costs of the charges made against himself, although the respondent has made unsuccessful, though not unreasonable, charges against the petitioner, and particularly if she is also found to have committed adultery with some one else.⁽¹⁷²⁾

(iv) Husband
to be free
from guilt.

A husband who, being himself guilty of adultery, or knowing his wife to be profligate, makes a claim for damages successfully resisted by a co-respondent, may be deprived of costs.⁽¹⁷³⁾

(v) Co-respondent's
adultery
must have
been un-
condoned.

Once adultery has been condoned, fresh adultery only by the co-respondent will revive a right, even as to costs, against him.⁽¹⁷⁴⁾

Condonation by a husband after decree *nisi* is no reason for relieving the co-respondent of his liability for costs.⁽¹⁷⁵⁾

Costs payable
by co-respondent,
amount
of.

When a co-respondent has been condemned in costs, he will, as a general rule, be ordered to pay all the costs of the proceedings, as well those of the respondent as those of the petitioner.⁽¹⁷⁶⁾

The costs which a husband has had to provide for a guilty wife are recoverable under an order for costs against the co-respondent. ⁽¹⁷⁷⁾ But the order does not include the costs of an unsuccessful showing of cause against the decree by the King's Proctor, unless the co-respondent be made a party thereto, for a co-respondent cannot be condemned in the costs of a suit to which he is not a party.⁽¹⁷⁸⁾

Where, however, the King's Proctor successfully shows cause, the co-respondent may, in a proper case, still have to pay the costs of the suit ordered against him.⁽¹⁷⁹⁾

Costs against
co-respondent
—Practice.

As a general rule, a co-respondent, whose adultery with the wife has been established, will be condemned in the costs of the suit,

(172) *Codrington v. Codrington and Anderson*, (1865) 4 Sw. & Tr. 63.

(173) *Watson v. Watson and Wilkinson*, (1862) 31 L.J. (P.M. & A.) 102, N.; *Manion v. Manion and Stevens*, (1865) 4 Sw. & Tr. 159.

(174) *Norris v. Norris, Lawson and Mason*, (1861) 4 Sw. & Tr. 237.

(175) *Hyman v. Hyman*, (1904) P. 403; 73 L.J. P. 106; 91 L.T. 361.

(176) *Evans v. Evans and Robinson*, 1 S. & T. 328.

(177) See *Townson v. Townson and Bucknall*, (1898) 78 L.T. 54. In this case the order was to the effect that the husband was to pay the wife's solicitors only what he received from the co-respondent.

(178) *Forbes Smith v. Forbes Smith*, (1901) P. 258, C.A.; *Blackhall v. Blackhall and Clarke*, (1882) 13 P.D. 94; *Taplen v. Taplen*, (1891) P. 286.

(179) *Hyman v. Hyman*, (1904) P. 403. But see *Youell v. Youell, Terrass and Burleigh*, (1875) 33 L.T. 578.

even though the petitioner does not expressly pray for costs in his petition. (180)

Although the successful petitioner does not claim costs in the petition he is nevertheless entitled to the costs incurred by him. (181)

A co-respondent condemned in costs is liable for costs of and incident to proceedings before Registrar for apportionment of damages. (182)

Costs of inquiry before Registrar—Apportionment of damages.

In cases where respondent is living apart from husband as prostitute, the co-respondent will not be condemned in costs. (183) If a husband allows his wife to lead a life of prostitution, the co-respondent will not be ordered to pay costs, even though at the time of the adultery the wife was living with her husband. (184) On the contrary, the petitioner's conduct in such a case would amount to connivance, and he would probably be ordered to pay the costs of the respondent and co-respondent. (185)

Costs, when co-respondent not liable to pay.

(i) Where wife lives as prostitute apart from husband.

The fact that the co-respondent is ignorant of fact that respondent was married is good ground why he ought not to be condemned in costs. (186)

(ii) Where co-respondent is ignorant of the fact of wife's marriage.

Where a wife had lived apart from her husband for some years, and led an abandoned life, the Court, notwithstanding that the co-respondent must have known that she was a married woman, refused to condemn him in costs. (187)

(iii) Where wife leads an abandoned life.

A co-respondent, who acted on a *bona fide* belief that the petitioner's marriage was void, may escape condemnation in costs. (188)

(iv) where co-respondent honestly believes wife's marriage to be void.

(180) *Evans v. Evans and Robinson*, 28 L.J. P. & M. 136; *Finlay v. Finlay and R.*, 30 L.J. P. & M. 104; *Goldsmith v. Goldsmith and others*, 31 L.J. P. & M. 163.

(181) *Youd v. Youd*, 28 C. 221; see, also, *Finlay v. Finlay*, 30 L.J.P. & M. 104; *Goldsmith v. Goldsmith*, 15 L.J. Ch. 264; *West v. West*, L.R. 2 P.L.D. 196 (198) cited in argument in *Youd v. Youd*, 28 C. 221 (222).

(182) *Irwin v. Irwin*, 59 L.J.P. 53; 62 L.T. 612.

(183) *Roe v. Roe*, 3 B.L.R. App. 9.

(184) *Adams v. Adams and Colter*, L.R., 1 P. 333.

(185) *Ibid.*

(186) *Boddington v. Boddington and N.*, 27 L.J.P. & M. 53; *Priske v. Priske and Goldby*, 29 L.J.P. & M. 195; *Home v. Home*, 15 W.R. (Eng.) 498.

(187) *Nelson v. Nelson*, 1 P. & D. 510.

(188) *Ousey v. Ousey*, (1874) L.R. 3 P. & D. 223.

(v) Where husband is guilty of condonation or connivance.

The conduct of the petitioner, and respondent must be considered as well as that of the co-respondent.⁽¹⁸⁹⁾

Hence, in certain cases, even if it is proved that, at the time of the adultery, the co-respondent knew that the respondent was a married woman, it does not necessarily follow that he will be condemned in costs.⁽¹⁹⁰⁾

The usual course is to grant costs against a co-respondent when his conduct has made the suit necessary.⁽¹⁹¹⁾ He will not, therefore, be condemned in costs when his adultery has been connived at, or condoned, by the petitioner.⁽¹⁹²⁾ In such a case the petitioner may be ordered to pay the co-respondent's costs.⁽¹⁹³⁾

Mere remissness of conduct on the part of the petitioner towards his wife will not necessarily deprive him of his right to costs against the co-respondent.⁽¹⁹⁴⁾

Where a husband had condoned adultery committed with a co-respondent which had been revived by adultery committed by another person, costs were not given against the co-respondent whose adultery was condoned.⁽¹⁹⁵⁾

Where a husband has condoned adultery committed with one co-respondent which has been revived by adultery committed with another co-respondent a decree *nisi* will be granted against both the co-respondents.⁽¹⁹⁶⁾ But, in such a case, costs will not be given against the co-respondent whose adultery was condoned.⁽¹⁹⁷⁾ Costs as between attorney and client can be allowed only against the first co-respondent.⁽¹⁹⁸⁾

(189) *Cordington v. Cordington and Anderson*, 4 S. & T. 63. See, also, *Youd v. Youd*, 28 C. 221.

(190) *Cordington v. Cordington and Anderson*, 4 S. & T. 63.

(191) *Norris v. Norris and Lawson*, 4 S. & T. 237; *Adams v. Adams and L.*, 4 S. & T. 237; *Bernstein v. Bernstein*, (1893) P. 292.

(192) *Norris v. Norris and Lawson*, 4 S. & T. 237; *Bernstein v. Bernstein*, (1893) P. 292.

(193) *Ibid.*

(194) *Badcock v. Badcock*, 1 S. & T. 188.

(195) *Norris v. Norris*, 4 S. & T. 237; 30 L.J.P. 111.

(196) *Youd v. Youd*, 28 C. 221.

(197) *Youd v. Youd*, 28 C. 221 (222), following *Norris v. Norris*, 4 S. & T. 237.

(198) *Youd v. Youd*, 28 C. 221 (223), not following *Outhwaite v. Outhwaite and Diaz*, 28 C. 84.

In allowing costs as between attorney and client against a co-respondent, the conduct of the parties is also to be looked to. (199)

Where a co-respondent discovered a week after he commenced an intimacy with the respondent that she was a married woman, but nevertheless continued to co-habit with her, the Court, taking all the circumstances of the case into consideration, refused to condemn him in costs. (200) But, where a co-respondent denied that he knew the respondent was married on their first acquaintance, but admitted that he became aware of the fact within a fortnight, the Court, being of opinion that practically he knew the fact from the first condemned him in costs. (201)

Where a jury were unable to agree on a first trial and on a second trial the petitioner obtained a verdict, the Court refused to condemn the co-respondent in the costs of the first trial. (202)

(vi) Where the jury do not agree at first trial.

Where a co-respondent countercharged condonation and adultery against the petitioner, and the Court found that the co-respondent had committed adultery with the respondent without knowing she was married, but acquitted petitioner, the co-respondent was condemned in the costs caused by his countercharges only. (203) But costs have been given against a co-respondent where he well knew the respondent was a married woman, though there was some remissness on the part of the husband. (204)

Co-respondent—When condemned in part only of the costs.

Where a decree *nisi* is rescinded it is rescinded for all purposes, and that part of it condemning the co-respondent in costs falls with it. (205)

Where an order for costs was made against the co-respondent, and it was proved that the wife was possessed of separate estate, an order was also made against her for the costs of the suit. (206)

Co-respondent and wife when both condemned in costs.

(199) *Per* Harington, J., in *Youd v. Youd*, 28 C. 221 (223).

(200) *Learmouth v. Learmcuth*, 59 L.J.P. 14; 62 L.T. 608.

(201) *Bilby v. Bilby*, (1902) P. 8; 71 L.J. P. 81; 86 L.T. 123.

(202) *Wood v. Wood*, L.R. 1 P. and D. 467; 37 L.J.P. 25.

(203) *Howe v. Howe*, 15 W.R. 498 (Eng.).

(204) *Badcock v. Badcock*, 1 S. and T. 188.

(205) *Hechler v. Hechler*, 58 L.J.P. 27. See, also, *Hyman v. Hyman*, (1904) P. 403.

(206) *Millward v. Millward*, 57 L.T. 569.

Co-respond-
ent and peti-
tioner
charged with
collusion—
Costs of
Queen's
Proctor.

Where the Queen's Proctor intervened, and established a charge of collusion against both the petitioner and co-respondent, the Court condemned the co-respondent in the costs of the Queen's Proctor's intervention, although he did not appear. (207)

Co-respond-
ent, when
allowed costs.

If the Court dismisses the husband's petition, or allows it to be withdrawn, as against the co-respondent, on the ground that there is no evidence against him, the petitioner will ordinarily be ordered to pay the co-respondent's costs. (208)

Where the adultery between the co-respondent and respondent has been established, the dismissal of the petitioner's suit does not necessarily entitle their co-respondent to costs from the petitioner, unless the suit is dismissed on the ground that the adultery in question had been condoned, or connived at, by the petitioner. (209)

If the petition is dismissed on the ground that the petitioner has been proved by the co-respondent to have been guilty of incestuous adultery, the co-respondent will be entitled to be paid the costs of that issue, though, if his own adultery with the respondent has also been established, he may be liable for the costs of proving the respondent's adultery with him. (210)

Co-respond-
ent, when
ordered to pay
his own costs.

Even where the husband's petition is dismissed as against the co-respondent on the ground that the charge of adultery against him has not been established, he may nevertheless be ordered to pay his own costs if he has acted imprudently with a woman, whom he had reason to believe to be married so as to raise a reasonable suspicion of adultery in the mind of the petitioner. (211) In such a case he will neither be allowed nor condemned in costs. (212)

(207) *Taplen v. Taplen*, (1891) P. 263; 60 L.J.P. & M. 88; 64 L.T. 870.

(208) *Smith v. Smith and Millet*, 33 L.J.P. & M. 11.

(209) *Forster v. Forster and Beridge*, 3 S. & T. 144; *Bernstein v. Bernstein*, (1893), P. 292; *Seddon v. Seddon & D.*, 31 L.J.P. & M. 101; *Scode v. Scode & H.*, 30 L.J.P. & M. 105; *Bremner v. Bremner & B.*, 33 L.J.P. & M. 102.

(210) *Courady v. Courady and Flashman*, L.R. 1 P. 63.

(211) *Carstairs v. Carstairs and Dickenson*, 3 S. and T. 538; *Winscom v. Winscom & P.*, 3 S. and T. 380, *Robinson v. Robinson and Gamble*, 32 L.J.P. & M. 210; *West v. West & P.L.R.* 2 P. 196.

(212) *Robinson v. Robinson and Gamble*, 32 L.J., P. & M. 210.

An omission to award costs cannot be considered merely as a clerical error, but must be rectified by way of review within the prescribed time.⁽²¹³⁾

Costs, order as to—Review.

Loch, J., said in the case of *Ram Sahoy v. Rookhoo Singh*.⁽²¹⁴⁾ "A Judge, when passing a decree, gives costs or refrains from giving costs for some reason or other; and if he refrain from giving costs, and any party considers that he is entitled to obtain costs, he should apply within the prescribed time to the Judge for a review of that part of the decree which he considers injurious to himself. Now, it is clear that in the present case the petitioner could not file a petition for review, because there had been a special appeal to the High Court, and further he was out of time, and apparently had no cause to show why he did not make the petition in due time."⁽²¹⁵⁾

In a suit by a wife against her husband, the attorney for the petitioner made an application on notice to the petitioner, the respondent, and the respondent's attorneys, for an order that the suit be dismissed or withdrawn, and that the petitioner's costs be taxed and the amount thereof be paid to him by the respondent, and stated in his affidavit that he had instituted the suit under the instructions of the petitioner, that the parties had returned to co-habitation and the suit had been amicably settled; that the petitioner had since instructed him to withdraw the suit, and the respondent would pay the costs for which purpose he had drawn a petition, which the respondent's attorneys would not agree to. The Court granted the application, so far as to direct that the costs of the petitioner's attorney, when taxed, should be paid by the respondent, but refused to make any order for the withdrawal or other final disposal of the suit, and ordered that the attorney should personally bear the costs of the application, the same not having been brought in proper form.⁽²¹⁶⁾

Costs in case of judicial separation—Return to co-habitation—Withdrawal of suit.

Sec. 14. Election Petitions—Costs of.

Election petition, costs of.

English law regarding the same.

Costs where petition is overloaded.

(213) *Ram Sahoy Singh v. Rookhoo Singh*, 15 W.R. 414.

(214) 15 W.R. 414.

(215) *Per* Loch, J., in *Ram Sahoy Singh v. Rookhoo Singh*, 15 W.R. 414.

(216) *P. v. P.*, 9 B.L.R. App. 6 referred to in *K. M. Butt v. F. C. K. Butt*, 25 C. 222=2 C.W.N. 37.

Costs where petition is caused by Returning Officer's mistake.

Costs where there is a difference of opinion among Judges.

Costs of Attorney-General or Public Prosecutor in England.

Expenses of witnesses.

Taxation of costs.

Scale of costs—English practice.

Security for costs—English practice.

Election
petition,
costs of.

It has been held that a District Judge has authority under S. 23 of the Bombay District Municipal Act, 1884,⁽¹⁾ to award costs of an inquiry into an election petition and the order of the District Judge as to costs is capable of being enforced by a separate suit.⁽²⁾

(1) Bom. Act III of 1888. (On the subject-matter of this section see Mew's Digest, Vol. VI, cols. 139—142; Encyclopædia of the Laws of England, Vol. V—Headings—"Election agent," "Election Commissioners," "Election expenses," "Election petition" and "Election." There is a considerable body of literature regarding elections and election expenses in England. Much of it is based on Local Acts, and local conditions, and may not apply to this country. The following are the important sources of the English law on the subject:—The English Election Commissioners, Expenses Act, (1869) and (1871), 32 and 33, Vic. Ch. 61; Corrupt and Illegal Practices, Prevention Act, 1883, S. 58; Rogers on Election, 18th Ed. (1906), Vol. II, (Parliamentary) and Vol. III (Municipal). Halsbury's Laws of England, Vol. XII, pp. 419-422; 472-483; 520-524. Reference may also be made to the following authorities:—Carew, Historical Account of the Rights of Elections, 1755; Whitelocke on the King's writ for choosing Members of Parliament, 1766; Simeon, Treatise on the Law of Elections, 2nd Ed., 1795; Heywood, Law of Borough Elections, 1797; Heywood, Law of County Elections, 2nd Ed., 1812; Orme, Digest of the Election Laws, 2nd Ed., 1812; Hatsell, Precedents of Proceedings in the House of Commons, 4th Ed., 1818; Roe, Law of Elections, 2nd Ed., 1818; May, Parliamentary Practice, 11th Ed., 1906. Bazalgette and Humphreys, Law relating to Local and Municipal Government, 1888; Macmorran, Local Government Act, 1888, 3rd Ed., 1898; Bazalgette and Humphreys, Law relating to County Councils, 3rd Ed., 1889; Glen, Law relating to County Government, 1890; Lushington, County Council and Municipal Elections Manual, 2nd Ed., 1892; Ryde, Election Manual for Parish Councillors, Urban and Rural District Councillors and Guardians outside London, 1894; Macmorran and Dill, The Local Government Act, 1894, 3rd Ed., 1896; Hunt, London Local Government, 1897; Macmorran, London Government Act, 1899; Hunt, London Government Act, 1899; Hunt, Metropolitan Borough Councils Elections, 1900; Seton on Judgments & Orders, 6th Ed., 1901, Vol. I, p. 275.

(2) *Ram Lal Lallubhai v. Bhagubhai Dayabhai*, 2 Bom. L.R. 960. Batty, J., said in the course of the judgment:—This is a civil reference made, under S. 617 of the Code of Civil Procedure (1882), by Khan Bahadur Barzorji Edulji Modi, Judge of the Small Cause Court, Surat, in a suit brought to recover costs which an order by the District Judge of Surat purported to award to the plaintiff against the defendant in an application made under S. 23 of the Bombay District Municipal Act, Amendment Act, 1884. It appears that the plaintiff and the defendant in the suit now

“The costs, charges, and expenses of and incidental to the presentation of a petition, and to the proceedings consequent thereon, are to be defrayed by the parties to the petition in such manner

English Law
regarding the
same.

pending, had been rival candidates at a municipal election—and that on plaintiff being declared duly elected, the defendant applied, under the provisions of S. 23 of the Bombay Act II of 1884, to the District Judge, in order to bring in question the validity of the plaintiff's election. The second paragraph of that section provides that the District Judge may, after such inquiry as he deems necessary, pass an order confirming or amending the declared result of the election or for setting the election aside. And the third paragraph of the section proceeds “For the purposes of the said inquiry, the District Judge may exercise any of the powers of a Civil Court, and his decision shall be conclusive.” It was in the supposed exercise of the powers conferred by this second paragraph, that the District Judge, after rejecting the application made by the present defendant, passed the order directing the defendant to bear all the costs of the inquiry. The order relating to the costs was passed the day after the order rejecting the application, the question as to what order should be passed in respect of costs, having been expressly reserved for consideration, by the District Judge at the time when he passed the order disposing of the application. The District Judge on application made to him to give effect to his order for costs—by execution proceedings rejected the application on the ground that he had no power under S. 23 of Bombay Act II of 1884 to execute his own order. The plaintiff then filed this suit which has given rise to this reference. The points of law in which the Judge of the Small Cause Court entertains doubt are as follows, namely, “(1) Had the District Judge authority under S. 23 of the Bombay District Municipal Act (Amendment Act II of 1884) to award costs of the inquiry? (2) Is the District Judge's order as to costs capable of being enforced by a separate suit?” The Judge in submitting the reference has stated in a most lucid and able as well as concise report, his reasons for considering that both of the above questions should be answered in the affirmative and in favour of the plaintiff. As stated in that report “The main point is whether there is a statutory obligation on the defendant to pay the plaintiff's costs of the election petition, or, in other words, whether the District Judge had power, under S. 23 of the Act, to award costs.” This is indeed the point which has been specially pressed by the learned pleader for the defendant, and it is not seriously disputed that the costs, if the District Judge had power to award them, could, in the circumstances, be recoverable by suit. The learned pleader for the defendant in support of his contention cites the case of *Jalam Punja v. Khoda Javra* (8 Bom. H.C. 29) in which it was ruled that an action for recovery of costs incurred in defending a claim for possession under Bombay Act (V of 1864), (now repealed) was not maintainable. That ruling proceeded on the ground that the Act in question was entirely silent as to costs between party and party. The present case would be manifestly distinguishable, if, as the Judge of the Small Cause Court appears to hold, the 2nd paragraph of S. 23 of Bombay Act II of 1884 gives the District Judge authority to award costs. For the defendant, however, it is contended that no such authority is conferred by the section; that the District Judge is a *persona designata* for the purpose of the inquiry directed, and has none of the inherent powers of a Court; that the order which he is empowered to pass is one which must be passed after the inquiry is concluded, and therefore after the purposes for which he may exercise the powers of a Civil Court, are completed and those powers therefore no longer vest in him and that on the completion of the inquiry, the District Judge is *functus officio*, and can exercise no more powers for the purposes thereof. It is further urged that the language of other enactments clearly indicates that special provision must be made for a power to award costs—and that such power would not be included as one for the

and in such proportions as the Court may determine regard being had to the disallowance of any costs, charges, or expenses which may in the opinion of the Court have been caused by vexatious

purpose of an inquiry. Section 75 of the Registration Act, 1877, was specially referred to, as giving first, a power "for the purpose of any inquiry" to summon and enforce the attendance of witnesses and to compel them to give evidence, and then, as a distinct and separate matter, declaring that the Registrar may also direct by whom the whole or any part of the costs of any such inquiry shall be paid. Section 508 of the City of Bombay Municipal Act, 1888, was also cited as showing that the legislature deemed it necessary to make special provision in sub-S. (3) of that section for costs, as a matter not included under "powers for the purposes of an inquiry," such as are conferred in sub-S. (1) of the same section. In considering the weight to be attached to these arguments, it is, of primary importance to bear in mind the effect of S. 23 as a whole, in conferring powers on the District Judge to deal with applications made thereunder. And first it is to be noted that an application by some person duly qualified is a condition precedent to the existence and exercise of those powers. Secondly, it is to be noted that the power of the District Judge to pass any order at all is subject to the condition that an inquiry must precede the order. It is true that the inquiry which the District Judge is required to make, as an essential preliminary to his order, is to be such inquiry only as he deems necessary, that is, he must exercise a sound and judicial discretion, excluding of course irrelevant issues, and limiting its scope to points essential for his decision. But the third paragraph of the section which invests him with the powers of a Civil Court for the purposes of the said inquiry very clearly indicates that though the District Judge is, as contended, a *persona designata* and not technically a Court, the section contemplates that the inquiry, which he is called upon to hold, should be "an inquiry by the examination of witnesses," and not mere informal, personal observation. The case of *Baroness Wenlock v. River Dee Co.* (L.R., 19 Q.B. D. 155, 158), may be usefully referred to in this connection. Indeed the word "inquiry" is a form of legislative expression that frequently recurs in the Indian Statute book, with a connotation to be gathered from the context, almost invariably implying certain formalities and principles of procedure,—involving incidentally many questions which require decision by the authority conducting the inquiry, but which would not arise in an informal search for information. The most obvious instances that suggest themselves in this connection, are questions relating to the summoning of witnesses enforcing their attendance, compelling them to give evidence. These are all instances where the exercise of a Civil Court's powers is absolutely necessary if enquiry is to be held at all and such powers are therefore referred to in S. 75 of the Registration Act, 1877—as "for the purpose of any inquiry." But the expression used in S. 23 of the Bombay Act II of 1894, "for the purposes of the said inquiry"—appears to have a wider range and to extend not only to matters without which no inquiry could be made at all, but also to all such incidental requisites to a formal proceeding on a formal application, as are the ordinary adjuncts to formal proceedings in Civil Courts—and, though not necessary for the purposes of an informal search for information, are necessary to regulate matters that would inevitably arise for decision by a Civil Court in dealing with the inquiry contemplated by the section. The phrase "for the purposes of an inquiry" cannot have the same limited meaning as the phrase "for the purpose of an enquiry" and appears to include all purposes to which the formal inquiry contemplated gives rise. Section 23, therefore, appears to give the District Judge all the powers which a Civil Court should exercise with reference to all matters incidentally necessary for the purposes of a formal inquiry. That is to say, the District Judge may exercise the powers of a Civil Court not only for the purpose of making the enquiry, but for the

conduct, unfounded allegations, or unfounded objections on the part either of the petitioner or the respondent, and regard being had to the discouragement of any needless expenses by throwing

purpose of regulating the conduct thereof, and of disposing of all questions which necessarily arise from action taken for any purpose subservient to the inquiry. The inquiry is to be such as the Judge deems necessary. If in his discretion he deems it necessary to hear such pleaders as the parties interested have engaged for the purposes of inquiry, the District Judge would appear to have in respect of those pleaders, and of the apportionment of costs incurred for the purpose of so conducting the inquiry, precisely the same powers as a Civil Court would have for the same purposes. In other words, nothing that is requisite for, or subsidiary to the purposes of the inquiry which the District Judge, in his discretion, deems it necessary to hold, is beyond his powers, provided that it would not be beyond his powers if he were dealing with the same subject matter as a Civil Court. If it is necessary for the purposes of the inquiry to summon witnesses it seems equally necessary for the same purposes to direct by whom the costs incurred for process fees, &c., should be defrayed and if for the purposes of the inquiry it is necessary to hear pleaders, it would be difficult to say on what ground the apportionment of costs incurred for that purpose would be less necessary as an adjunct of the inquiry, than the apportionment of the costs of the witnesses. A decision on such a detail is under S. 220 of the Code of Civil Procedure within the power of every Court dealing with an application, whether it has the jurisdiction to try the case are not, and appears to be a necessary supplement of its powers to reject an application. Thus in the case of *Pringle v. The Secretary of State for India*, (L.R. 40 Ch. D. 288) it was laid down as a "broad principle that a Court which is put in motion wrongly, has inherent jurisdiction to compel the person who puts in motion wrongly, and who brings an innocent party to answer an unfounded claim or an unjustifiable proceeding, to pay the costs. That was in a case in which the Act (45 & 46 Vict. c. 45, vide 39 Ch. D. 300) then in question was silent as to costs. The Court there hesitated to say that if the question had arisen whether the person against whom action was taken had been unsuccessful, that person could have been ordered to pay costs, but was unanimous in holding that as the plaintiff had wrongly applied to the Court for its interference, the Court had jurisdiction, independently of any statutory enactment to make him pay the costs occasioned by that wrongful application. In the present case, the defendant, the person ordered by the District Judge to pay costs, was the person who had applied to the District Judge under S. 23 of Bombay Act II of 1894, and according to the result of the inquiry had wrongly put in motion, the machinery provided. And so far as the District Judge had any powers of a Civil Court at all for the purposes of the inquiry, he might perhaps be regarded as having that power which is part of the inherent jurisdiction of every Court, to compel the defendant as a person who had wrongly put it in motion, to pay the costs.

If, as would appear, the power to determine and apportion costs, is a power exercisable for the purpose of such an inquiry, the precise stage of the proceedings at which it is exercised, must be immaterial, for until the power is exhausted or expressly or impliedly relinquished, the District Judge cannot be regarded as *functus officio* in respect thereof. In this case, the power was expressly reserved. The District Judge was under no obligation to exercise it without consideration. In reserving, for a single day, the consideration of this question, he cannot be regarded as having charged the nature of the question so as to deprive it of the character of a question which for the purposes of the inquiry, i.e., the formal proceeding, he was empowered to determine. The question whether his powers extended to the execution of the direction as to costs, has not been raised in this reference, and it may suffice to add that the District Judge appears to

the burden of defraying the same on the parties by whom it has been caused, whether such parties are or not on the whole successful.”⁽³⁾

“Where it appears to the Election Court that a corrupt practice has not been proved to have been committed in reference to the election by or with the knowledge and consent of the respondent, and that the respondent took all reasonable means to prevent corrupt practices being committed on his behalf, the Court may make one or more of the following orders with respect to the payment of the whole or part of the costs of the petition:—(1) If it appears to the Court that corrupt practices extensively prevailed, they may order the whole or part of the costs to be paid by the county or borough; (2) if any persons are proved to have been extensively engaged in corrupt practices, or to have encouraged or promoted extensive corruption, the Court, may, after giving them an opportunity of being heard by counsel or solicitor, and examining and cross-examining witnesses to show cause why the order should not be made, order the whole or part of the costs to be paid by those persons, or any of them, and may order that if the costs cannot be recovered from one or more of such persons they shall be paid by some other of such persons or by either of the parties to the petition.⁽⁴⁾ Moreover, where any person appears to the Court to have been guilty of a corrupt or illegal practice, he may be ordered to pay the whole or any part of the costs of or incidental to any proceeding before the Court in relation to such offence.”⁽⁵⁾

have been correct in holding that the execution of his order might involve questions of a totally new and distinct character from those which necessarily arose for the purposes of the inquiry, and that therefore S. 23 could not be regarded as empowering him to deal with matters of execution at all. The only alternative to such realisation is admitted if the remedy adopted by the plaintiff in the present suit. The answers to both the questions submitted by the Judge of the Small Cause Court, Surat, should therefore be in the affirmative, that is to say, that the District Judge had authority under S. 23 of Bombay Act II of 1894 to award costs of the inquiry and that the order of the District Judge as to costs is capable of being enforced by a separate suit.” *Ramlal Lallubhai v. Bhagubhai Dayabhai*, 2 Bom. L.R. 960—967.

(3) *Encyclopædia of the Laws of England*, Vol. V, page 140. See S. 41 of Act XII of 1863 (Eng. statute).

(4) *Corrupt and Illegal Practices Prevention Act*, (1883), S. 44 (1).

(5) *Encyclopædia of the Laws of England*, 2nd Ed., Vol. V, page 140; *Corrupt and Illegal Practices Prevention Act* (1883), S. 44 (2).

The costs of an election petition are entirely in the discretion of the Court, such discretion, however, being exercised in accordance with the foregoing considerations.⁽⁶⁾

An overloaded election petition will be visited with costs, even if it is successful.⁽⁷⁾ Costs where petition is overloaded.

A returning officer, acting *bona fide*, put such an erroneous construction upon a section of the Ballot Act as rendered a petition necessary: the Court declined to order him to pay any part of the costs.⁽⁸⁾ The returning officer having acted on his own mere motion, and without the interference of either candidate, the Court decided that the petitioner and respondent should each bear his own costs.⁽⁹⁾ Costs where petition is caused by returning Officer's mistake.

Where the petition is caused by the conduct of the returning officer, *e.g.*, by miscounting the ballot papers, the Court may order him to pay the costs if he is a party to the petition.⁽¹⁰⁾

(6) *Encyclopædia of the Law of England*, 2nd Ed., Vol. V, p. 140. "Though, as a general rule, the unsuccessful party has to pay the costs, the costs following the event see *Hertford*, (1869) 1 O'M. & H. 196; *Barrow-in-Furness*, (1886) 4 O'M. & H. 83; *Kennington*, (1886) *ibid.* 95; *Worcester*, (1892) *ibid.* 154; *Manchester*, (1892) *ibid.* 122; *Halifax*, (1893) *ibid.* 204; *Elgin & Nairn*, (1895) 5 O'M. & H. 16; *Lichfield*, (1895) *ibid.* 38; *Lancaster*, (1896) *ibid.* 52; *Sunderland*, (1896) *ibid.* 67; *Maidstone*, (1901) *ibid.* 154; *Monmouth*, (1901) *ibid.* 174; *Islington*, (1901) *ibid.* 131, yet where the expenses are very numerous, and where the petition is justified, though in the event the petitioner may be unsuccessful, and in some cases even where the petitioner succeeds, each party is frequently ordered to pay his own costs (see *Guildford*, (1869) 1 O'M. & H. 15; *Norwich*, (1869) *ibid.* 12; *Stafford*, (1869) *ibid.* 234; *Thornbury*, (1886) 4 O'M. & H. 69; *Stepney*, (1886) *ibid.* 58; *Walsall*, (1892) *ibid.* 129; *Cirencester*, (1893) *ibid.* 199; *Pontefract*, (1893) *ibid.* 201. In recent cases, moreover, there appears to be a tendency for the costs to be apportioned between the petitioners and respondents in respect of the various issues, the successful party being given the general costs of the petition, but having to pay the other side the costs of charges which failed (see *Hexham*, (1892) 4 O'M. & H. 151; *South Meath*, (1892) *ibid.* 142; *Rochester*, (1892) *ibid.* 161; *North Meath*, (1892) *ibid.* 193; *Southampton*, (1895) 5 O'M. & H. 24; see also *Haggerston*, (1896) *ibid.* 88, and *St. George's*, (1896) *ibid.* 116; *Islington*, (1901) *ibid.* 133; *Bedmin*, (1906) *ibid.* 235." *Encyclopædia of the Laws of England*, 2nd Ed., Vol. V, pp. 140, 141.)

(7) *Birkbeck v. Bullard*, 54 L.T. 625; 4 O'M. & H. 84. See also *Ackers v. Howard*, 4 O'M. & H. 65.

(8) *Sheil v. Ennis*, Ir. R. 8 C.L.240.

(9) *Ibid.*

(10) See *East Clare*, (1892) 4 O'M. & H. 166; *Halifax*, (1893) *ibid.* 205. But such an order is rarely made, see *Hackney*, (1874) 2 O'M. & H. 87; *Greenock*, (1892) *Daly's El. Cas.* 82.

Costs where there is a difference of opinion among Judges.

Costs of Attorney-General or Public Prosecutor in England.

In election cases where the Judges differ, or in respect of charges upon which the Judges differ, no costs as a rule are ordered.⁽¹¹⁾

"With regard to the costs of the Public Prosecutor, it is provided that they are in the first instance to be paid by the Treasury; but if for any reasonable cause it seems just, the Court may order all or part of them to be paid to the Treasury by the parties to the petition, or such of them as the Court may direct."⁽¹²⁾

In pursuance of this provision the persons whose conduct has rendered the costs of the Public Prosecutor necessary have in some cases been ordered to pay his costs.⁽¹³⁾

In an English election case, where costs were ordered to follow the event, the costs of the Attorney-General were not allowed on the ground that they were incident to the administration of the law.⁽¹⁴⁾

Where a petition is utterly unfounded the costs of the public prosecutor will be ordered to be paid by the petitioner.⁽¹⁵⁾

Expenses of witnesses.

The amount to be paid to any witness whose expenses are allowed by the Judges⁽¹⁶⁾ is to be ascertained and certified by the Registrar.⁽¹⁷⁾

Taxation of costs.

It has been held in an English case⁽¹⁸⁾ that a petitioner being awarded the costs of a petition, he would be entitled to be recouped (i) the sums actually paid by him for copies of the shorthandwriter's notes; (ii) as also expenses of the witnesses *bona fide* summoned, though they have not been produced. It was further held that (iii) the Registrar's certificate is not necessary to entitle him to expenses of witnesses; (iv) he would be entitled to the cost of an illustrated map of the country; (v) he would also be entitled to a retainer of a

(11) Down, (1880) 3 O'M. & H. 129; Montgomery, (1892) 4 O'M. & H. 170; Haggerston, (1896), 5 O'M. & H. 88; Great Yarmouth, (1906) *ibid.*, 199; but see Worcester, (1906), *ibid.*, 235.

(12) Corrupt and Illegal Practices Prevention Act, (1883), S. 43 (8); Encyclopædia of the Laws of England, 2nd Ed., Vol. V, pp. 140, 141.

(13) *Ibid.*

(14) *Londonderry Case*, 4 O'M. & H. 96; *S. P. Belfast Case*, 4 O'M. & H. 105.

(15) *Crossman v. Gent Davis*, 4 O'M. & H. 93; 54 L.T. 628.

(16) See S. 34.

(17) Rule 73; as to the effect of the Registrar's certificate see *M'Laren v. Home*, (1881) 7 Q.B.D. 477.

(18) *Trench v. Nolan*, Ir. R. 7 O.L. 445; 21 W.R. 640 (Eng.).

reasonable amount paid to each of the two senior counsel ; (vi) he would likewise be entitled to the fee paid to junior counsel on the hearing of a case reserved ; (vii) he may also be awarded the costs of proceedings to draw money out of Court. (viii) It was also held that the master, in exercising his discretion as to the number of counsel, the amount of their fees, the number of consultations, the amount of consultation fees and refreshers, and the expenses of subpoenas to witnesses, telegrams and messages, ought to have regard to the difficulty, magnitude and importance of the particular case.⁽¹⁹⁾

Upon the taxation of the costs of a parliamentary election petition, it is within the discretion of the master to allow a lump sum for "Instructions for brief," provided the items making up the lump sum have been brought before him, so as to enable him to determine whether it represents reasonable and proper charges.⁽²⁰⁾

"On the taxation of the costs of a petition, the number of witnesses to be allowed, the length of the briefs and proofs, the number of counsel, and the amount of their fees, and the incidental expenses of the trial, are matters for the master's discretion, subject to the control of the Court where a proper case is shown for its interference."⁽²¹⁾

"Although the amount of the reasonable expenses to be paid to any witness in an election petition may be ascertained and certified by the registrar, his certificate is not conclusive of the amount as between the petitioner and respondent ; but it is, as part of the general costs of the petition, subject to taxation by a master, who must exercise his discretion on the expenses certified."⁽²²⁾

On taxation of the costs of a petition for bribery and undue influence, when the petition is only withdrawn three days before the trial, and an order is made that the petitioner shall pay the

(19) *Trench v. Nolan*, Ir. R. 7 O.L. 445 ; 21 W. R. 640 (Eng.).

(20) *Barnstaple Election petition*, *In re, Fleming v. Cave*, 44 L.J.C.P. 200 ; 32 L. T. 160.

(21) The master, on taxation of the petitioner's costs, disallowed fees for consultations during the trial ; the Court, in accordance with the *Tamworth Case*, 39 L.J. C.P. 89 ; L.R. 5 C.P. 172, directed him to review his taxation in that respect, *Tillett v. Stracey*, 39 L.J. C.P. 93 ; L.R. 5 C.P. 185 ; 22 L.T. 101 ; 18 W.R. 631 (Eng.). The master disallowed a moiety of the charges paid to the under-sheriff on the trial ; the Court declined to interfere. *Ibid*.

(22) *Mclaren v. Home*, 50 L.J.Q.B. 658 ; 7 Q.B.D. 477 ; 45 L.T. 350 ; 30 W.R. 85 (Eng.) ; 46 J.P. 85.

respondent's costs, the respondent is entitled to all costs that could be reasonably incurred by an attorney for his client up to that time ; and reasonable expenses incurred before delivery of particulars are to be allowed.⁽²³⁾

The judgment of the election Court on the question of costs is final.⁽²⁴⁾

Scale of costs
—English
practice.

“ The rules and regulations of the Supreme Court of Judicature in England with respect to costs to be allowed in actions, causes, and matters in the High Court are in principle, and so far as practicable, to apply to the costs of election petitions, and no costs are to be allowed on a higher scale than would be allowed in any action, cause, or matter in the High Court on the higher scale as between solicitor and client.”⁽²⁵⁾

Security for
costs—Eng-
lish practice.

According to the practice of the English Courts “ at the time of presenting a Municipal election petition or within three days afterwards, the petitioner must give security for all costs, charges, and expenses which may become payable by him to any witness summoned on his behalf or to any respondent.”⁽²⁶⁾

Sec. 15. Fraud, Relief sought on the Ground of.

Suit for relief on the ground of fraud—General rule is that costs follow the event.

Cases where costs do not follow the event.

- (i) Where successful party guilty of negligence or misplaced confidence.
- (ii) Where conduct of the parties has been blamable in the matter.
- (iii) Where successful party's conduct rendered suit reasonable.
- (iv) Where defeated party is free from moral blame.
- (v) Where both parties not free from moral blame.
- (vi) Where defeated defendant had a fair and reasonable ground of defence.
- (vii) Where the successful party fails in his allegations of fraud.
- (viii) Where the successful party fails on a particular issue.
- (ix) Where technical objection (as) want of jurisdiction was not raised before lower Court.
- (x) Where property is erroneously described.

Extent of liability.

Abatement of fraud—Liability of abettor.

(23) *Penbrooke Election Petition, In re, Hughes v. Meyrich*, 39 L.J. C.P. 249 ; L. R. 5 C.P. 407 ; 22 L.T. 482 ; 18 W.R. 806 (Eng.).

(24) See *Lovering v. Dawson*, (1875) L.R. 10 C.P. 726. As to the taxation and recovery of costs of election petitions, see S. 41 of the Act of 1868 and r. 55.

(25) Corrupt and Illegal Practices Prevention Act, 1883, S. 44 (3).

(26) M. C. Act, 1882, S. 89 (1) ; see *Encyclopædia of the Laws of England*, 2nd Ed., Vol. V, p. 146.

Liability of solicitor.
 Liability of agent.
 Error of Court.
 Fraudulent valuation of suit.
 Costs on higher scale.
 Practice and pleading.

"WHERE a transaction is set aside, ⁽¹⁾ or an action for the specific performance of a contract is dismissed, ⁽²⁾ on the ground of misrepresentation, concealment, undue influence, or any other species of fraud, the successful litigant is, as a general rule, entitled to the costs."

Suit for relief on the ground of fraud—
 General rule is that costs follow the event.

This is in accordance with the general rule that costs follow the event.⁽³⁾

"So also where an action is brought for the rescission of a transaction, or for the recovery of money, on the ground of fraud, and the charge of fraud fails, the dismissal is, in general, with costs."⁽⁴⁾

Similarly when the specific performance of a contract is resisted on the ground of fraud, and the charge of fraud fails, the decree is, in general, with costs.⁽⁵⁾

(1) *Edwards v. M'Cleay*, 2 Sw. 289; *Bellamy v. Sabine*, 2 Ph. 425; *Dent v. Bennett*, 4 M. & C. 269; *Gibson v. D'Este*, 2 Y. & C.C.C. 581; *Mulhellen v. Marum*, 3 Dr. & War. 317; *Waters v. Thorn*, 22 Beav. 561; *Slim v. Croucher*, 1 D.F. & J. 520; *Dally v. Wonham*, 33 Beav. 162; *Baker v. Monk*, ib. 425; *Davies v. Davies*, 4 Giff. 417. On the subject-matter of this section see Kerr on Fraud and Mistake, 2nd Ed., pp. 458 to 465 (to which work the authors are greatly indebted in the preparation of the present section). Seton on Judgments and Orders, 6th Ed., 1901, Vol. III, pp. 2310, 2313, 2317; Encyclopædia of the Laws of England, 2nd Ed., Vol. VII, p. 265. See also Bigsloe on Fraud (American) 1890; Monereiff on Fraud, (1902); Notes to *Chandelor v. Lopus* and *Pasley v. Freeman*, in Smith's Leading Cases; Morgan and Wurtzburg on Costs, pp. 28, 106—107, 385, 456; Marshall on Costs, p. 517; Annual Practice, Notes under O. LXV; Yearly Practice, Notes under O. LXV; Daniell's Chancery Practice, 7th Ed., 1901, Vol. I, pp. 975 and 1015.

(2) *Yancouver v. Bliss*, 11 Ves. 463; *Lord Brooke v. Roundthwaite*, 5 Ha. 306; *Myers v. Watson*, 1 Sim. N.S. 529; *Cox v. Coventon*, 31 Beav. 388. For a case where a suit was brought on behalf of the Crown for relief on the ground of fraud and where the principle that "the Crown neither pays nor receives costs" was acted upon, see *Johnson v. The King*, 9 O.W.N. (Journal portion), page L.

(3) See Kerr on Fraud, 2nd Ed., 1883, p. 458.

(4) *Langley v. Fisher*, 9 Beav. 91; *Loader v. Clark*, 2 Mac. & G. 387; *Pulsford v. Richards*, 17 Beav. 87; *Jennings v. Broughton*, 17 Beav. 239; *Dolman v. Nokes*, 22 Beav. 402; *New Brunswick, &c., Railway Co. v. Conybeare*, 9 H.L. 735; *Luff v. Lord*, 11 Jur. N.S. 50; *Straker v. Ewing*, 34 Beav. 147; *Chapman v. Chapman*, 9 Eq. 296; *Cargil v. Bower*, 10 Ch. D. 516.

(5) *Abbott v. Sworder*, 4 Deg. & G. 460; *Haywood v. Cope*, 25 Beav. 140; *Clarke v. Mackintosh*, 4 Giff. 134.

"Acting on the same principle when a purchaser obtains specific performance, with compensation, the Court will, in general, give him a decree with costs."⁽⁶⁾

Cases where costs do not follow the event.

Though the general rule is as stated above that, *prima facie*, he who succeeds ought to have the costs, yet it is not the invariable rule that in all cases where relief is sought for on the ground of fraud that costs do always follow the event.⁽⁷⁾

(i) Where successful party guilty of negligence or misplaced confidence.

Thus "if there has been negligence or misplaced confidence on the part of the plaintiff, he will not have his costs, although he succeeds in the suit."⁽⁸⁾

As a general rule, although a suit is dismissed, it will be without costs if there has been negligence.⁽⁹⁾

Where the plaintiff has by his conduct rendered the fraud possible, he will not be allowed his costs:⁽¹⁰⁾ and it was held that in such a case he had no claim for the amount of his costs against the bank whose manager had committed the forgery:⁽¹¹⁾

(ii) Where conduct of the parties has been blamable in the matter.

The costs in actions on the ground of fraud and mistake must depend on the conduct of the parties, where the mistake is entirely owing to the conduct of the plaintiff he must pay all the costs: where the defendant has been aware of the mistake from the beginning, and refused to correct it, then the costs will be given against him.⁽¹²⁾ But where a defendant improperly refuses to correct the mistake, no costs will be allowed if the error is due to the fault of the plaintiff.⁽¹³⁾

Where suit has become necessary entirely by the plaintiff's own fraudulent conduct, the Court would not allow him any of the costs of the litigation.⁽¹⁴⁾

(6) *Leyland v. Illingworth*, 2 D.F. & J. 248; *Gedye v. Duke of Montrose*, 26 Beav. 45.

(7) *Staines v. Morris*, 1 V. & B. 16.

(8) *Allen v. Knight*, 5 Ha. 280; *Thonston v. Renton*, 9 Eq. 181.

(9) *Evans v. Bicknell*, 6 Ves. 173.

(10) *Johnston v. Renton*, 9 Eq. 181; *Taylor v. G.I.P. Ry. Co.*, 4 D. & J. 559; *Cottam v. E. C. Ry. Co.*, 4 J. & H. 243.

(11) *Re United Service Co.*, 6 Ch. 212.

(12) *M. R., in Harris v. Pepperell*, 5 Eq. 5; *Meadows v. M.*, 16 Beav. 401; *Collyer v. Clay*, 7 Beav. 188; *Neesom v. Clarkson*, 2 Ha. 163. See also *Sufseeollah Sirkar v. Begum Bibee*, 25 W.R. 219 at p. 220.

(13) *Bloomer v. Spittle*, 13 Eq. 427; *Harris v. Pepperell*, 5 Eq. 1; *Garrard v. Franckel*, 30 Beav. 445; *Murray v. Parker*, 19 Beav. 303.

(14) *Sufseeollah Sirkar v. Begum Bibee*, 25 W.R. 219 at p. 220.

In one case, the successful appellant was ordered to pay the costs of the respondent, owing to his conduct.⁽¹⁵⁾

“Where a suit for the rescission of a transaction, on the ground (iii) Where successful party's conduct rendered suit reasonable. of undue influence, or of advantage taken of a fiduciary position, was dismissed on the ground of acquiescence, or delay in instituting the suit, or even on the merits, the dismissal was without costs, the Court being satisfied that the plaintiff had a reasonable cause of suit, or that the conduct of the defendant had rendered an investigation not unreasonable.”⁽¹⁶⁾

Where the defendant has also been to blame in the matter, or has by conduct contributed to the litigation, the dismissal of a suit for specific performance will be without costs.⁽¹⁷⁾

“As a general rule, where costs have been occasioned by the conduct of either party, the party who occasioned the costs must bear them; and where by the misconduct of both parties, neither has his costs.”⁽¹⁸⁾

The suit will be dismissed without costs, if the conduct of the defendant has not met with the approval of the Court.⁽¹⁹⁾

Where a transaction is set aside, the rescission may be without costs, if the defendant is free from moral blame.⁽²⁰⁾ (iv) Where defeated party is free from moral blame.

In one case costs were allowed to the trustees of a voluntary settlement, though it was set aside, as they seemed to have acted *bona fide*, and really with the desire to benefit the plaintiff⁽²¹⁾.

Similarly although the Court may set aside a transaction as against the defendant, in a suit based on the ground that the (v) Where both parties not free from moral blame.

(15) *Gyanee Ram v. Palee Ram*, 2 N.W.P. 73.

(16) *Montesquieu v. Sandys*, 18 Ve. 301; *Champion v. Rigby*, 9 L.J. Ch. N.S. 211; *Fyler v. Fyler*, 3 Beav. 550; *Edwards v. Meyrick*, 2 Ha. 75; *De Montmorency v. Devereux*, 7 Cl. & Fin. 188; *Salmon v. Cutts*, 4 Deg. & Sm. 125; *Baker v. Reed*, 18 Beav. 398; *Hartopp v. Hartopp*, 21 Beav. 274; *Wright v. Vanderplank*, 2 K. & J. 18; *Clegg v. Edmondson*, 8 D.M. & G. 806; *Clanricarde v. Henning*, 30 Beav. 175; *Toker v. Toker*, 3 D.J. & S. 487.

(17) *Walters v. Morgan*, 3 D.F. & J. 718.

(18) *Kerr on Fraud*, 2nd Ed., 1883, p. 460.

(19) *Leather Cloth Co. v. America Leather Cloth Co.*, 33 L.J. Ch. 199; *Peek v. Gurney*, 13 Eq. 79.

(20) *Ward v. Hartpole*, 3 Bligh. 490; *Wood v. Abrey*, 3 Madd. 423; *Groves v. Perkins*, 6 Sim. 576; *Baker v. Carter*, 1 Y. & C. 250; *Stanton v. Tattersall*, 1 Sm. & G. 536; *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 394. In particular cases the plaintiff may have to pay the costs, although the transaction is set aside, if the defendant be free from moral blame. *Davies v. Oity*, 35 Beav. 208.

(21) *Everitt v. Everitt*, 10 Eq. 410.

transaction was tainted with fraud, the Court may not order the defendant to pay the costs of the plaintiff if it finds that plaintiff also is not free from moral blame. ⁽²²⁾

"Where the plaintiff is *particeps criminis*, and seeks to set aside a security on the ground of public policy, the decree will be without costs." ⁽²³⁾

Where no blame attached to any person, the costs of a suit to rectify a settlement were paid out of the *corpus* of the settled fund: ⁽²⁴⁾ but where a maintenance clause was rectified in the interests of infants, the costs were paid out of the income. ⁽²⁵⁾

(vi) Where defeated defendant had a fair and reasonable ground of defence.

Although specific performance be decreed, the decree will be without costs, if the party resisting performance had a fair and reasonable ground for doing so. ⁽²⁶⁾

(vii) Where the successful party fails in his allegations of fraud.

If a man succeeds in obtaining the relief prayed for, and has the costs of the suit generally, but fails to establish allegations of fraud in the plaint, he must pay the costs occasioned by such allegations being introduced. ⁽²⁷⁾

In such case for the sake of simplicity, no costs will be given to either side when, but for the allegations of fraud, the plaintiff would have been entitled to the costs. ⁽²⁸⁾

Where an *ikrarnamah* relied on by the respondents and on which the case depended was found to be fabricated, and the

⁽²²⁾ *Lord Aylesford v. Morris*, 8 Ch. 498; *Lyon v. Home*, 6 Eq. 655.

⁽²³⁾ *Debenham v. Ox*, 1 Ves. 276; *Morgan v. Bruen*, Ll. & G. Temp. Sug. 180; but see *Jackman v. Mitchell*, 13 Ves. 581; *Comp. Davies v. Otty*, 35 Beav. 208; *Ayerst v. Jenkins*, 16 Eq. 282.

⁽²⁴⁾ *Stock v. Vining*, 25 Beav. 235.

⁽²⁵⁾ *Tomlinson v. Leigh*, 14 W.R. 121 (Eng.); 11 Jur. N.S. 962.

⁽²⁶⁾ *Borrowes v. Lock*, 10 Ves. 470; *Vancouver v. Bliss*, 11 Ves. 463; *Fenton v. Browne*, 14 Ves. 150. See *M'Queen v. Farquhar*, 11 Ves. 482. In *Higgins v. Samels*, where a suit for specific performance of a contract was dismissed, on the ground of misrepresentation, the dismissal was, under the circumstances of the case, without costs. 2 J. & H. 460; Kerr on Fraud, p. 460. The Court always exercises its discretion in dismissing a suit for specific performance, and with costs, on the ground of circumstances which would not be sufficient to cancel the agreement on the ground of fraud. *Davis v. Symonds*, 1 Cox 402.

⁽²⁷⁾ *Blest v. Brown*, 4 D.F. & J. 367; *Jones v. Ricketts*, 10 W.R. 576 (Eng.); *Tabor v. Cunningham*, 24 W.R. 156 (Eng.); *Clinch v. Financial Corporation*, 5 Eq. 450; *Thomson v. Eastwood*, 2 App. Ca. 236. See *Harvy v. Mount*, 8 Beav. 439; *Shackleton v. Sutcliffe*, 1 Dig. & Sm. 623; *Bromley v. Smith*, 26 Beav. 670; *St. Albyn v. Harding*, 27 Beav. 11; *Baker v. Bradley*, 7 D.M. & G. 620.

⁽²⁸⁾ *Cullingworth v. Lloyd*, 2 Beav. 385; *Rawlins v. Wickham*, 1 Giff. 355; *Tyler v. Yates*, 6 Ch. 665.

appellant was successful, no order was made as to costs, fabricated documents having also been put forward on behalf of the appellant.⁽²⁹⁾

Charges of fraud, forgery and perjury, having been made by the respondents against the appellant, the party who propounded the will, costs of the Court in India, and upon appeal to England, were, upon the reversal of the decree of the Sudder Court, ordered to be paid by the respondents.⁽³⁰⁾

The appellant-defendant continuing to impute fraud to the respondent-plaintiff, which he could not substantiate, was deprived of his costs in appeal.⁽³¹⁾

"In *Parker v. McKenna*,⁽³²⁾ the plaintiff set up a case which entitled him to relief and also a separate case of fraud; so much of his suit as was founded on the case of fraud was dismissed with costs, and he got no costs of the rest of the suit."⁽³³⁾

"In *Rhodes v. Bate*,⁽³⁴⁾ the defendant was not ordered to pay costs, though the transaction was set aside, inasmuch as the case of the plaintiff failed to a considerable extent, and inasmuch as in so far as it succeeded, it was by force of the law of the Court, and not by any merits of his own, the evidence adduced by him being also irrelevant and overcharged."

"In *Staniland v. Willot*,⁽³⁵⁾ where charges of fraud were neither supported nor repelled by evidence on either side, the costs were not thereby affected, as it did not appear that any costs were specially occasioned by such charges."

In *Fyler v. Fyler*,⁽³⁶⁾ however, a plaint containing unproven charges of fraud was dismissed without costs, because the defendants, by mixing up their personal interests in the transactions in question, had rendered an investigation not unreasonable.

(29) *Coomari Rodeshwar v. Manroop Kcer*, 13 I.A. 20 = 4 Sar. 689 = Bald. 487 (P.C.).

(30) *Nana Nurain Rao v. Huree Punth Bhao*, 9 M.I.A. 96 = Marsh. 476 = 1 Sar. 843 (P.C.).

(31) *Lewen v. Morrison*, 2 Agra, Part II, 151.

(32) 10 Ch. 96.

(33) See *Gray v. Lewis*, 8 Ch. 1035.

(34) 1 Ch. 262.

(35) 3 Mac. & G. 664.

(36) 3 Beav. 550.

In like manner, charges of fraud made by defendants will, if unsubstantiated, be visited with costs, even though the defendant gets the costs of the suit generally.⁽³⁷⁾

So also, the introduction of charges of fraud which are irrelevant and cannot be tried is improper."⁽³⁸⁾

(viii) Where the successful party fails on a particular issue.

"Where a man succeeds in the main point in having a deed set aside but fails in a particular issue, he must have the costs generally except so far as they have been increased by the issue in which he has failed, and the costs of the issue in which he has failed will be given to the party who has succeeded in that issue, and one set of costs will be set off against the other."⁽³⁹⁾

(ix) Where technical objection (as) want of jurisdiction was not raised before lower Court.

Where in a case for relief on the ground of fraud the objection to jurisdiction was not raised before the lower appellate Court, each party was directed to pay his own costs.⁽⁴⁰⁾

(x) Where property is erroneously described.

"In a suit for the rescission of a transaction on the ground of misrepresentation which was dismissed, the Court did not award costs to the successful party on the ground that although the charges as to misrepresentation had failed, it appeared from the evidence that the property which was the subject-matter of the litigation had not been correctly described".⁽⁴¹⁾

Extent of liability.

Where plaintiff succeeds in a suit on the ground of fraud, he will be entitled to all the costs occasioned by it.⁽⁴²⁾

Abetment of fraud—Liability of abettor.

If a man has abetted a fraud, the absence of a personal benefit resulting from it is no excuse; he may be justly made responsible for its results, and even if no other relief can be had against him, he may be compelled to pay the costs of the action.⁽⁴³⁾

Liability of solicitor.

"Solicitors or attorneys who have abetted their clients in a fraud, or have prepared deeds to carry it out, may be made parties to an action to set aside the fraudulent transaction, and are liable

(37) *Wright v. Howard*, 1 Sim. & St. 205; *Warrin v. Thomas*, 2 W.R. 442 (Eng.); *Pledge v. Buss*, John. 666; *Theyer v. Tombs*, 12 W.R. 512 (Eng.).

(38) *Kerr on Fraud*, 2nd Ed., 1883, p. 461 (462).

(39) *Kerr on Fraud*, 2nd Ed., 1883, p. 462.

(40) *Ramjit Misser v. Ramador Singh*, 17 C.W.N. 116 = 16 C.L.J. 77 (83) = 16 Ind. Cas. 940.

(41) *Bartlett v. Salmon*, 6 D.M. & G. 40; *Hallows v. Fernie*, 3 Eq. 520.

(42) *Stanley v. Bond*, 6 Beav. 423.

(43) *Seddon v. Connell*, 10 Sim. 85; *Clark v. Girdwood*, 7 Ch. D. 18.

to pay the costs, even though they may have derived no personal benefit therefrom."⁽⁴⁴⁾

A solicitor, or legal adviser, who has abetted or mixed himself up in that character, in a fraudulent transaction, or has prepared improper instruments which afterwards lead to litigation may be made a party to the suit, for the mere purpose of having the costs paid by him.⁽⁴⁵⁾

He cannot excuse himself from the payment of costs, on the ground that he acted as his client's adviser.⁽⁴⁶⁾

In a case where a solicitor was free from all moral blame, and took no benefit from the transaction, the costs of a suit to set aside the transaction were nevertheless thrown on him, because he had not explained to his client the nature of the instrument.⁽⁴⁷⁾

"Although costs may not be given against a solicitor who has mixed himself up in a fraudulent transaction, costs will not be given to him."⁽⁴⁸⁾

In *Harvey v. Mount*,⁽⁴⁹⁾ a solicitor who acted as such in a transaction which was impeachable on the ground of fraud, but was himself free from moral culpability, was ordered to pay his own costs, as he had not acted with proper prudence in the matter.

So, also, in *Fyler v. Fyler*,⁽⁵⁰⁾ where a solicitor, by mixing up his personal interest in his client's transactions, rendered an investigation not unreasonable, the suit was dismissed against him without costs, though it contained unproven charges of fraud.

Where a solicitor has not been guilty of participation in a fraud, but at most only of a blunder, for which the remedy is an action for professional negligence, there is no jurisdiction to order him to pay the costs of the suit.⁽⁵¹⁾

(44) *Bowles v. Stewart*, 1 Sch. & Lef. 227; *Beadles v. Burch*, 10 Sim. 332; *Berry v. Armitstead*, 2 Keen. 227; *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 444. See *Cory v. Eyre*, 1 D.J. & S. 167.

(45) *Marshall v. Sladden*, 7 Ha. 443; *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 394; *Baker v. Loader*, 16 Eq. 49. See *Brent v. Brent*, 10 L.J. Ch. 84.

(46) *Bennet v. Wade*, 2 Atk. 324; *Harvey v. Mount*, 8 Beav. 439.

(47) *Moore v. France*, 9 Ha. 303. See *Beadles v. Burch*, 10 Sim. 332; *Berry v. Armitstead*, 2 Keen. 227; *Gilbert v. Lewis*, 1 D.J. & S. 52; *Bagnall v. Carlton*, 6 Ch. D. 371.

(48) *Koddy v. Williams*, 3 J. & L. 23.

(49) 8 Beav. 439.

(50) 3 Beav. 550.

(51) *Clark v. Girdwood*, 7 Ch. D. 9.

No other person can be made a defendant for the purpose of having the costs paid by him, but a solicitor or other agent, or an arbitrator.⁽⁵²⁾

The costs of a suit to set aside a deed for fraud, will not be given against a solicitor, or party to the fraud, if they are not specifically prayed in the statement of claim.⁽⁵³⁾

Liability of agent.

Where there has been misrepresentation or fraud by an agent, the principal cannot retain any benefit obtained through it.⁽⁵⁴⁾

Error of Court.

It could not be said that the error of a Court of justice which leads a party to initiate proceedings against another is sufficient to exonerate the losing party from paying the costs incurred by the opposite party.⁽⁵⁵⁾

It has however been held that a defendant is only chargeable as costs with that amount of stamp duty which can legally be demanded from the plaintiff, and not with any excess he may have had to pay through a mistake in law by the Court.⁽⁵⁶⁾

Fraudulent valuation of suit.

A plaintiff who alters the valuation of his suit for the purpose of evading jurisdiction may be punished by having no costs allowed to him; but it does not conduce to promote the ends of justice if an appellate Court were to set aside a decision which is found to be

(52) *Weise v. Wardle*, 19 Eq. 172. See *Burnes v. Addy*, 9 Ch. 244. See Kerr on Fraud, 2nd Ed., p. 464.

(53) *Beadles v. Burch*, 10 Sim. 338; *Roddy v. Williams*, 3 J. & L. 16.

(54) *Western Bank of Scotland v. Addie*, L.R. 1 H.L. Sc. 145, 158, 167; *Kisch v. Central Ry. Co. of Venezuela*, 3 D.J. & S. 122 = L.R. 2 H.L. 99; *New Brunswick Co. v. Conybeare*, 9 H.L.C. 711, 725, 749; *National Exchange Co. v. Drew*, 2 Macq. 103, 125; *Henderson v. Lecon*, 5 Eq. 249, 261; *Re Met. Coal Consumers' Assoc., Karberg's case*, (1892) 3 Ch. 1, 18; and see *Bartlett v. Salmon*, 6 D.M. & G. 33; and on the question whether an innocent principal is liable for tort in respect of misrepresentation by his agent, see *Weir v. Bell*, 3 Ex. D. 238, C.A. = 3 Ex. D. 32, Nom. *Weir v. Barnett*; *Mullens v. Miller*, 22 Ch. D. 194; *Swire v. Francis*, 3 App. Ca. 106; *Mackay v. Comm'l. Bank of New Brunswick*, L.R. 5 P.C. 394; *Western Bank of Scotland v. Addie*, L.R. 1 H.L. Sc. 145; *Barwick v. English Joint Stock Bank*, L.R. 2 Ex. 259; *Udell v. Atherton*, 7 H. & N. 172; *Cornfoot v. Fowke*, 6 M. & W. 358; *British Mutual Banking Co. v. Charnwood Forest Ry. Co.*, 18 Q.B.D. 714, C.A.; *Thorne v. Heard*, (1894) 1 Ch. 599, C.A.; (1895) A.C. 495, H.L.

(55) *Husaini Begam v. Collector of Muzaffarnagar*, 9 A. 11.

(56) *Ajoodhya Chowbe v. Daibee Singh*, 3 Agra Rev. 5.

correct on the merits, simply because the value of the suit had been designedly increased or diminished to evade jurisdiction.⁽⁵⁷⁾

Costs on the higher scale have been allowed where wholly unfounded charges of fraud have been made.⁽⁵⁸⁾ Costs on higher scale.

“If acts are charged against a party which are in themselves fraudulent, the Court, upon the question of costs, always considers the bill as imputing fraud, although the word fraud be not used in the bill.”⁽⁵⁹⁾ Practice and pleading.

“Although a suit cannot be maintained, the Court may dismiss it before the hearing, even without costs, if the defendant has been guilty of gross fraud.”⁽⁶⁰⁾

If a man be accessory to a fraud on creditors, as being the trustee of a voluntary settlement, he will not be allowed his costs on setting aside the deed, although he may have derived no benefit from it.⁽⁶¹⁾

In a case where the name of a man had, by the false representations of a third party, been inserted on the register of the shareholders of a company, it was held that the company, though innocent, must bear the costs of the application.⁽⁶²⁾

Sec. 16.—Habeas Corpus.

Jurisdiction to award costs in cases of *Habeas Corpus*.

Who can be ordered to pay such costs.

Practice.

It was formerly held that the Court had no jurisdiction to order costs in cases of *habeas corpus*, though there was always Jurisdiction to award costs in cases of *Habeas Corpus*.

(57) *Hamidunnissa Bibi v. Gopal Chandra Malakar*, 24 C. 661. See *Raghunath Charan Singh v. Shamo Koori*, 31 C. 344. See as to Suits Valuation Act, *Hukm Chand, Res Judicata*, 420. Even where the valuation has been arbitrary and no objection to jurisdiction has been taken, S. 11 of that Act will apply: *Aklemannessa Bibi v. Mahomed Hatem*, 31 C. 849: but see, also, *Boidya Nath Adaya v. Malkhan Lal Adhya*, 17 C. 680. See, also, *Ameer Ali's Civ. Pro. Code*, 2nd Ed., 1916, p. 83.

(58) *Harrison v. Leutner*, 24 Ch. D. 594; but see *Re Terrell*, 22 Ch. D. 473, C.A.

(59) *Marshall v. Sladden*, 7 Ha. 444.

(60) *Elsey v. Adams*, 2 D.J. & S. 147; *Kerr on Fraud*, 2nd Ed., p. 463.

(61) *Townsend v. Westacott*, 4 Beav. 58; *Turguand v. Knight*, 14 Sim. 644.

(62) *Re Patent File Co.*, 15 W.R. 754 (Eng.).

power to award an officer obeying the writ the expenses of bringing up the prisoner. ⁽¹⁾

The Court of Chancery has authority to give to the functionary who brings up a prisoner, in obedience to a *habeas corpus* at common law, the expenses of so doing, but not his general costs. ⁽²⁾

The Court has jurisdiction, since the Judicature Act, 1890, to give costs to the successful party in proceedings for a writ of *habeas corpus*. ⁽³⁾

Who can be
ordered to pay
such costs.

Although under S. 5 of the Judicature Act, 1890, the English Courts have power when granting an application for a writ of *habeas corpus* to order payment by the defendant of the costs of the successful party, ⁽⁴⁾ yet there is no jurisdiction to grant costs against a person who is not on the record. ⁽⁵⁾

Practice.

In recent practice costs have frequently been awarded by judges at chambers in cases relating to the custody of infants. ⁽⁶⁾

"Where a defendant already in custody is brought up to be charged in execution on a *habeas corpus ad satisfaciendum*, and tenders the amount of debt, interest and costs on the judgment against him, he cannot be detained for the court-fees payable on the *habeas corpus ad satisfaciendum*." ⁽⁷⁾

It has been held that the warden of the Fleet could not demand an additional fee for expedition in returning a *habeas corpus*. ⁽⁸⁾

(1) See *In re Dodd*, (1857) 2 De. G. & J. 510; 44 E.R. 1087; see, also, *In re Cobbet*, (1845) 14 Mee. & W. 175; on the subject-matter of this section see Yearly Practice, 1914, Notes under O. LIX, r. 1 (g), pp. 978, 979; Annual Practice, Notes under O. LIX, r. 1 (g); Mew's Digest, Vol. V, cols. 150, 151.

(2) *Ibid.* As to the costs in appeal in cases of *habeas corpus*, see *Ex parte Bell Cox*, (1887) 57 L.J. Q.B., at p. 113.

(3) *Reg. v. Jones*, 63 L.J. Q.B. 656; (1894) 2 Q. B. 382; 10 R. 287; 70 L. T. 845; 42 W. R. 607; 58 J. P. 733.

(4) See *R. v. Jones*, (1894) 2 Q.B. 283.

(5) See *In re Carter*, (1893) 95 L.T. 37.

(6) See Short and Mellor, Cr. Of. Pr., p. 364; see, also, *Ex parte Child*, (1854) 15 C. B. 238.

(7) *Dezill v. Cillen*, 7 Jur. 979.

(8) *Johnson v. Smith*, 1 H. Bl. 105.

Sec. 17.—Infants.

Suits by or against infants—Provisions of the Code of Civil Procedure.

Who can be made liable for costs in such suits.

- (i) Next friend.
- (ii) Minor.
- (iii) Minor's estate.
- (iv) Guardian *ad litem*.
- (v) Official guardian *ad litem*.
- (vi) Guardian being a solicitor of the Court.
- (vii) Pleader.

Course to be followed by minor plaintiff or applicant on attaining majority—Provisions of the Code of Civil Procedure.

Infant attaining age must elect whether he will continue or abandon the suit.

Costs in case he continues.

Costs in case he abandons.

Right of solicitor where infant adopts proceedings—Costs.

Retirement of next friend—Costs.

Removal of next friend—Costs.

Retirement, removal or death of guardian for the suit—Costs.

Costs of infant-defendant.

Costs of proceedings under Guardians and Wards Act.

Costs in suit for accounts against guardian.

Costs in suits for divorce, etc.

Costs of proceedings under Act XX of 1864.

Costs of application for certificate under Act XL of 1858.

Costs of litigation—Legal necessity.

Appointment of attorney.

Costs of attorney.

Lien of attorney or solicitor.

Security for costs.

Court of Wards.

(i) Costs against Court of Wards.

(ii) Expenses of suits by or against Court of Wards.

(iii) Pleadings' fees in suits by or against Court of Wards.

Application of above rules relating to minors to persons of unsound mind.

Saving for Princes and Chiefs.

THE Code of Civil Procedure provides that "Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor."⁽¹⁾

Suits by or against infants—Provisions of the Code of Procedure.

(1) Civ. Pro. Code (Act V of 1908), O. XXXII, r. 1; on the subject-matter of this section, see Encyclopædia of the Laws of England, 2nd Ed., Vol. VII, Heading—"Infants," pp. 152 to 175; Halsbury's Laws of England, Vol. XVII, Heading—Infants; Mew's Digest, Vol. VII, Col. 1480; Annual Practice, Notes under O. LXV, r. 1; Yearly

O. XXXII, r. 4, cl. (4) of the Code provides that "Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require."⁽²⁾

"Whatever be the propriety of making provision by the appointment of a public officer for the institution of suits on behalf of infants, it is of the utmost importance that no person should be appointed of whom even a suspicion can exist that he may be barred by personal interest.⁽³⁾ The Privy Council therefore disapproved of the appointment of the Registrar, who, according to the practice of the Supreme Court, was entitled to a commission of 5 per cent. on all sums paid into Court."⁽⁴⁾

Rule 5 provides as follows :—"Every application to the Court on behalf of a minor, other than an application under rule 10, sub-rule (2), shall be made by his next friend or by his guardian for the suit. Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader."⁽⁵⁾

Practice (1914), Notes under O. LXV, p. 1085 ; Daniell's Chancery Practice, 7th Ed., 1901, Chap. XVI, S. IV and Chap XVIII ; Seton on Judgments and Orders, 6th Ed., 1901, pp. 985, 1032, 1517 ; Morgan & Wurtzburg, pp. 351—361 ; Amir Ali's Code of Civil Procedure, 1916, 2nd Ed., Notes under O. XXXII, pp. 1131, 1132 ; Marshall on Costs, pp. 354—357 ; Gordon on Costs. The following further works relating to Infants may also be usefully referred to :—Matthews' Children and Young Persons (1895) ; Eversley's Domestic Relations ; Macpherson on Infants ; Simson on Infants, 2nd Ed., pp. 482—501 ; Trevelyan on Minors, 3rd Ed., 1906, pp. 325—329.

(2) See Civ. Pro. Code (1908), Sch. 1, O. XXXII, r. 4, cl. (4).

(3) *Kerakoose v. Serle*, 3 M.L.A. 329.

(4) *Ibid.*

(5) Code of Civil Procedure, O. XXXII, r. 5. The costs may be directed to be paid by the pleader. See *Shonai Bewa v. Monoram Mundal*, 11 C.L.R. 15. In this case, a suit was filed by one S.B., the widow of C.B., as mother and guardian of her minor sons, the suit being brought for a declaration of their right and confirmation of possession. The plaintiff in her plaint described herself as "S.B., the widow of the

An infant plaintiff is not liable personally for the costs of the proceedings, unless after attaining full age he elects to continue the proceedings or obtain an order for their discontinuance.⁽⁶⁾

Who can be made liable for costs in such suits
(i) Next friend.

But the defendant is entitled to recover from the next friend his costs of the proceedings if they are dismissed.⁽⁷⁾

The next friend of a minor in a suit or other civil proceeding may be ordered to pay costs as if he were plaintiff.⁽⁸⁾

In the cases where an adult plaintiff would be ordered to pay the costs of the suit, the next friend would ordinarily be ordered to pay the costs of the opposite party,⁽⁹⁾ even although he be an officer of the Court.⁽¹⁰⁾

An order against the next friend to pay is final and cannot be questioned on further consideration.⁽¹¹⁾

late C.B., mother and guardian on behalf of the minors S.B., and K.B., plaintiff." Similar descriptions were given in the petitions of first appeal and second appeal. Held that the whole of the proceedings were bad in law and must be set aside, and that a plaint in the above form should not have been accepted, it being opposed to the provisions of S. 440 of the Civ. Pro. Code, Act X of 1877. The High Court, under the above circumstances, directed that the pleaders who filed the original suit and the pleaders who filed the appeal in the first appellate Court should both be called upon to show cause before the presiding officers of those Courts why they should not be ordered to pay the costs of the suit and the appeal under S. 44 of the Civ. Pro. Code. *Shonxi Bewa v. Monoram Mundal*, 11 C.L.R. 15. In such a case the minor being unrepresented, the Court has no authority to make his estate liable for costs. *Amirchand v. Collector of Sholapur*, 13 B. 234.

(6) See Halsbury's Laws of England, Vol. XVII, S. 317, p. 138. See, also, 10 Ind. Jur. 422.

(7) *Buckley v. Buckridge*, (1767) 1 Dick. 395; *Flight v. Bolland*, (1828) 4 Russ. 298, 301; *Fox v. Suwerkrop*, (1839) 1 Beav. 582; *Jones v. Lewis*, (1847) 1 De G. & Sm. 245; *Re Brocklebank*; *Ex parte Brocklebank*, (1877) 6 Ch. D. 358, 360, C.A.; *Caley v. Caley*, (1877) 25 W.R. 528 (Eng.); *Thomas v. Elsum*, (1877) 46 L.J. (Ch.) 793; *Gold v. Kerr*, (1884) W.N. 46; *Re Hicks*, *Lindon v. Hemrey*, (1893) W.N. 138; *Catt v. Wood*, (1908) 2 K.B. 458, C.A. per Kennedy, L.J., at p. 473; even though the proceedings are instituted under the sanction of the Court (*Frank v. Mainwaring*, (1851) 4 Beav. 37), and though he was made next friend without his authority (*Ward v. Ward*, (1843) 6 Beav. 251; *Bligh v. Tredgett*, (1851) 5 De G. & Sm. 74); in which case, however, he may recover the costs from the solicitor who made him next friend (*Ward v. Ward*, (1843) 6 Beav. 251 at p. 254; *Bligh v. Tredgett*, (1851) 5 De G. & Sm. 74).

(8) Act XIV of 1882, Ss. 440, 455 and 647. Trevelyan on Minors, 3rd Ed., 1906, p. 325.

(9) See *Omrao Singh v. Prem Narain Singh*, 24 W.R. 264. He would not be liable unless an order to that effect be made against him: *Brijessuree Dossia v. Kishore Doss*, 25 W.R. 316.

(10) *Stephen v. Hume*, Morton 281; see Trevelyan on Minors, 3rd Ed., 1906, pp. 307 and 325.

(11) *Caley v. Caley*, (1877) 25 W.R. 528 (Eng.).

The next friend is liable to the solicitor acting on behalf of the infant for the costs incurred by him in the proceedings.⁽¹²⁾

An order addressed to the minor in person to pay those costs would be illegal.⁽¹³⁾

As between the next friend and the minor, the former is *prima facie* entitled to costs.⁽¹⁴⁾

The Court may,⁽¹⁵⁾ and usually does, direct that the next friend should, though the suit be unsuccessful, have his costs out of the estate.

It frequently is right to make a next friend or guardian liable for costs, but there are also cases in which it is not proper to hold him personally liable.⁽¹⁶⁾

As a rule he is entitled to attorney and client costs, except where the fund is reversionary, and then he may claim the difference when the fund comes into possession.⁽¹⁷⁾

The Court may also direct that the next friend should pay all the minor's costs, *i.e.*, the costs incurred by himself as next friend, out of his own pocket.⁽¹⁸⁾

He is liable to pay the costs of an unsuccessful,⁽¹⁹⁾ or unnecessary,⁽²⁰⁾ or frivolous or vexatious⁽²¹⁾ action or application.

(12) *Hawkes v. Cottrell*, (1858) 3 H. & N. 243; *Re Flower (a Solicitor)*, (1871) 19 W.R. 578 (Eng.).

(13) *Rajah Bikromajest v. Court of Wards*, 21 W.R. 312, 314. This was a peculiar case, in which, though the suit failed, the defendant had, under the circumstances, to pay. See, also, *Bai Porebai v. Devji Meghji*, 23 B. 100 (102).

(14) *Dunn v. Dunn*, 3 Drew. 17; Ann. Pr., 1905, p. 173. See *Cross v. Cross*, 8 Beav. 445; *Staines v. Maddox*, Mos. 319.

(15) *Devkabai v. Jefferson*, 10 B. 248 at pp. 253, 254.

(16) *Damant v. Hennell*, 33 Ch. D. 224.

(17) *Brijessuree Dossia v. Kishore Doss*, 25 W.R. 316.

(18) *Devkabai v. Jefferson*, 10 B. 248.

(19) *Bai Porebai v. Devji Meghji*, 23 B. 100, 102; *Bligh v. Tredgett*, 5 De G. & S. 74. It does not, however, necessarily follow that because the suit is unsuccessful the next friend or guardian should be made liable for costs: *Brijessuree Dossia v. Kishore Doss*, 25 W.R. 316.

(20) *Re Hicks*, (1893) W.N. 138 (Eng.); *Elsom's Estate*, (1877) W.N. 177 (Eng.); *Morden v. Martin*, 75 L.T.J. 220; see *Kenrick v. Wood*, L.R. 9 Eq. 333; as where it is proved that the plaintiff is not a minor; cf. *Palmer v. Walesby*, 3 Ch. App. 732, where an action was brought on behalf of an alleged lunatic, who was not so. In *Gureeballa v. Chunder Kant*, 11 C. 213, the next friend was ordered to pay, as there was no evidence that the suit was for the benefit of the infant.

(21) *Gold's v. Keir*, (1884) W.N. 46 (Eng.).

If the next friend is personally ordered to pay the costs he cannot recover them from the minor's estate.⁽²²⁾

Where a guardian (and the same rule will hold good for a next friend) is personally held liable for costs, it should be stated in the decree or order of the Court, since ordinarily he is only liable in his representative capacity.⁽²³⁾

As a general rule, execution may be taken out against the next friend personally, leaving him to recover the sum so realized from him from the estate.⁽²⁴⁾

A widow defending a suit as guardian of her minor cannot be made liable in her own person as well as representing the heirs of her husband.⁽²⁵⁾

"It is not right to require a minor plaintiff to pay costs per- (ii) Minor. sonally, and except in cases which would justify a personal decree for money against a minor, it would rarely be right to make a personal decree against him for costs."⁽²⁶⁾

An infant defendant is not usually ordered to pay costs⁽²⁷⁾ unless he has been guilty of fraud.⁽²⁸⁾

(22) See *Collector of Mymensingh v. Kali Chunder*, S.D. Sum. Dec., 1st Sept., 1860, cited in O'Kinealy's Notes to the Code of Civil Procedure (Act XIV of 1832), S. 440.

(23) *Komul Chunder v. Surbessur Doss*, 21 W.R. 298; and where the terms of a decree do not make any such distinct order as to costs, no expression of opinion in a judgment can import any such liability for costs into the decree. See *Brijessuree Dossia v. Kishore Doss*, 25 W.R. 316.

(24) *Omrao Sing v. Prem Narain*, 24 W.R. 264.

(25) *Brojo Mohun v. Roodronath Surmah*, 15 W.R. 192. The above ruling in 15 W.R. 192 does not support the contention that execution of a decree for costs cannot be taken out against the guardian of a minor, or the manager of a lunatic's estate. The ruling indicates that the Courts have a discretion in the matter, and can make the person in whose name the suit is brought personally liable for costs, if the circumstances of the case make it proper to pass such an order. The object of making the manager a party to the suit is in this country as elsewhere to enable the opposite party to know where to resort in case the plaintiff in a suit brought on behalf of the lunatic is ordered to pay costs. The manager of a lunatic's estate in this country occupies much the same position *quoad* law-suits as the committee of a lunatic does in England. *Brojo Mohun Mojomdar v. Roodronath Surmah Mojomdar*, 15 W.R. 192 explained in *Omrao Singh v. Prem Narain Singh*, 24 W.R. 264.

(26) Trevelyan on Minors, 3rd Ed., 1906, pp. 48 and 325.

(27) *Turner v. Turner*, (1726) 2 Stra. 703, 710; *Elsey v. Cox*, (1858) 26 Beav. 95.

(28) *Chubb v. Griffiths*, (1865) 35 Beav. 127; *Lempriere v. Lange*, (1879) 12 Ch. D. 675, 679; *Woolf v. Woolf*, (1899) 1 Ch. 343. The costs of the unsuccessful defence

"Where, however, an infant, who is sole plaintiff or applicant in legal proceedings, attains full age while they are pending, he can elect whether the proceedings shall go on or not.⁽²⁹⁾ If he elects to continue the proceedings they will thenceforth be conducted in his own name, and he will be able for the costs of them from the commencement."⁽³⁰⁾

If he elects to discontinue them, he may obtain an order to dismiss them on payment of the costs from the commencement.⁽³¹⁾ Or he may take no steps, in which case the defendant may apply to dismiss the proceedings, but cannot make the infant pay the costs of them.⁽³²⁾

(iii) Minor's estate.

In some cases the circumstances would justify an order that costs be paid out of the property of the minor,⁽³³⁾ or be charged upon a portion of his estate.⁽³⁴⁾

The following rule is to be found in the rules of the High Court of Bengal, appellate side :—

"In drawing up decrees of this Court, dismissing with costs appeals by minors, or dismissing with costs, suits by minors, the Bench clerks should be careful to make the next friend of the minor liable for such costs, unless the Court otherwise orders.

of an infant or his general cost of the proceedings may be ordered to be paid out of property belonging to him over which the Court has jurisdiction. *Orford (Earl) v. Churchill*, (1814) 3 Ves. & B. 59, 71; *Mandeno v. Mandeno*, (1853) Kay, Appendix, p. ii. The plaintiff may be directed to pay them and to recover them out of the infant's property (*Robinson v. Aston*, (1845) 9 Jur. 224).

(29) *Brown v. Weatherhead*, (1844) 4 Hare 122. After the infant has attained full age, the next friend should take no further steps in the cause, even though they be only consequential or formal proceedings (*ibid*). But he cannot be interfered with until proof of the infant's majority has been furnished to the Court (*Stone v. March*, (1610) 1 Bulst. 24; *Almack v. Moore*, (1878) 2 L.R. Ir. 90).

(30) *Bligh v. Tredgett*, (1851) 5 De G. & Sm. 74, *per Parker*, V.C., at p. 77.

(31) *Anon*, (1819) 4 Madd. 461 (Eng.).

(32) *Turner v. Turner*, (1726) 2 Stra. 708. The repudiation of an action or proceeding by the infant relates back to its commencement so as to override all that has been done in it. (*Dunn v. Dunn*, (1855) 7 De G. M. & G. 25, C.A., *per Turner*, L.J., at p. 29.)

(33) See Civ. Pro. Code (Act XIV of 1882), s. 222. "As the question of payment of costs is a matter within the discretion of the Court, it is not possible to lay down any rules as to what cases would justify an order that payment of the costs of his opponent should be made out of a minor's estate. Generally, such an order would be made in a case where the minor defendant, if an adult, would have been ordered to pay the costs of the plaintiff." See Trevelyan on Minors, 3rd Ed., 1906, pp. 325 and 329.

(34) As, for instance, his share of the costs in a partition.

"In cases where the minor is respondent and the decree of the Court below is reversed or altered, it shall be the duty of the Bench Clerk to call the attention of the Division Court to the fact that the respondent is a minor, in order that special directions may be given as to the payment of costs."⁽³⁵⁾

Where the infant is entitled to property, the next friend can recover from that property any costs and damages which he has been ordered to pay, if the action was a proper one and for the infant's benefit.⁽³⁶⁾

If the suit or proceeding has been properly brought, and properly conducted, whether it has been successful or not, the next friend can recover from the estate of the minor, the costs which he has been compelled to pay to a defendant⁽³⁷⁾ and also such costs, charges, and expenses as have been properly incurred in conducting the suit on behalf of the minor.⁽³⁸⁾

Similarly, a guardian for the suit is, where his conduct is not improper, entitled to recover from the minor's estate his costs and expenses, and also such costs as he may have been compelled to pay to another party to the litigation.⁽³⁹⁾

(35) Trevelyan on Minors, 3rd Ed., 1906, pp. 325, 326.

(36) *Staines v. Maddox*, (1730) Mos. 319; *Taner v. Ivie*, (1752) 2 Ves. Sen. 466, per Lord Hardwicke, L.C., at p. 468; *Thompson v. Sheppard*, (1789) 2 Cox. Eq. Cas. 161; *Mackenzie v. Taylor*, (1844) 7 Beav. 467; *Cross v. Cross*, (1845) 8 Beav. 455; *Pritchard v. Roberts*, (1873) L.R. 17 Eq. 222, per Hall, V.C., at p. 224; *Damant v. Hennell*, (1886) 33 Ch. D. 224; *Re Burton, Burton v. Burton*, (1887) W.N. 160; *Re Aldred, Marshall v. Marshall*, (1888) W.N. 82; *Steeden v. Walden*, (1910) 2 Ch. 393.

(37) *Bistooprya Patmadayee (Ranee) v. Basudeb Dhall*, (1870) 13 M.L.A. 602=6 B. L.R. 190=15 W.R.P.C. 19; *Taner v. Ivie*, (1752) 2 Ves. Sen. 466. See Act IX of 1872, S. 68; Trevelyan on Minors, 3rd Ed., 1906, p. 21.

(38) *Fearn v. Young*, (1804) 10 Ves. 184. As to the costs of next friends in suits by wards of the Courts of Wards, see Trevelyan on Minors, 3rd Ed., 1906, pp. 486, 491, 497.

(39) See *Morgan v. Morgan*, 11 Jur. N. S. 233. "He ought first to endeavour to obtain from other parties such costs as may have been ordered to be paid to him by them. It is not necessary that a suit should be brought by the next friend or guardian for the suit. The guardian of the minor's estate is justified in paying thereout such costs as have been properly incurred by a next friend or guardian for the suit. If the minor's property be in the hands of the Court, or as in the case of an administration or partition-suit there is property belonging to the minor with which the Court can deal, the Court can order the costs to be paid thereout. See Act XIV of 1882, S. 222. In *Gobind Chunder Gangooly v. Buddinath Biswas*, which was a suit to set aside an adoption, Pontifex, J. (Dec. 19th, 1878) ordered the costs of a minor defendant to be paid out of his estate. The suit had been dismissed with costs, and the guardian for the suit was unable to recover his costs from the plaintiff, who had been admitted to sue as a pauper."

The next friend can bring an action against the infant to be indemnified against the costs, and any damages which he has been ordered to pay, as well as his own costs.⁽⁴⁰⁾

Where the suit or proceeding is unnecessary or improper, or it has been improperly conducted, the next friend will not be permitted to recover his costs from the estate of the minor.⁽⁴¹⁾

Where costs are allowed to the next friend as against the infant, he may have a charge for them on the infant's property; ⁽⁴²⁾ and in a proper case takes them as between solicitor and client,⁽⁴³⁾ including all just allowances.⁽⁴⁴⁾

According to the practice of Courts in England, "where the proceedings are in respect of the infant's reversionary interest in a fund, the next friend may only be allowed in the first instance to take his costs as between party and party, with liberty to apply for the difference when part of the fund falls into possession."⁽⁴⁵⁾

(iv) Guardian
ad litem.

A guardian *ad litem* is not liable to pay the costs of an unsuccessful defence, unless he has been guilty of gross misconduct.⁽⁴⁶⁾

It is only in the case of breach of duty or improper conduct of the defence that a guardian for the suit can be made personally liable for the costs incurred by other parties. ⁽⁴⁷⁾

(40) *Steeden v. Walden*, (1910) 2 Ch. 393.

(41) *Pearce v. Pearce*, (1804) 9 Ves. 548; *Flight v. Bolland*, (1828) 4 Russ. 298; *Devkabai v. Jefferson*, 10 B. 248, at p. 250. "It was held in *Whittaker v. Marlar*, (1786) 1 Cox. 285, that nothing short of a dishonest intention will be sufficient to render a next friend liable personally for the costs, and that no degree of mistake or misapprehension will be sufficient. But negligence in bringing an unnecessary or improper suit, or impropriety in the conduct of it, would be sufficient. This is recognized by S. 455 of Act XIV of 1882. Trevelyan on Minors, 3rd Ed., 1906 p. 312. As to security for the costs of an officer of the Court or an attorney or pleader who is appointed guardian for the suit, see Trevelyan on Minors, 3rd Ed., 1906, p. 307.

(42) *Mandeno v. Mandeno*, (1853) Kay, Appendix, p. ii; see *Steeden v. Walden*, (1910) 2 Ch. 393.

(43) *Fearn v. Young*, (1804) 10 Ves. 184; *Damant v. Hennell*, (1886) 33 Ch. D.; *Re Slaughter*, *Walton v. Aitchison*, (1907) W.N. 197.

(44) *Fearn v. Young*, (1804) 10 Ves. 184.

(45) *Damont v. Hennell*, (1886) 33 Ch. D. 224; *Re Burton*, *Burton v. Burton*, (1887) W.N. 160; *Re Aldred*, *Marshall v. Marshall*, (1888) W.N. 82.

(46) *Morgan v. Morgan*, (1865) 11 Jur. N.S. 233; *Vivian v. Kennelly*, (1890) 68 L. T. 778. See however Macpherson on Infants, p. 397; 5 Indian Jurist, p. 634.

(47) S. 458 of Act XIV of 1882, Trevelyan on Minors, pp. 313, 314, does not apply only to cases where the guardian is removed, but applies to all cases where costs have been occasioned by his breach of duty. It is only in a case of flagrant impropriety that a

He may, however, be liable at any rate in the first instance for the costs of unsuccessful applications made, or appeals preferred by him.⁽⁴⁸⁾

The guardian *ad litem* appointed by the Court usually gets his costs out of the estate of the defendant whom he represents if he does not recover them from the plaintiff; but when the guardian *ad litem* takes upon himself to appeal against a decree passed against a minor or lunatic, whom he represents, he must personally pay the costs incurred.⁽⁴⁹⁾

It has been held that a guardian *ad litem* is not liable for costs, merely because he raises an unsuccessful defence.⁽⁵⁰⁾ In *Elsey v. Cox*,⁽⁵¹⁾ where the assignee in bankruptcy set aside a voluntary settlement on the wife and the child of the settlor, the Court said all it could do for the infant was not to make him pay costs.⁽⁵²⁾

In a suit against a minor, if the Court considers that the guardian for the suit should be personally ordered to pay the costs, it should so state it in the decree or order. Where the guardian is

guardian should be made personally liable for costs. In *Goolam Hoosein Noor Mahomed v. Fatmabai*, 8 B. 91, where a guardian for the suit had been guilty of gross misconduct in putting executors to proof of a will which he wished to upset for his own private purposes, and which the evidence showed was to his knowledge duly executed by the testatrix in a sound state of mind, he was held liable for the costs of the suit. Where there has been no breach of duty there can be no order for costs; *Narasimha Rau v. Lakshmi pati Rau*, 3 M. 263. The Civ. Pro. Code does not authorize a Court to decree costs against a guardian of a defendant except in the case referred to in S. 458 of the Code of 1877. (*Ibid.*)

(48) Trevelyan on Minors, 3rd Ed., 1906, p. 328. He would in these cases be in a position similar to that of a next friend.

(49) *Shapurji Hormasji Harver v. Monosseh Jacob Monosseh*, 11 Bom. L.R. 1011 = 34 B. 374. Where costs are decreed against a party suing on behalf of a minor son and for his benefit, execution cannot, without special reason, be taken out against her personally or against her personal representative or estate. See *Sreemuttee Tara Soonduree v. Sreemuttee Rash Munjoree*, 12 W.R. 78. For a case where the next friend was held liable for costs on his adducing no evidence to show that the suit was for the benefit of the minor, see *Geereeballa Dabee v. Chunder Kant Mookerjee*, 11 C. 213. Advance by plaintiff for costs of minor defendants under order of Court—Right to recover amount advanced. See *Venkata Vijaya Gopalaraju v. Timmayya Pantulu*, 22 M. 314. Order for costs in execution, nature of, see *Puresh v. Dalrymple*, 9 W.R. 458.

(50) *Morgan v. Morgan*, 11 Jur. N. S. 233.

(51) 26 Beav. 95.

(52) See, however, *Goldsmith v. Russell*, 5 De G. M. & G. 547, 556, where all the costs were paid out of the estate and *Short v. Ridge*, (1876) W.N. 47, where the plaintiffs were ordered to pay the infant defendant's costs, though successfully suing to set aside a deed.

simply declared liable for them as the defendant in the case, the liability must be taken to refer to him as the representative of the minor, and as representing his estate.⁽⁵³⁾

The Court can in a proper case order the costs of any of the parties to be paid out of the estate of a minor,⁽⁵⁴⁾ and will ordinarily do so where the minor defendant, if of age, would have been required to pay costs.

(v) Official
guardian *ad*
litem.

As has already been pointed out, where there is no other person fit and willing to act as guardian for the suit, the Court may appoint one of its officers to be such guardian, provided that he has no interest adverse to that of the minor.⁽⁵⁵⁾ It may also appoint an attorney or pleader.

In making such order in the case of a minor defendant the Court will ordinarily require the plaintiff to indemnify the officer,

(53) *Komul Chunder Sen v. Surbessur Dass Goopto*, 21 W.R. 298; *Brojomohun Mojoomdar v. Roodronath Surmah Mojoomdar*, 15 W.R. 192.

(54) *Orford v. Churchill*, (1814) 3 V. & B. 59; Trevelyan on Minors, 3rd Ed., 1906, pp. 325 and 329. As to the powers of the Court to authorize the sale or mortgage of property belonging to a minor, see Trevelyan on Minors, 3rd Ed., 1906, Chap. XXIV. The following decision relating to the scale of costs may be noted :—"This was a suit for an ascertained sum of money against the defendant, an infant, sued as the heir of his father Uma Charan Khan. Upon the application of the infant, a guardian *ad litem* was appointed who entered appearance and filed a written statement. The suit was thereupon placed on the defended list of causes. Mr. Knight (with him Mr. Dunne) having proved the plaintiffs' case, asked for a decree with costs on scale No. 2. Mr. Sinha, for the guardian *ad litem*, left the matter to the Court. The attention of the Court was called to the case of *Ram Prasaud and others v. Nur Mahomed and others* (5 C.W.N. 1xxviii). Mr. Knight submitted that that case was opposed to principle and to the practice of the Court and was not followed by Sale, J., in *Kristo Chand v. Gourhari Khan* (unreported). His Lordship delivered the following judgment :—"In this case the infant's guardian has been appointed at his own instance. I take that as distinguishing this present case from the judgment of Mr. Justice Stanley's ruling in the case of *Ram Prasaud v. Nur Mahomed*, (5 C.W.N. 1xxviii) and my brother Sale, J., has allowed costs on scale No. 2 in a recent case of *Kristo Chand Roy Bahadur v. Gourhari Khan*. I think, on these grounds, costs may be allowed on scale No. 2." *Balkissen v. Gourharri Khan*, 6 C.W.N. (Journal portion), p. cxxiii.

(55) Act XIV of 1882, S. 456. *Issur Chunder Gupto v. Nobokristo Gupto*, 7 C.L. R. 407. The appointment of an officer of the Court does not oust the Court's jurisdiction to try the suit. See *Jadow Mulji v. Ohnagan Raichand*, 5 B. 306, which holds that S. 3, cl. (b) of Act XV of 1880 supersedes the law as laid down on this subject in *Mohun Ishwar v. Haku Rupa*, 4 B. 688. For a case where the Collector who made an erroneous application in his capacity as guardian for minor plaintiffs was directed to pay costs to the opposing defendants out of the estate of the minors, see *Kumat Seth Dwarakadas v. Dindyal Ram*, 7 C.W.N. clx (Journal portion).

attorney or pleader, and also to make provision for his costs.⁽⁵⁶⁾ It may also provide for such costs out of a fund in which the minor is interested.⁽⁵⁷⁾

The Court may allow the plaintiff to add to his own costs such costs as under these circumstances he may be required to pay.⁽⁵⁸⁾

Where the minor has property which is under the control of the Court, provision can be made for the costs of his official guardian for the suit thereout.⁽⁵⁹⁾

Such provision could also be made for the costs of the next friend, but this would only be done in very exceptional cases, such as where a suit is urgently necessary, and no next friend willing to undertake the risk of costs can be found.⁽⁶⁰⁾

Where the Court or a Judge appoints one of the solicitors of the Court to be guardian *ad litem* of an infant, the Court or Judge may direct that the costs to be incurred in the performance of the duties of such office shall be borne and paid, either by the parties or some one or more of the parties to the cause or matter in which such appointment is made, or out of any fund in Court in which such infant may be interested, and may give directions for the repayment or allowance of such costs, as the justice and circumstances of the case may require.⁽⁶¹⁾

(vi) Guardian
being a
solicitor of
the Court.

Where, under the practice of the English Courts, the solicitor to the suitors' fee fund is appointed, it is the settled rule that the plaintiff pays the costs, and adds them to his own; there is no jurisdiction to order payment out of the suitors' fund.⁽⁶²⁾ This is the practice in a foreclosure action⁽⁶³⁾ even where the security is insufficient.⁽⁶⁴⁾ In a partition action all costs up to the hearing are

(56) Trevelyan on Minors, 3rd Ed., 1906, p. 307.

(57) *Ibid.*

(58) See Belchambers' Practice, p. 265, and cases there cited. Act XIV of 1882, S. 458. See also Trevelyan on Minors, 3rd Ed., 1906, p. 313.

(59) See Trevelyan on Minors, 3rd Ed., 1906, p. 307.

(60) *Ibid.*

(61) R. S. C., O. LXV, r. 13; and see O. XXXIII, r. 9. The costs will not be taxed as between solicitor and client unless specially ordered. *Eady v. Elsdon*, (1901) 2 K.B. 460, C.A.; *Goatty v. Jones*, (1907) W.N. 161.

(62) *Fraser v. Thompson*, 4 De. G. & J. 659, 662.

(63) *Newbery v. Martin*, 15 Jur. 166; *Robey v. Whitehead*, cited in *Robinson v. Aston*, 9 Jur. 224.

(64) *Harris v. Hamlyn*, 3 De. G. & S. 470.

in the discretion of the Court; ⁽⁶⁵⁾ and the practice is that the entire costs, in the case of a sale, are paid out of the proceeds; and, in the case of a partition, are in ordinary cases borne by the parties, in proportion to their interests.⁽⁶⁶⁾ An infant's costs may be charged on his share.⁽⁶⁷⁾

Where the solicitor to the suitors' fee fund is guardian for an infant, and also for parties defending *in forma pauperis*, he is entitled to his full costs in each case.⁽⁶⁸⁾

- (vii) Pleader. "Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented. Notice of such application shall be given to such person, and the Court, after hearing his objections (if any), may make such order in the matter as it thinks fit.⁽⁶⁹⁾"

(65) St. 31 and 32 Vict., c. 40 (Partition Act, 1868), S. 10.

(66) *Cannon v. Johnson*, 11 Eq. 90; *Simpson v. Ritchie*, 16 Eq. 103; *Ball v. Kempwelch*, 14 C.D. 512.

(67) *Robinson v. Aston*, 9 Jur. 224; *Simpson on Infants*, 2nd Ed., p. 499.

(68) *Frazer v. Thompson*, 1 Giff. 337.

(69) Code of Civil Procedure (Act V of 1908), O. XXXII, r. 2. This rule refers to a case where the plaint on the face of it appears to have been filed by a person who was a minor. "It does not contemplate any inquiry into the question of minority where the suit is brought by a person professing himself to be adult, and where the defendant objects to the suit on the ground that he is not an adult, but a minor, and where upon these conflicting allegations an issue is raised for trial. In a case like this the order of the Court, if it finds that the defendant's allegation is correct, is not passed under this rule. Such a case is not expressly provided for in the Code, but the practice is to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend. (*Beni Ram v. Ram Lal*, 13 C. 189 (191). See also *Sham Krishna v. Ram Das*, 20 A. 162, (165); *Rattan Bai v. Chabildas*, 13 B. 7 (11). In the first case it was held that the order, though purporting to be passed under the former section, must be taken to have been one rejecting the plaint or dismissing the suit, and so appealable.) The Court as a rule only strikes a plaint off the file where it appears on its face that it was filed by a person who was a minor, or where it is proved that it was filed with the knowledge that the plaintiff was a minor, and with the intention of deceiving the Court and evading the payment of costs in case the plaintiff fails in the claim. Where the fact of minority is a *bona fide* question of evidence and the defendant's allegation is found correct, then the usual course is to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented." *Rattanbai v. Chabildas*, 13 B. 7. See also on this subject *Amichand v. Collector of Sholapur*, 13 B. 234.

The pleader or solicitor acting for the minor will have to bear the costs personally, if the proceedings were not for the infant's benefit⁽⁷⁰⁾ or were improperly instituted.⁽⁷¹⁾

With regard to the course to be followed by a minor plaintiff on his attaining majority the Code of Civil Procedure contains the following provisions :—

"A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application. Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name."⁽⁷²⁾

Course to be followed by minor plaintiff or applicant on attaining majority—Provisions of the Code of Civil Procedure.

"Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend.

Any application under this rule may be made *ex parte* : but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend."⁽⁷³⁾

"Where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co-plaintiff ; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit. Notice of the application shall be served on the next friend, on any co-plaintiff and on the defendant. The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the

(70) *Olayton v. Clarke*, (1861) 3 De G. F. & J. 682, C.A.; *Re Fish, Bennett v. Bennett*, (1893) 2 Ch. 413, C.A., *per* Lindley, L.J. at p. 422; *Re Hicks, Lindon v. Hemery*, (1893) W.N. 138.

(71) *Buckley v. Buckridge*, (1767) 1 Dick. 395; *Roddam v. Retherington*, (1799) 5 Ves. 91, *per* Lord Loughborough, L. C. at p. 95; *Pearce v. Pearce*, (1804) 9 Ves. 548; *Flight v. Bolland*, (1828) 4 Russ. 293, 301; *Campbell v. Campbell*, (1837) 2 My. & Cr. 25 (30); *Edgley v. Adam*, (1869) 31 L.T. 15; *Thomas v. Elsum*, (1877) 46 L.J. Ch. 793; *Re Fish, Bennett v. Bennett*, (1893) 2 Ch. 413, C.A., *per* Lindley, L.J. at p. 422; *Re Hicks, Lindon v. Hemery*, (1893) W.N. 138.

(72) Code of Civil Procedure (Act V of 1908), O. XXXII, r. 12.

(73) Code of Civil Procedure (Act V of 1908), O. XXXII, r. 12, cls. (4) and (5).

Court directs. Where the applicant is a necessary party to the suit, the Court may direct him to be made a defendant.”⁽⁷⁴⁾

“A minor on attaining majority may, if a sole plaintiff, apply that a suit instituted in his name by a next friend be dismissed on the ground that it was unreasonable or improper. Notice of the application shall be served on all the parties concerned; and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit, or make such other order as it thinks fit.”⁽⁷⁵⁾

Infant
attaining age
must elect
whether he
will continue
or abandon
the suit.

“If an infant sole plaintiff attain twenty-one during the proceedings, he may elect whether he will go on with them or not. The next friend should not take any further steps in his name, even though they are consequential on former proceedings.”⁽⁷⁶⁾

Costs in case
he continues.

If the late infant elect to continue the action, the proceedings will be continued in his own name, and he will be liable for the costs from the beginning, as if he had been of age when it was commenced.”⁽⁷⁷⁾

Costs in case
he abandons.

If he elect to abandon the action, he may obtain an order on motion of course to dismiss, on payment of costs by himself, or he may refrain from taking any step at all. He cannot make the next friend pay the costs, unless the action was an improper one.”⁽⁷⁸⁾ If he refrain from taking any steps, the defendant may move to dismiss the action, but he cannot make the late infant pay the costs, even though the next friend is dead, so that no order can be made against him.”⁽⁷⁹⁾

The repudiation by the minor, when made, relates back to the beginning of the action.”⁽⁸⁰⁾

Right of soli-
citor where
infant adopts
proceedings—
Costs.

When the infant on attaining full age adopts the proceedings, the solicitor is entitled to a charge on his estate for the costs of them.”⁽⁸¹⁾

(74) Code of Civil Procedure (Act V of 1908), O. XXXII, r. 13.

(75) Code of Civil Procedure (Act V of 1908), O. XXXII, r. 14.

(76) *Brown v. Weatherhead*, 4 Ha. 122. But the next friend is *dominus litis*, till it is shown that the infant is of age; *Almack v. Moore*, 2 L.R. Ir. 90.

(77) *Bligh v. Tredgett*, 5 De. G. & S. 74; Dan. Ch. Pr. 114.

(78) *Anon.*, 4 Madd. 461.

(79) *Turner v. Turner*, 2 Stra. 708; Ld. Red. Pl. 26, n. (t); Simpson on Infants, 2nd Ed., pp. 481 and 482.

(80) *Dunn v. Dunn*, 7 De G.M. & G. 25.

(81) *Baile v. Baile*, (1872) L.R. 13 Eq. 497.

But where he repudiates the proceedings, the solicitor has no lien for his costs on deeds brought into Court in the proceedings.⁽⁸²⁾

Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred. The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed, and also that he has no interest adverse to that of the minor.⁽⁸³⁾

Retirement of
next friend—
Costs.

According to the practice of Courts in England, a next friend cannot retire without showing that it is for the benefit of the infant that another next friend should be substituted for him,⁽⁸⁴⁾ and that his proposed successor is a fit and proper person and is not interested in the subject of the proceedings;⁽⁸⁵⁾ and he must give security for the costs up to his retirement if required to do so.⁽⁸⁶⁾

The Code of Civil Procedure provides as follows:—"Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or where he does not do his duty, or, during the pendency of the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, and make such other order as to costs as it thinks fit. Where the next friend is not a guardian appointed or declared by an authority competent in his behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next

Removal of
next friend—
Costs.

(82) *Dunn v. Dunn*, (1855), 7 De G.M. & G. 25, C.A.

(83) Civil Procedure Code (Act V of 1908), O. XXXII, r. 8.

(84) *Melling v. Melling*, (1819) 4 Madd. 261.

(85) *Harrison v. Harrison*, (1842) 5 Beav. 130.

(86) *Witts v. Campbell*, (1806) 12 Ves. 493; *Davenport v. Davenport*, (1822) 1 Sim. & St. 101. If this is not done the new next friend will be responsible for the costs previous to his appointment (*Bligh v. Tredgett*, (1851) 5 De G. & Sm. 74); Halsbury's Laws of England, Vol. XVII, p. 136.

friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit.⁽⁸⁷⁾

Retirement,
removal or
death of
guardian for
the suit—
Costs.

Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit. Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place.⁽⁸⁸⁾

Costs of
infant
defendant.

The costs of an infant defendant, who has been made a party to the proceedings without any action or fault on his part, will be ordered to be provided for or paid by the plaintiff,⁽⁸⁹⁾ who, however, in a proper case, may be allowed to add them to his own costs of the proceedings.⁽⁹⁰⁾

Costs of
proceedings
under Guar-
dians and
Wards Act.

The Guardians and Wards Act provides that "the costs of any proceeding under the Guardians and Wards Act, including the costs of maintaining a guardian or other person in the civil jail, are, subject to any rules made by the High Court under that Act, in the discretion of the Court in which the proceeding is had."⁽⁹¹⁾

Costs in suit
for accounts
against guar-
dian.

A ward on attaining majority, a new guardian in the name of the ward, or the ward's representative on the death of the ward, may by suit require a guardian ⁽⁹²⁾ to account for his dealings with the property and to deliver such property as may belong to the ward, and such money as upon the taking of the accounts by the Court may be found to be due to him.⁽⁹³⁾ The Courts have a discretion in allotting the costs of such suits and must be guided by the circumstance of each case, bearing in mind the rule that the person responsible for the litigation is ordinarily liable for the costs of his

(87) Code of Civil Procedure (Act V of 1908), O. XXXII, r. 9.

(88) Code of Civil Procedure (Act V of 1908), O. XXXII, r. 11. This may be done now. This rule is not, so far as regards payment of costs, applicable to any person appointed to act as guardian *ad litem* without his previous consent. *Jadow Mulji v. Chhagan Raichand*, 5 B. 306.

(89) *Goldsmith v. Russell*, (1855) 5 De. G.M. & G. 547, 556; *Fraser v. Thompson*, (1859) 4 De G. & J. 659, 663, C.A.; *Short v. Ridge*, (1876) W.N. 47, 48.

(90) *Fraser v. Thompson*, *supra* (1859) 4 De G. & J. 659, 663, C.A.

(91) Act VIII of 1890, S. 49, *cf.* Act XIV of 1882, Ss. 218 to 222. Where the Court has made no order a suit will not lie for the costs of proceedings under the Act: see *Kabir v. Mahadu*, 2 B. 360.

(92) See Trevelyan on Minors, 3rd Ed., 1906, Ch. XIX, p. 212, note 6.

(93) As to the remedy against the representative of the guardian, see Trevelyan on Minors, 3rd Ed., 1906, pp. 213, 214.

opponent; but in a suit of this nature a reasonable mode of dealing with the costs might ordinarily be to make the guardian liable for the costs incurred up to and including the interlocutory decree, which makes the order for an account, in cases where he had refused or unreasonably neglected or delayed to render a proper account to his ward. In other cases he might be allowed such costs. (94)

The costs of taking the accounts by the Court and of the final decree, if any, might in many cases depend upon the result of the accounts. (95)

A guardian would ordinarily obtain the costs of an unsuccessful suit against him. (96)

Where both parties are to blame for the litigation or in the conduct of it, the Court may reasonably require each party to pay their own costs, but in the absence of misconduct a guardian, like any other trustee, is entitled to his costs, charges and expenses, out of the ward's estate. (97)

No petition presented by a minor under the Indian Divorce Act can be filed until the next friend has undertaken in writing to be answerable for costs. Such undertaking must be filed in Court, and the next friend is thereupon liable in the same manner and to the same extent as if he were a plaintiff in an ordinary suit. (98)

An action brought to recover costs of proceedings held under Act XX of 1864 is not maintainable when the Court, before which such proceedings were taken, has made no order as to the payment of such costs. (99)

Where the widow of a deceased proprietor, as the guardian of his minor son, put in a petition for a certificate under Act XL of 1858, in which she represented that she was in possession of the whole of the deceased's property, specifying a particular pergunnah and its appurtenances—*Held* that, though she did not expressly ask

(94) See Trevelyan on Minors, 3rd Ed., 1906, p. 216. Either from the plaintiff or if the ward be suing by next friend, from the next friend, or out of the ward's estate.

(95) See Trevelyan on Minors, 3rd Ed., 1906, p. 216.

(96) *Ibid.*

(97) Trevelyan on Minors, 3rd Ed., 1906, pp. 216, 217.

(98) Act IV of 1869, S. 49; Trevelyan on Minors, 3rd Ed., 1906, p. 298.

(99) *Kabir valad Bamjan v. Mhadu Valad Shiwaji*, 2 B. 360 (referred to in *Mahram Das v. Ajudhia*, 8 A. 452 (461); *Maung Gyi v. Lu Pe*, 3 L.B.R. 120; *Kumarappa Chetty v. Nga Pyi*, U.B.R. (1905) 2nd Qr., C.P.C., p. 21; distinguished in *Palneappa Chetty v. Maung Shwe Ge*, U.B.R. 1904, 1st Qr. C.P.C., p. 4).

for a certificate to manage the particular pergunnah named, as her petition was so worded as to obtain, and had the effect of obtaining, a certificate of that tenor, she must be held liable for the costs of a party entitled to object to the grant of such a certificate, and appealing with a view to its amendment.⁽¹⁰⁰⁾

Costs of litigation — Legal necessity.

The necessary expenses of a suit or prosecution brought against a minor,⁽¹⁰¹⁾ or presented on his behalf for the recovery or preservation of his estate, or for the protection of his person is a necessity sufficient to justify a sale or charge.

Necessary legal expenses incurred either by the minor or on his behalf can be recovered from his estate in a suit against him as necessities.⁽¹⁰²⁾

A solicitor cannot recover the costs of litigation incurred by the next friend of a minor on his behalf from the quondam minor, who, on coming of age, repudiates the proceedings, there being no relation of contract between them. *Held* that even assuming that the legal proceedings were in the nature of necessities, the next friend is the person responsible to the solicitor.⁽¹⁰³⁾

Appointment of attorney.

A next friend or guardian for the suit can appoint an attorney or pleader to act for the minor.⁽¹⁰⁴⁾

(100) *Feda Hoossein v. Ramee Khajoorunnissa*, 9 W.R. 459.

(101) *Gunga Pershad v. Phool Singh*, 10 W.R. 106=10 B.L.R. note to p. 368. In considering as to what are necessities "the surrounding circumstances of each particular case" furnish the only means for the solution of the question. The term "necessaries" primarily implies only suitable food, drink, clothing, lodging, instruction, and education for the minor in accordance with his position in life and his fortune, and articles purely of ornament and luxury would not be included in the term. (*Peters v. Fleming*, (1940) 6 M. & W. 46.) In some cases special circumstances might bring under the term "necessaries" expenses which generally could not be considered as such.

(102) See Trevelyan on Minors, 3rd Ed., 1906, Chap. 2, p. 21; *Sham Charan Mal v. Chowdhry Dabya Singh Pahraj*, 21 C. 872; *Watkins v. Dhunnoo*, 7 C. 140=8 C.L.R. 43; *Helps v. Clayton*, 10 Jur. N.S. 1184; *Collins v. Brook*, (1860) 5 H. & N. 700 at p. 708.

(103) *Branson v. Appasami*, 17 M. 257, distinguishing *Watkins v. Dhunnoo*, 7 C. 140 and referred to in *Venkata Vijaya Gopalaraaju v. Timmayya Pantulu*, 22 M. 314 (316).

(104) A next friend is allowed, as of course, to change from one attorney to another. *Dinendra Nath Dutt v. Wilson*, 28 C. 264; 5 C.W.N. 434; *Ram Chunder Roy v. Poorno Chunder Roy*, 4 C.W.N. 175 (notes); *Sarat Chunder Dawn v. Kristo Dhone Dawn*, 5 C.W.N. 88 (notes); *Brown v. Brown*, (1849) 11 Beav. 562. There is no reason why a next friend should be in this respect in a position different from that of an ordinary suitor. As no order of the Court is necessary in the case of a change of pleader, there seems to be nothing to prevent a next friend changing his pleader whenever he likes. The interests of a minor would suffer if a next friend was compelled to employ an attorney of whom he disapproved.

The death or removal of the next friend or guardian for the suit does not, of itself, discharge the attorney or pleader.⁽¹⁰⁵⁾

Unless he relieves himself from liability by special agreement,⁽¹⁰⁶⁾ a next friend or guardian for the suit is liable in the first instance for the costs incurred by the attorney or pleader employed by him.⁽¹⁰⁷⁾ Costs of attorney.

An attorney acting on behalf of a minor has a lien for his costs on sums recovered in the suit or proceeding.⁽¹⁰⁸⁾ Lien of attorney or solicitor.

The power of the next friend, or the solicitor employed by him, to recover costs from the infant is aided by the lien the latter has on a fund realized in a cause for costs in that cause.⁽¹⁰⁹⁾

"By the English Attorneys and Solicitors Act, 1860, ⁽¹¹⁰⁾ a solicitor employed to prosecute or defend a suit or matter may have a charge for his costs on the property recovered or preserved, and after a declaration of charge, he has a charge upon and against and a right to payment out of the property, of whatsoever nature it may be. It was considered by Stuart, V.C., that a solicitor could not be "employed" by an infant within the meaning of the Act ⁽¹¹¹⁾ but this view is incorrect.⁽¹¹²⁾ If the infant adopt the suit after attaining twenty-one, the lien may be enforced against him then; ⁽¹¹³⁾ If he repudiate the suit, the solicitor has no lien on deeds

(105) See *Krishna Vijaya Puchaya Naicker v. Marudanayagam Pillai*, 15 M. 135; Trevelyan on Minors, 3rd Ed., 1906, pp. 326 & 310.

(106) *Radhanath Bose v. Suttoprosono Ghose*, 2 Ind. Jur. N.S. 269.

(107) The attorney cannot sue the minor or his representatives because the contract is made by the next friend. See *Radhanath Bose v. Suttoprosono Ghose*, 2 Ind. Jur. N.S. 269; *Jaynarain Bose v. Mohesh Chunder Moonshree*, Ben. S.D.A. 1858, p. 1215; *Branson v. Appasami*, 17 M. 257. In *Steed v. Preece*, (1874) L.R. 18 Eq. 192 at p. 196, Jessell, M.R., says: "An infant has no costs; the costs incurred on his behalf in a suit are the costs of his guardian or next friend." In *Watkins v. Dhunmoo*, 7 C. 140=8 C.L.R. 433, a decree against the minor's estate was made at the suit of the attorney.

(108) *Pritchard v. Roberts*, (1873) L.R. 17 Eq. 222; *Radhanath Bose v. Suttoprosono Ghose*, 2 Ind. Jur. (N.S.) 269. See *Devkabal v. Jefferson*, (1886) 10 B. 248, Act IX of 1872, S. 171.

(109) *Staines v. Maddox*, Mos. 319; *Pritchard v. Roberts*, 17 Eq. 222.

(110) St. 23 and 24 Vict., c. 127, S. 28.

(111) *Bouser v. Bradshaw*, 30 L.J. Ch. 159.

(112) *Re Keane*, 12 Eq. 115, 123; *Baile v. Baile*, 13 Eq. 497; *Greer v. Young*, 24 C.D. 545.

(113) *Bouser v. Bradshaw*, 4 Giff. 260; *Baile v. Baile*, 13 Eq. 497.

belonging to the infant, which were deposited by the defendant for inspection in the suit.”(114)

Security for costs.

The words “such plaintiff” in the 2nd paragraph of S. 380, Civ. Pro. Code, cannot be construed as applying to an infant plaintiff's next friend. In the case of infant plaintiffs, unless the circumstances are exceptional, they cannot be required to give security for costs.(115)

Court of Wards
(i) Costs against Court of Wards.

If in any suit any Civil Court shall decree any costs against the next friend or guardian for the suit of the ward, the Court of Wards (116) shall cause such costs to be paid out of any property of the ward which, for the time being, may be in its hands.

(ii) Expenses of suits by or against Court of Wards.

“Collectors are authorized to incur all *ordinary* charges incidental to the conduct of suits instituted or defended by them at their own instance or in anticipation of sanction or with the approval of the Court of Wards, provided there is provision in the Budget, (117) or the charge can be met by transfer from another head. When the cost cannot be so met, or when any extraordinary charges have to be incurred, the sanction of the Court must be obtained. A

(114) *Dunn v. Dunn*, 7 De G.M. & G. 25; Simson on Infants, 2nd Ed., p. 485. For cases where property was held to be “recovered or preserved” within the meaning of the Act, and for the whole subject of solicitor's lien, see *Twynham v. Porter*, 11 Eq. 181; *Re Fiddey*, 7 Ch. 773; *Pinkerton v. Easton*, 16 Eq. 490; *Foxon v. Gascoigne*, 9 Ch. 654; Dan. Ch. Pr., c. 37, S. 1; Cordery on Solicitors, 2nd Ed., ch. xii.

(115) *Mani Bai v. Lodd Govind Doss*, 18 M.L.J. 155 (156). The Court, White, C.J., and Wallis, J., said in the course of the judgment:—“In this case an order has been made requiring the next friend of a female infant plaintiff to give security for the costs of the suit. It is not contended that the order can be supported unless there is jurisdiction to make the order under S. 380 of the Code of Civil Procedure. We do not think the words “such plaintiff” in the second paragraph of the section can be construed as applying to the infant plaintiff's next friend, and there is no evidence in the present case that the plaintiff does not possess sufficient immoveable property within British India. Assuming, however, that the Court would have jurisdiction to make the order if satisfied that the next friend “did not possess sufficient immoveable property,” we are of opinion that the order should not have been made in the present case. We agree with the decision in *Bai Porebai v. Devji Meghji*, 23 B. 100. We do not think the circumstances of the present case are of so exceptional a character as to warrant the making of the order.” *Mani Bai v. Lodd Govind Doss*, 18 M.L.J. 155 at 156.

(116) Court of Wards Rules, S. 1, r. 8. The Commissioner can also sanction the payment of any damages which may be decreed against the ward. Trevelyan on Minors, 3rd Ed., 1906, pp. 309, 312, 486, 496, 497. Mad. Act I of 1902, S. 50 (1); Bom. Act I of 1905.

(117) Trevelyan on Minors, 3rd Ed., 1906, pp. 424 & 492. Rule (5) in O. XX, p. 216, of the Madras Board of Revenue.

memorandum showing the charges incurred by Collectors under this authority under the several heads, such as stamp duty, process fees, pleader's fees, etc., should accompany the monthly accounts current, a certificate being added to the effect that no extraordinary charges requiring the Court's sanction have been included therein."

"In regard to pleaders' fees, Collectors must make the best terms they can, but should try as a rule not to pay more than the regulation fees in all ordinary cases and bargain for a consolidated sum when a number of exactly similar cases, of which only one has to be argued, has to be dealt with. Collectors are at the same time granted a discretionary authority to allow fees to pleaders not exceeding Rs. 25 in each case where the regulation fees are less than that amount, if the circumstances of the case render a higher fee necessary." (118)

(iii) Pleadings' fees in suits by or against Court of Wards.

In Small Cause cases, pleaders' fees should ordinarily be paid at the rate of Rs. 5 and a minimum of Re. 1, half fees only being allowed in cases decided *ex parte*, withdrawn, or compromised at the commencement. (119)

The Code of Civil Procedure (120) provides that "the provisions contained in rr. 1 to 14, (121) so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued." (122)

Application of above rules relating to minors to persons of unsound mind.

Rule 16 of O. XXXII of the same Code (123) provides as follows: "Nothing in this Order shall apply to a Sovereign Prince or Ruling Chief suing or being sued in the name of his State, or being sued by direction of the Governor General in Council or a Local Government in the name of an agent or in any other name, or shall be construed to affect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind." (124)

Saving for Princes and Chiefs.

(118) Trevelyan on Minors, 3rd Ed., 1906, p. 492. Rule 6 of the Standing Orders of the Madras Board of Revenue, O. XX, p. 216.

(119) *Ibid.*, Trevelyan on Minors, 3rd Ed., 1906, p. 492.

(120) Act V of 1908.

(121) Of O. XXXII which rules are specially applicable to minors.

(122) Code of Civil Procedure (Act V of 1908), O. XXXII, r. 15.

(123) Act V of 1908.

(124) Code of Civil Procedure (Act V of 1908), O. XXXII, r. 16.

Sec. 18—Infringement.*I. Of Copyright.*

General rule—Such costs in discretion of Court.

Costs not generally ordered against innocent infringer.

Costs, liability to, how affected, by defendant's submission to plaintiff's lawful demand.

Costs, where action fails on ground of indecency of work.

Costs, scale of.

II. Of Patents and Designs.

Rule as to costs where defendant submits in a patent action.

Costs where plaintiff refuses reasonable offer by defendant.

Costs where plaintiff succeeds on some issues and fails on others.

Costs in case of innocent purchaser of infringing goods.

Costs, if affected by notice of action not given.

Costs in case of infringement of registered design.

Costs, scale of.

III. Of Trade Mark.

English law as to costs in cases of infringement of trade-marks and trade-names.

Costs in trade-mark cases, general rule as to.

Costs against innocent infringer.

Costs where defendant submits to plaintiff's legal demands.

Costs unnecessarily incurred.

Costs where successful defendant is guilty of improper conduct.

Costs where both parties are at fault.

Costs against infant.

Costs, lien as to—Priority of wharfinger's costs.

Infringement (1) Of Copyright.

General rule—
Such costs in
discretion of
Court.

THE costs of all parties in any proceedings in respect of the infringement of copyright are in the absolute discretion of the Court.⁽¹⁾

(1) See The English Copyright Act, 1911, S. 6, sub-S. 2. On the subject-matter of this section see Kerr on Injunctions, 5th Ed., 1914, pp. 418, 419; Seton on Judgments and Orders, 6th Ed., 1901, Vol. I, 1901, p. 258; Encyclopædia of the Laws of England, 2nd Ed., Vol. III, Heading "Copyright", Yearly Practice, 1914, Notes under O. LXV, r. 1, p. 1080. The following authorities relating to the law of Copyright may also be consulted:—Maugham (1828); Lowndes (History) (1840); Turner (1851); Blaine (Artistic) (1853); Fraser (1860); Underdown (1863); Marshall (1863); Chappel and Shoard (1863); Phillips (1863); Coryton (Dramatic) (1873); Purday (1877); Macfie (1879); Jerrold (1881); Shortt (Literature and Art), 2nd Ed., (1884); Cutler (Musical and Dramatic) (1890); Bewes (1891); Copinger on Copyright, 4th Ed., (1904) by Eston; Scrutton on Copyright, 4th Ed., (1903); Briggs (International) (1906); and the American Works of Law, (1866); Whitman, (1871).

A plaintiff whose copyright is invaded is *prima facie* entitled to an injunction with costs,⁽²⁾ but, as costs are in the discretion of the Court, the plaintiff may be deprived of his costs if he has acted unreasonably.⁽³⁾

The plaintiff is not bound, as a general rule, to give notice to the defendant before serving him with the writ in the action,⁽⁴⁾ and it is immaterial that the defendant may have innocently infringed the copyright.⁽⁵⁾ But an innocent infringer will not necessarily be ordered to pay costs.⁽⁶⁾

Costs not generally ordered against innocent infringer.

If the defendant do not, after injunction obtained, offer to pay the costs, and to give the plaintiff all the other relief to which he is entitled, the plaintiff may bring the suit to a hearing, and will be entitled to the costs of the suit, although at the hearing he may waive his right to the other relief.⁽⁷⁾

Costs, liability to, how affected, by defendant's submission to plaintiff's lawful demand.

But if the defendant offers to submit to the injunction with costs, and to give the plaintiff all the relief to which he is entitled, the Court will not give the plaintiff his costs of the subsequent prosecution of the suit to the hearing,⁽⁸⁾ and may order him to pay the defendant's costs.⁽⁹⁾

In a case where an action for infringement failed on the ground of the indecency of the work, and the defendant had repeated the indecent passages in his own work, the action was dismissed without costs.⁽¹⁰⁾

Costs, where action fails on ground of indecency of work.

(2) *Cooper v. Whittingham*, 15 C.D. p. 507; 49 L.J. Ch. 52; *Weatherby & Sons v. International Horse Agency Co.*, (1910) 2 Ch., p. 305; 79 L.J. Ch., p. 613.

(3) *Dick v. Brooks*, 15 C.D. 41; 49 L.J. Ch. 812; *Walter v. Steinkopff*, (1892) 2 Ch. 489; 61 L.J. Ch. 521; *Haufstaengl v. Smith*, (1905) 1 Ch. 528; 74 L.J. Ch. 304 (Damages); see *Burberrys v. Watkinson*, (1906) 23 R.P.C. 141.

(4) *Goodhart v. Hyett*, 25 C.D. 182; *Wittman v. Oppenheim*, 27 C.D. 260, 268; 54 L.J. Ch. 56; see *Burberrys v. Watkinson*, (1906) 23 R.P.C. 141; *Weingarten v. Bayer*, (1905) 92 L.T., p. 513; 22 R.P.C., p. 350.

(5) *Wittmann v. Oppenheim*, 27 C.D. 260; 54 L.J. Ch. 56; *Weatherby & Sons v. International Horse Agency Co.*, (1910) 2 Ch. p. 305; 79 L.J. Ch., p. 613.

(6) *American Tobacco Co. v. Guesé*, (1892) 1 Ch. 630; 61 L.J. Ch. 242 (Trade-mark); *Haufstaengl v. Smith*, (1905) 1 Ch. 528; 74 L.J. Ch. 304; *Burberrys v. Watkinson*, (1906) 23 R.P.C. 141 (passing off).

(7) See *Kerr on Injunctions*, 5th Ed., 1914, p. 387.

(8) (*Ibid*).

(9) See *Fettes v. Williams*, (1908) 25 R.P.C. 511; *Slasenger v. Spalding*, (1910) 1 Ch. 261; 79 L.J. Ch. 122.

(10) *Baschet v. London Illustrated Standard Co.*, (1900) 1 Ch. 73; 69 L.J. Ch. 35.

Costs, scale
of.

Where an action for alleged infringement of copyright is dismissed with "full costs," the costs are to be taxed in the ordinary way as between party and party. (11)

(ii) Of Patents and Designs.

Rule as to
costs where
defendant
submits in a
patent action.

"If the defendant offers to submit to an injunction, or promises no longer to infringe, it will depend upon circumstances whether he will be ordered to pay the costs incurred subsequently to his submission. The real point is whether the plaintiff must go on with his proceedings, or whether he is already sufficiently protected by the surrender of his opponent." (12)

The plaintiff is generally entitled to go on, if there be any doubt, at any rate until he has obtained his injunction or if the defendant offers unreasonable conditions, as that the order should not be advertised, (13) but the Court will use its discretion on the facts of each case. (14)

Costs where
plaintiff
refuses
reasonable
offer by
defendant.

A plaintiff must not act unreasonably, and if he refuses a reasonable offer, although an injunction is granted, no costs may be given. (15)

"Where the defendant did not dispute the plaintiff's patent, and had never used the machine (which he had purchased and which infringed the plaintiff's patent), and did not intend to use it, and undertook not to use it, and the plaintiff would not accept this or

(11) *Avery v. Wood*, (1891) 3 Ch. 115, C.A.; Seton on Judgments and Orders, 6th Ed., 1901, Vol. I, p. 258.

(12) *Upmann v. Elkan*, 7 Ch. 130; 41 L.J. Ch. 246; *Proctor v. Bayley*, 42 C.D. 390; 59 L.J. Ch. 12; *Wernor Motors Co. v. Gamage & Co.*, (1904) 1 Ch., pp. 267, 268; 73 L.J. Ch. 268; see *Gill v. Philips*, (1912) 29 R.P.C. 397. On the subject-matter of this section, see Encyclopaedia of the Laws of England, 2nd Ed., Vol. X, pp. 614—617; Morgan and Wurtzburg pp. 245—247; Kerr on Injunctions, 5th Ed., 1914, pp. 354—357; Yearly Practice, 1914, Notes under O. LXV, r. 1, pp. 1095—1096; Annual Practice, Notes under O. LXV, r. 1. The following works relating to this branch of law may also be generally referred to:—Edmonds on Patents, 2nd Ed., 1897; Cunningham on Patents; Frost on Patents, 1903, Vol. I, pp. 511—513; Fulton on Patents, Trade Marks and Designs, 3rd Ed., 1905; Lawson on the Patents, etc.; Acts, 3rd Ed., 1898; Wallace and Williamson's Letters Patent for Inventions, 1900; Tyrrell on Letters Patent, 4th Ed., 1906; Webster's Patent Cases; Hindmarch on Patents; Higgin's Digest of the Law of Patents; Robinson on Patents (American Law); Gordon on Monopolies by Patents.

(13) *Henry Clay v. Godfrey Phillips*, (1910) 27 R.P.C. 508.

(14) *Colburn v. Sims*, 2 Ha. 543; 12 L.J. Ch. 388; 62 R.R. 225; *Nunn v. D'Albuquerque*, 34 Beav. 595; *Jenkins v. Hope*, (1896) 1 Ch. 280; 65 L.J. Ch. 249.

(15) *Nunn v. D'Albuquerque*, 34 Beav. 595; *Burberrys v. Watkinson*, (1906) 23 R.P.C. 141.

any other undertaking, on the undertaking being given to the Court, the motion for an injunction was dismissed with costs."⁽¹⁶⁾

So also, where the defendant before the motion for an injunction, offered the plaintiff an unconditional undertaking not to infringe, and that the motion should be treated as the trial of the action, and the plaintiff refused the defendant's offer, the motion was dismissed with costs.⁽¹⁷⁾

Where a party is successful on some issues and fails on others, the more common practice in patent actions is to apportion the costs; or, as often happens, no general costs of the action are given.⁽¹⁸⁾

Costs where plaintiff succeeds on some issues and fails on others.

"Where the plaintiff comes to enforce a legal right, and there has been no misconduct on his part, the Court will not deprive the plaintiff of his costs."⁽¹⁹⁾ But this does not mean that every innocent purchaser of a small quantity of infringing goods incurs a liability to pay the costs of an action to restrain the infringement of the patent.⁽²⁰⁾ The case is, however, different where the quantity of goods purchased is large, that is, large enough to justify the plaintiffs in suspecting that the goods were intended for distribution and not for personal use."⁽²¹⁾

Costs in case of innocent purchaser of infringing goods.

"As a general rule a plaintiff is entitled to issue his writ without notice to the defendant, and after that the only offer which the defendant can properly make is to submit to an injunction and to pay the costs."⁽²²⁾

Costs if affected by notice of action not given.

Where the defendant innocently sold the plaintiff's articles as being of his own manufacture, but only did so on one occasion, and

(16) *Lyon v. Newcastle Corporation*, 11 R.P.C. 218; and see *Jenkins v. Hope*, (1896) 1 Ch. 280; 65 L.J. Ch. 249.

(17) *Spaul v. Monopole Cycle Co.*, (1906) 23 R.P.C. 647; see *Gill v. Phillips*, (1912) 29 R.P.C. 397.

(18) See *per* Bowen, L.J., in *Badische, etc. and Co. v. Levinstien*, (1885) 29 Ch. D. at p. 419; see, also, *In re Geipel's Patent*, (1904) 1 Ch. 239, as to the discretion of the Judge and the apportionment of costs, by the Court of appeal in Patent actions, see *In re Geipel's Patent*, (1904) 1 Ch. 239.

(19) *Cooper v. Whittingham*, 15 C.D. 501; 49 L.J. Ch. 752; *Upmann v. Forester*, 24 C.D. 231; 52 L.J. Ch. 946; but see *Walter v. Steinkopft*, (1892) 3 Ch., p. 500; 61 L.J. Ch. 521.

(20) *American Tobacco Co. v. Guest*, (1892) 1 Ch. 630; 61 L.J. Ch. 242; *Leahy v. Glover*, 10 R.P.C. 141; *Burberrys v. Watkinson*, (1906) 23 R.P.C. 141.

(21) *Upmann v. Forester*, 24 C.D. 231; 52 L.J. Ch. 946.

(22) *Wittmann v. Oppenheim*, 27 C.D. 260, 268; 54 L.J. Ch. 56; but see *Burberrys v. Watkinson*, (1906) 23 R.P.C. 141, as to giving notice.

the plaintiff commenced proceedings for an injunction without giving the defendant warning or asking for an undertaking not to repeat the act, the motion for an injunction was dismissed, no order being made as to costs.(23)

Costs in case
of infringement
of registered
design.

The costs of an action for the infringement of a registered design follow the event, subject however to the discretion of the Court as in other actions.(24)

Costs, scale
of.

"Where a plaintiff has obtained a certificate of the validity of the copyright in his design, in any subsequent action for infringement in which he obtains judgment he will be entitled to his full costs, charges and expenses as between solicitor and client, unless the Court otherwise directs."(25)

(iii) Of Trade Mark.

English law
as to costs
in cases of
infringement
of trademarks
and trade-
names.

"Subject to S. 46 of the Trade Marks Act, 1905 (which provides that the owner of a registered trademark certified to be valid, shall have his full costs, charges and expenses as between solicitor and client in any subsequent legal proceeding in which the validity of the trademark comes in question, unless the Court in such subsequent proceeding certifies that he ought not to have the same) the costs of an action for infringement follow the event, subject however to the discretion of the Court, as in any other action."(26)

Costs in
trademark
cases, general
rule as to.

Where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part, no omission or neglect which would induce the Court to deprive him of his costs, the Court has no discretion, and cannot take away the plaintiff's right to costs. To entitle him to costs, the plaintiff is not bound to give notice before commencing proceedings. (27)

(23) *Burberrys v. Watkinson*, (1906) 23 R.P.C. 141.

(24) *Kerr on Injunctions*, 5th Ed., 1914, pp. 386, 387, 427.

(25) 7 Edw. 7, c. 29, ss. 35, 61.

(26) *Millington v. Fox*, 3 M. & C. 338; 45 R.R. 271; *Burgess v. Hills*, 26 Beav. 244; 28 L.J. Ch. 356; *Edelston v. Edelston*, 1 De G.J. & S. 185, 204; *Pierce v. Franks*, 15 L.J. Ch. 122; *McAndrew v. Bassett*, 4 De. G.J. & S. 380, 387; 10 L.T. 65. With regard to the subject-matter of this section, reference may also be made to the following works:—*Encyclopædia of the Laws of England*, Vol. XIV, Heading "Trade Mark"; *Kerly*, 3rd Ed., by *Kerly and Underhay* (1908) pp. 458 to 467; *Kerly's and Underhay's Trade Marks Act* (1905); *Sebastian*, 4th Ed., 1897, *Sebastian's Trade Marks Act* (1905); *Frost on Patents*, Vol. I, pp. 511—513; *Yearly Practice*, 1914, Notes under O. LXV, r. 1, pp. 1095, 1096, also Notes under O. LIII-A; *Annual Practice*, Notes under O. LXV, r. 1; *Kerr on Injunctions*, 5th Ed., 1914, pp. 386, 387; *Marshall on Costs*, p. 14 *Morgan and Wurtzburg* pp. 99, 123.

(27) *Cooper v. Whittingham*, (1880) 15 Ch. D. 501; *Goodhart v. Hyett*, (1883) 25 Ch. D. 182.

There then are cases in which even innocent infringers of trademarks or registered designs have been ordered to pay costs.⁽²⁸⁾ But where there had been an innocent dealing with a small quantity of goods which turned out to be an infringement of the plaintiff's trademark, and defendant submitted to an injunction, the Court refused to order him to pay costs.⁽²⁹⁾

This was a motion to restrain the defendant, who was the proprietor of the *Bristol Mercury*, from selling any further copies of his newspaper containing verbatim re-prints of two articles, called "A Troubled Night," and "How I lost the County," published in the *Belgravia Annual* and *Belgravia Magazine*, of which the plaintiff was proprietor. The plaintiffs had been in the habit for many years of sending their Magazine and Annual to the *Bristol Mercury* for review. The defendants alleged that they had been in the habit of acting in a similar manner for many years, and it was a general custom of provincial newspapers to make such extracts from magazines sent them, and that, in fact, they were sent to him for that purpose. Bacon, V. C., said in the course of the judgment:—"I must grant an injunction against the defendant, since he has done acts which the plaintiff may legally complain of. A lawful use for reviewing is right, an unlawful copying of whole articles is illegal, and the custom of trade which has been alleged would be no justification against the law. With regard to that, an affidavit by the defendant as to his own knowledge on the subject would, in my opinion, have been sufficient, without all the voluminous evidence which has been filed; there must be an injunction in the terms of the first paragraph of the prayer. Inasmuch as the defendant has acted throughout properly and with *bona fides*, I do not think fit to give either party their costs of this application."⁽³⁰⁾

A man whose trademark or tradename has been taken by another is as a general rule entitled to the costs of obtaining an injunction to restrain a repetition of the wrongful act.⁽³¹⁾

Costs where defendant submits to plaintiff's legal demands.

(28) *Upmann v. Forester*, (1883) 24 Ch. D. 231; *Wittman v. Oppenheim*, (1884) 27 Ch. D. 260.

(29) *American Tobacco Co. v. Guest*, (1892) 1 Ch. 630; 61 L.J. Ch. 242.

(30) See *Maxwell v. Somerton*, 9 Mad. Jur. 305 (Short Notes of English Cases).

(31) *Guardian Fire and Life Insurance Co. v. Guardian and General Insurance Co.*, 50 L.J. Ch. 256; *Upmann v. Forester*, 24 Ch.D. 231; 52 L.J. Ch. 946. See *Burgoyne & Co. v. Burgoyne Godfrey & Co.*, (1905) 22 R.P.C., p. 171; *Hanfstaengl v. Smith*, (1905) 1 Ch., p. 528; 74 L.J. Ch. 304 (Copyright).

If the defendant on being served with the writ, does not contest the plaintiff's claim, but offers him the relief to which he is entitled, the plaintiff should not bring the cause to a hearing. If he proceeds with his action and fails to obtain more than he was offered, he will lose his right to the costs incurred after the defendant's offer. (32) In such a case he may also be ordered to pay the costs of the defendant. (33).

"But if the defendant, upon notice of the plaintiff's right and the fact of its violation, instead of submitting to the injunction with costs, contests the plaintiff's right or refuses any of the terms to which the plaintiff is entitled, (34) or insists on conditions to which he is not entitled (*e.g.*) that the order be not advertised, (35) the cause may be brought to a hearing and the plaintiff will have the costs of the suit." (36)

A person having in his hands or under his control goods bearing a forged trademark is bound upon the fact being brought to his knowledge at once to submit to do whatever he may be compelled to do on an action being brought against him; otherwise, however innocently the goods may have come to him he will be liable for the costs of an action brought by the person whose right is infringed for the purpose of obtaining relief. (37)

Where, in an action for infringement of copyright, the defendants offered an undertaking with costs not to republish the matter complained of, and the plaintiffs nevertheless proceeded with their action, they were disallowed their costs subsequent to the defendants' offer. (38)

(32) *Millington v. Fox*, 3 M. & C. 338; 45 R.R. 271; *McAndrew v. Bassett*, 4 De G. J. & S. 387; 10 L.T. 65; *Moet v. Custon*, 33 Beav. 581; 10 L.T. 395; *Nunn v. D'Albuquerque*, 34 Beav. 595; *Hudson v. Bennett*, 14 L.T. 698; 14 W.R. 911; *Fetts v. Williams*, (1908) 25 R.P.C. 511 (costs of further consideration); *Lever Bros. v. Masbro' Equitable Pioneers Society*, (1912) 106 L.T. 472; 28 T.L.R. 294.

(33) *Bass v. Dawber*, 19 L.T. p. 628; *Jan v. Grossman*, 12 R.P.C. 537 (Design); *Vernon v. Buchanan Flour Co.*, (1906) 23 R.P.C. 17; *Slazenger v. Spalding*, (1910) 1 Ch. 261; 79 L.J. Ch. 122. See *Lever Bros. v. Masbro' Equitable Pioneers Society*, (1912) 106 L.T. 474; 28 T.L.R. 294.

(34) *Geary v. Norton*, 1 De. G. and Sm. 9; 75 R.R. 1; *Burgess v. Hatley*, 26 Beav. 249; *Hipkins v. Plant*, 15 R.P.C. 294; *Hat Manufacturers Supply Co. v. Tomlin*, (1906) 23 R.P.C. 413.

(35) *Henry Clay & Co. v. Philips*, (1910) 27 R.P.C. 508.

(36) *Kerr on Injunctions*, 5th Ed., 1914, p. 387.

(37) *Upmann v. Elkan*, 12 Eq. 140; 40 L.J. Ch. 475; 7 Ch. 132; 41 L.J. Ch. 130; *Moet v. Pickering*, 8 C.D. 372; 47 L.J. Ch. 527.

(38) *Walter v. Steinkopff*, (1892) 3 Ch. 489; and see *Jenkins v. Hope*, (1896) 1 Ch. 278.

Where the defendant consents to the plaintiff obtaining an order in chambers for the relief claimed, the plaintiff will not necessarily be allowed the extra cost of bringing the matter on in Court.⁽³⁹⁾ Costs unnecessarily incurred.

Though the case for an injunction may fail, the dismissal of the action may be without costs, if the defendant has been guilty of improper conduct.⁽⁴⁰⁾ Costs where successful defendant is guilty of improper conduct.

But in order to be deprived of his costs the defendant's improper conduct must have been in connection with the subject-matter of the action.⁽⁴¹⁾

If a trader imitates another's label or trademark, even though the case may be one where the Court may refuse an injunction, it will not willingly give the defendant his costs.⁽⁴²⁾

Where the Court was of opinion that both plaintiff and defendant were deceiving the public, no costs were given.⁽⁴³⁾ Costs where both parties are at fault.

Infancy will not protect a person from being ordered to pay the costs of a trade-mark action.⁽⁴⁴⁾ Costs against infant.

In a case where wharfingers were in possession of goods bearing a brand in spurious imitation of the brand of the plaintiff, it was held that the plaintiff was entitled to have the brand removed, but that his lien on the goods for his costs, if it did exist, must be postponed to the wharfinger's costs.⁽⁴⁵⁾ Costs, lien as to — Priority of wharfinger's costs.

(39) *Slazenger v. Pigott*, 12 R.P.C. 439 (extra costs disallowed); *Gandy Bell Manufacturing Co. v. Fleming*, 18 R.P.C. 276; *Royal Warrant Holders Association v. Kiston*, (1909) 26 R.P.C. 157 (extra costs allowed).

(40) *Rodgers v. Rodgers*, 22 W.R. 889 (Eng.); 31 L.T. 285; *Borlwick v. The Evening Post*, 37 C.D., p. 465; 57 L.J. Ch. 406; *Thorneloe v. Hill*, (1894) 1 Ch., p. 578; 63 L.J. Ch. 331; *Warsop & Sons v. Warsop*, (1904) 21 R.P.C. 481 (wrongful use of the word "registered"); *King v. Gillard*, (1905) 2 Ch. 7; 74 L.J. Ch. 421; *Claudius Ash v. Invicta Co.*, (1911) 28 R.P.C. 597.

(41) *King v. Gillard*, (1905) 2 Ch. 7; 74 L.J. Ch. 421.

(42) *Bass v. Dawber*, 19 L.T. 627.

(43) *Estcourt v. Escourt Hop Essence Co.*, 10 Ch. 280; 44 L.J. Ch. 223; *Thorneloe v. Hill*, 11 R.P.C. 61.

(44) *Chubb v. Griffiths*, 35 Beav. 127; *Woolf v. Woolf*, (1899) 1 Ch. 343; 68 L.J. Ch. 82.

(45) *Upmann v. Elkan*, 12 Eq. 140; 40 L.J. Ch. 475; 7 Ch. 132; 41 L.J. Ch. 246; *Moet v. Pickering*, 8 C.D. 372; 47 L.J. Ch. 527.

Sec. 19—Injunction.

General rule as to costs of application for injunction.

General rules as to costs of motion for injunction in Chancery Division.

Exceptions to the above.

Costs of *interim* injunction.

Effect of ordering a motion to stand over reserving costs.

Defendant submitting to plaintiff's lawful demands.

Offer by defendant.

Costs of action for injunction—Notice.

Costs of motion for injunction.

Cases where no costs were given on either side.

Costs unnecessarily incurred.

Costs of *ex-parte* application.

Costs in case of breach of injunction.

Costs of frivolous motions to commit—Such motions discouraged.

Costs in case of dismissal of plaintiff's suit.

Costs of abandoned motion.

Costs of motion—Practice.

Costs in appeal.

Costs, scale of.

Taxation on higher scale.

Court-fees.

General rule
as to costs of
application
for injunc-
tion.

THE Court has full jurisdiction to deal with the costs of an application for an injunction as it thinks fit on the hearing of the application.⁽¹⁾

(1) *Pearce v. Wycombe Rail Co.*, (1853) 17 Jur. 660. On the subject-matter of this section, see Seton on Judgments & Orders, 6th Ed., 1901, Vol. I, pp. 742, 748; Daniell's Chancery Practice, 7th Ed., 1901, Ch. XVIII; Encyclopædia of the Laws of England, Heading "Injunction"; Halsbury's Laws of England, Heading "Injunction", Vol. XVII, pp. 287-291; Maw's Digest, Vol. VII, cols. 1635-1637; Gordon on Costs, Chaps. XV and XVI, pp. 133-145; Morgan & Wurtzburg on Costs, pp. 43-76; Marshall on Costs, Chap. VI, pp. 46-59; Annual Practice, Notes under Os. L & LXV; Yearly Practice, Notes under Os. L & LXV. The following works relating to the subject of Injunctions may also be usefully referred to:—Woodroffe in Injunctions, 2nd Ed., 1906, pp. 174, 175 Addison's Treatise on the Law of Contracts, 9th Ed., 1892, pp. 281-287; Chitty's Archbold's Practice, 14th Ed., 1885, pp. 426-431; Daniell's Chancery Practice, 7th Ed., 1901, pp. 1327-1399; Day's Common Law Procedure Acts, 4th Ed., 1872; Eden on Injunctions, 1821; Fry on Specific Performance of Contracts, 3rd Ed., 1892, pp. 522-528; Gilbert's Forum Romanum, 1758; Joyce on Injunctions, 1872; Kerr on Injunctions; Pollock on Torts, 5th Ed., 1897; Seton's Judgments and Orders, 6th Ed., 1901, pp. 518-748; Spence on The Equitable Jurisdiction of the Court of Chancery, 1846; Story's Equity Jurisprudence, 2nd English Ed., 1892, pp. 570-624.

As a general rule the Court will direct that such costs be costs in the cause, ⁽²⁾ though, if the application is improperly made, it will be dismissed with costs. ⁽³⁾

"When disposing of any application for an injunction, the Court may give to either party the costs of the application or may reserve the question of costs. ⁽⁴⁾

Costs of an application ordered to stand over till trial, and costs reserved to be disposed of at the trial follow the event of the trial without any special direction. ⁽⁵⁾

If the costs are not reserved upon an interlocutory application and in all cases when judgment is finally delivered in the action, the judgment will direct by whom the costs are to be paid. ⁽⁶⁾

The Court has full power to give and apportion costs of every application and suit in any manner it thinks fit. But the general rule is that costs of an application or suit follow the event, and if the Court directs otherwise it must state its reasons in writing. ⁽⁷⁾

So where a party is entitled to appeal and has obtained a decree he will be awarded the costs of the appeal even though it be a hard case. ⁽⁸⁾ If both parties are in the wrong, no costs will be given to either side." ⁽⁹⁾

In the Chancery Division, no direction is given by the Court concerning the costs of a motion for injunction. The following general rules have been laid down ⁽¹⁰⁾:—(1) "The party making a

General rules
as to costs of
motion for
injunction in
Chancery
Division.

(2) *Mailland v. Backhouse*, (1848) 17 L.J. Ch. 121, 127; see *Coles v. Sims*, (1854) 5 De. G.M. & G. 1, 11, C.A.; *Powell v. Cockerell*, (1846) 4 Hare 557, 572.

(3) *Marsack v. Reeves*, (1821) Madd. & G. 108.

(4) Woodroffe on Injunctions, p. 174.

(5) *Ibid.*

(6) See Woodroffe on Injunctions, p. 174.

(7) Civ. Pro. Code, Ch. XLVIII; see Kerr on Injunctions, pp. 31, 32, where the rules laid down by Sir John Leach in 1 Sim. & St. 357 are given, as also the several exceptions to these rules.

(8) *Callianji Harjivan v. Narsi Tricum*, 19 B. 764 (770).

(9) *Hilliard v. Hanson*, 21 Ch. D. 69; *Aylwin v. Evans*, 47 L.T.N.S. 568. A suit for an injunction and including no claim for damages is not a suit to recover a debt or damages within S. 376 of the Civ. Pro. Code (1882) dealing with payment into Court. In such a case a Judge has full power under S. 220 of the Code to apportion the costs; but the principle underlying S. 379 of the Code ought to regulate the discretion of the Court in directing the payment of costs. *Luxuman Nana Patil v. Moroba Ramkrishna*, 21 B. 502.

(10) *Per Leach, V.C.*, (1823) 1 Sim. & St. at p. 357.

successful motion is entitled to his costs as costs in the cause. (11) But the party opposing is not entitled to his costs as costs in the cause; (2) the party making a motion which fails is not entitled to his costs as costs in the cause, but the party opposing it is entitled to his costs as costs in the cause; and (3) where a motion is made by one party and not opposed by the other party, the costs of both parties are costs in the cause." (12)

Exceptions to the above.

There are, however, several exceptions to these rules. For example, if a defendant unsuccessfully opposes a motion for an injunction, but at the hearing the action is dismissed with costs, the defendant's costs of opposing the motion will be costs in the cause. (13)

So, also, if a motion is ordered to stand over until the trial, and the action is subsequently dismissed with costs, the defendant's costs of the motion will be costs in the cause. (14)

A party who succeeds in his action, but is ordered to pay the costs of the suit up to a given time, will have to bear the costs of motions before that time. (15)

Costs of *interim* injunction.

An order, made on notice, continuing an injunction with costs will, in the absence of special directions to the contrary, include the costs of an *interim* injunction previously obtained *ex parte*. (16)

Effect of ordering a motion to stand over reserving costs.

Where the Court orders a motion to stand over till the hearing, it simply reserves to itself the power of dealing with the costs of the motion in a manner different from that in which it may deal with the costs of the cause. (17)

(11) Where a motion for an injunction is ordered to stand over to the hearing, but no order is made as to costs, and at the hearing the plaintiff obtains a perpetual injunction, the motion is substantially a successful one, and the costs of the motion will be costs in the cause (*Mounsey v. Lansdale (Earl)*, *A. G. v. Lonsdale (Earl)*, (1870) 6 Ch. App. 141).

(12) See, also, *Great Western Rail Co. v. Oxford, Worcester and Wolverhampton Rail Co.*, (1852) 5 De G. & Sm. 437, 450; *Hind v. Whitmore*, (1856) 2 K. & J. 458, 463.

(13) *Stevens v. Keating*, (1850) 1 Mac. & G. 659.

(14) *Betts v. Clifford*, (1860) 1 John. & H. 74; *Corcoran v. Witt*, (1871) L.R. 13 Eq. 53.

(15) *Webster v. Manby*, (1869) 4 Ch. App. 372.

(16) *Blakey v. Hall*, (1887) 56 L.J. Ch. 568.

(17) *Singer v. Audsley*, (1872) L.R. 13 Eq. 401, 405.

But if the costs of such motions are not then mentioned to the Judge, they are treated as costs in the action, and need not be mentioned in the judgment.⁽¹⁸⁾

Where the costs are reserved, especially if it is suspected that the action will not come to a hearing, application should be made that they may be reserved, not simply to the hearing, but till the hearing or further order; because otherwise, if the cause does not come on for trial, the costs of the motion cannot be obtained.⁽¹⁹⁾

Even if the action does come to a hearing, and at the hearing no mention is made of the costs of the motion, but the costs of the action are reserved until the hearing on further consideration, that reservation will not include the costs of the motion.⁽²⁰⁾

Where the costs of a motion have been reserved, such costs are not to be mentioned in the judgment or order, or allowed on taxation, without the special leave of the Judge.⁽²¹⁾

“Actions for injunction to restrain the violation of a legal right do not usually go to the hearing. If the defendant offers to submit to an injunction with costs, and to give the plaintiff all the other relief to which he may be, under the circumstances of the case, entitled, and no question remains open to be decided between the parties and no account is sought or the account is waived, and the plaintiff nevertheless proceeds to trial, the Court, though it may give the plaintiff the decree, will not give him the costs of the subsequent prosecution of the action up to the trial.”⁽²²⁾

Defendant
submitting to
plaintiff's
lawful de-
mands.

(18) See *Mounsey v. Lonsdale (Earl)*, *A.-G. v. Lonsdale (Earl)*, (1870) 6 Ch. App. 141; *British Natural Premium Provident Association v. Bywater*, (1897) 2 Ch. 531; see Halsbury's Laws of England, Vol. XVII, p. 287.

(19) *Rumbold v. Forteach*, (1858) 4 Jur. (N.S.) 608; see *Jones v. Batten*, (1853) 10 Hare Appendix, xi.

(20) *Gardner v. Marshall*, (1845) 14 Sim. 575.

(21) *British Natural Premium Provident Association v. Bywater*, (1897), 2 Ch. 531 and Halsbury's Laws of England, Vol. XVII, p. 287.

(22) *Millington v. Fox*, 3 M. & C. 338; 45 R.R. 271; *Colburn v. Sims*, 2 Ha. 561; 12 L.J. Ch. 388; 62 R.R. 225; *Chappel v. Davidson*, 2 K. & J. 123; 114 R.R. 1; *Nunn v. Albuquerque*, 34 Beav. 595; *Sonnenschein v. Barnard*, 57 L.T. 713; *Walter v. Steinkoppf*, (1892) 3 Ch. 489; 61 L.J. Ch. 521; *Jenkins v. Hope*, (1896) 1 Ch. 278; 65 L.J. Ch. 249; *Slazenger v. Spalding*, (1910) 1 Ch. 261; 79 L.J. Ch. 125; *Lever Bros. v. Masbro' Equitable Pioneers Society*, (1912) 106 L.T. p. 474; 28 T.L.R. 294; *Brinsmead v. Brinsmead*, (1913) 29 T.L.R. 237.

Where a full and sufficient undertaking is offered by the defendant, the plaintiff ought to accept it.⁽²³⁾

The tender must include the costs of the action up to the time when the tender is made.⁽²⁴⁾

It was held that the plaintiff was justified in bringing the action for trial and claiming the costs of the action in the following cases.

(i) Where the defendant does not offer to submit to the injunction and pay all the costs up to that time.⁽²⁵⁾

(ii) Where, although he offers to submit to the injunction, he refuses to pay the costs, or to give the plaintiff any of the other relief to which he is entitled.⁽²⁶⁾

(iii) Where the defendant imposes a condition which the plaintiff is not bound to accept, *e.g.*, that the order should not be advertised, or that it should recite that the defendant had submitted for the sake of peace.⁽²⁷⁾

Where the defendants offered to submit to the injunction and to pay the costs, and the plaintiffs afterwards brought the cause to a hearing, the Court would give the defendants their costs subsequent to that offer.⁽²⁸⁾

(23) *Jenkins v. Hope*, (1896) 1 Ch. 278. Where in a patent action the plaintiff notwithstanding such an offer persisted, the Court, on the defendant's giving the undertaking, declined to grant an injunction, but gave to plaintiff costs down to the date of the offer and the costs of the days' appearance, and to the defendant the other costs subsequent to the offer. *Jenkins v. Hope*, (1896) 1 Ch. 278; *Snuggs v. Seyd and Kelly's Credit Index Co.*, W.N. (1894) 95.

(24) *Fradella v. Weller*, 2 R. & M. 247; 34 R.R. 81; *Geary v. Norton*, 1 De G. & S. 12; 75 R.R. 1; *Burges v. Hill*, 26 Beav. 244; 28 L.J. Ch. 356; 122 R.R. 94; *Moet v. Couston*, 33 Beav. 579; *Nunn v. Albuquerque*, 34 Beav. 595; *Jenkins v. Hope*, (1896) 1 Ch. 278; 65 L.J. Ch. 249.

(25) *Upmann v. Forester*, 24 C.D. 231; 52 L.J. Ch. 946; *Wilman v. Oppenheim*, 27 C.D. 260; 54 L.J. Ch. 56; *Sonnenschien v. Barnard*, 57 L.T. 713; *Birmingham District Land Co. v. London and North Western Railway Co.*, 57 L.T. 185; *Schlesinger v. Turner*, 63 L.T. 764.

(26) *Fradella v. Weller*, 2 R. & M. 247; 34 R.R. 81; *Geary v. Norton*, 1 De G. & S. 12; 75 R.R. 1; *Chappel v. Davidson*, 2 K. & J. 123; 110 R.R. 134; *Burgess v. Hill*, 26 Beav. 244; 28 L.J. Ch. 356; 122 R.R. 94; *M'Andrew v. Bassett*, 4 D.J. & S. 380; *Fennessey v. Day and Martin*, 55 L.T. 161; *Hat Manufacturers' Supply Co. v. Tomlin*, (1906) 23 R.P.C. 413.

(27) *Henry Clay & Co. v. Godfrey Phillips*, (1910) 27 R.P.C. 508. *Kerr on Injunctions*, 5th Ed., 1914, p. 40.

(28) *Joyce on Injunctions*, Vol. I, 1872, p. 317.

If an owner of a trade-mark, by his bill, asks for an injunction to which he is entitled, together with an account of profits to which he is not entitled, and the defendant offers to submit to a perpetual injunction on each party paying his own costs, and the plaintiff brings the cause on for hearing, the Court, holding both parties in the wrong, will give no costs to either side.⁽²⁹⁾

If before action brought⁽³⁰⁾ or after the issue of the writ⁽³¹⁾ the plaintiff is offered by the defendant all the relief that he seeks, and the offer is one which, in the opinion of the Court, ought to have been accepted, but the plaintiff nevertheless proceeds with his action, the Court, although it may grant the injunction, may order the plaintiff to pay the costs incurred subsequently to the offer.⁽³²⁾ Offer by defendant.

In order to entitle a plaintiff to the costs of an action for an injunction in pursuance of a legal right,⁽³³⁾ he is not bound to give any preliminary notice to the plaintiff.⁽³⁴⁾ Costs of action for injunction —Notice.

In general, an infringer of a legal right is liable to pay the costs of an action for an injunction although he has acted innocently.⁽³⁵⁾

A plaintiff is not bound to apply to a person, who is infringing his legal right, to know whether or not he will accede to his demands before commencing an action for an injunction.⁽³⁶⁾

But the Court will not as a matter of course order the defendant to pay the costs, when no previous application has been made to him.⁽³⁷⁾

(29) *Moet v. Couston*, 33 Beav. 578; 10 Jur. (N.S.) 1012; 10 L.T. (N.S.) 395.

(30) *Numm v. D'Albuquerque*, (1865) 34 Beav. 595; *Snuggs v. Syed and Kelly's Credit Index Co.*, (1894) W.N. 95.

(31) *Millington v. Fox*, (1838) 3 My. & Cr. 338; *Colburn v. Simms*, (1843) 2 Hare 543, 561; *Sonnenschein v. Barnard*, (1887) 57 L.T. 712; *Walter v. Steinkopff*, (1892) 3 Ch. 489.

(32) *Jenkins v. Hope*, (1896) 1 Ch. 278; see *Chappell v. Davidson*, (1855) 2 K. & J. 123 (129); *McAndrew v. Bassett*, (1864) 4 De. G. J. & Sm. 380.

(33) For instance a copyright.

(34) *Cooper v. Whittingham*, 15 Ch. D. 501; *Witmann v. Oppenheim*, 27 Ch. D. 260; see Seton on Judgment and Orders, 6th Ed., p. 748.

(35) *Upmann v. Forrester*, 24 Ch. D. 231; *Witmann v. Oppenheim*, 27 Ch. D. 260.

(36) *Burgess v. Hills*, (1858) 26 Beav. 244; *Burgess v. Hatley*, (1858) 26 Beav. 249; *Upmann v. Elkan*, (1871) L.R. 12 Eq. 140; *Cooper v. Whittingham*, (1880) 15 Ch. D. 501; *Upmann v. Forester*, (1883) 24 Ch. D. 231; *Wittman v. Oppenheim*, (1884) 27 Ch. D. 260.

(37) *American Tobacco Co. v. Guest*, (1892) 1 Ch. D. 630; *Walter v. Steinkopff*, (1892) 3 Ch. 489; see *Upmann v. Elkan*, (1871) L.R. 12 Eq. 140, and Judicature Act, 1890 (53 & 54 Vict., c. 44), S. 5; R.S.C. O. 65, r. 1. The dictum of Jessel, M. R., in

Costs of
motion for
injunction.

The notice of motion for injunction should state clearly the nature of the order asked for. (38) Costs may be given though not asked for by the notice, (39) provided that the respondent appears upon the hearing of the motion. (40)

Cases where
no costs were
given on
either side.

In the following cases no costs were given to either side :—

(i) Where, in an action for an injunction both parties are in the wrong, the one claiming more than he is entitled to claim and the other offering less than he is bound to offer. (41)

(ii) Where the one succeeds as to part of his claim and fails as to another part. (42)

(iii) In either of the above cases the costs as to which one party has failed will be taxed and set off against those in which he has succeeded, and the balance of such costs only will be paid to the party entitled to such costs. (43)

(iv) Where the defendant has been to blame in the matter, though only morally, the dismissal of the action of injunction will be without costs. (44)

(v) As has already been stated, a *bona fide* offer from the defendant before the action for injunction to give the plaintiff all the relief to which he is entitled and which he ultimately obtains by the action, may be a reason for depriving the plaintiff of costs. (45)

Cooper v. Whittingham, (1880) 15 Ch. D. 501 at p. 502 (see also *Upmann v. Forester*, (1883) 24 Ch. D. 231) to the effect that "where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part, no omission or neglect which would induce the Court to deprive him of his costs, the Court has no discretion and cannot take away the plaintiff's right to costs," was disapproved in *American Tobacco Co. v. Guest*, (1892) 1 Ch. D. 630 and *Walter v. Steinkopff*, (1892) 3 Ch. 489.

(38) *Brown v. Robertson*, 2 Ph. 173.

(39) *Clark v. Jaques*, 11 Beav. 623; *Buller v. Gardner*, 12 Beav. 525.

(40) *Pratt v. Walker*, 19 Beav. 261; 105 R.R. 123; but see also the English Judicature Act, 1890, S. 5.

(41) *Moet v. Couston*, 33 Beav. 578; *Wood v. Saunders*, 10 Ch. p. 585 affirming 44 L.J. Ch. 514, 523; see *Att. Gen. v. Parish*, (1913) 57 S.J. 625.

(42) *Russel v. Watts*, 25 C.D. p. 577; *Moore v. Bennett*, 1 R.P.C. 130.

(43) *Bourke v. Alexandra Hotel Co.*, 25 W.R. 782 Eng.; *Nordenfeli v. Gardner*, 1 R.P.C. 65; *Sellors v. Mallock Board of Health*, 14 Q.B.D. 935; see *Cracknall v. Janson*, 11 C.D. 23; *Knight v. Pursell*, 49 L.J. Ch. 120; *Reinhardt v. Mantasti*, 42 C.D. p. 690; *Jenkins v. Jackson*, (1891) 1 Ch. 89; 60 L.J. Ch. 206; *Todd v. North Eastern Railway Co.*, (1903) 88 L.T. 112. See O. LXV, r. 27, sub-r. 21.

(44) *Wylam v. Clarke*, (1876) W.N. 68; *Harrison v. Goode*, 11 Eq. 354, 355; 40 L.J. Ch. 294 (301); *Borthwick v. Evening post*, 37 C.D. p. 465; 57 L.J. Ch. 410, and see *Snuggs v. Seyd*, (1894) W.N. 95; *King v. Gillard*, (1905) 2 Ch. 7; 74 L.J. Ch. 421.

(45) *Millington v. Fox*, 3 M. & C. 398; 45 R.R. 271.

(vi) So, also, if the plaintiff fails as to part and succeeds as to part of his claim, the Court will either give no costs on either side,⁽⁴⁶⁾ or will direct the costs of the part as to which the plaintiff has failed to be taxed and set off against those of the part as to which he has succeeded, and the balance of the costs only to be paid to the party entitled to the larger amount of costs.⁽⁴⁷⁾

(vii) In a case which the Court considers as one of great hardship an injunction may be granted without costs.⁽⁴⁸⁾

(viii) Where an injunction is refused, but the defendant has been to blame in the matter, the plaintiff may not be ordered to pay the defendant's costs.⁽⁴⁹⁾

(ix) "The Court will not make an order for costs where it is probable that proceedings in the cause may afterwards take place which will affect the decision of the Court upon the question of costs."⁽⁵⁰⁾

Therefore where a bill to restrain the infringement of a patent was retained at the hearing, to give the patentee an opportunity of trying the right at law, the Court refused to make an order as to the costs of the evidence, which were claimed by the plaintiff on the ground that the defendant had not required him to establish his title at law.⁽⁵¹⁾

In an English case where a defendant offered to submit to a perpetual injunction to be obtained by the plaintiffs in chambers, but the plaintiffs set the action down on motion for judgment, the plaintiffs were only allowed such costs as they would have properly incurred if they had proceeded by summons in chambers.⁽⁵²⁾

(46) *Russell v. Watts*, (1883) 25 Ch. D. 559, 577 C.A. reversed (1885) 10 App. Cas. 590; *Moore v. Bennett*, (1884) 1 R.P.C. 129 H.L.; *Sutton v. English and Colonial Produce Co.*, (1902) 2 Ch. 502, 507; see *Rochdale Canal Co. v. King*, (1853) 16 Beav. 630.

(47) *Bourke v. Alexandra Hotel Co. Ltd.*, (1877) 25 W.R. 782; *Knight v. Burssell*, (1879) 49 L.J. (C.H.) 120; *Nordensfelt v. Gardner and Gardner Gun Co.*, (1884) 1 R.P.C. 61, 76, C.A.; *Sellers v. Mallock Bath Local Board*, (1885) 14 Q.B.D. 928, 935; *Jenkins v. Jackson*, (1891) 1 Ch. 89, C.A.; R.S.C. O. LXV, r. 27 (21).

(48) *Broder v. Saillard*, (1876) 2 Ch. D. 692.

(49) *Harrison v. Good*, (1871) L.R. 11 Eq. 338; *Rodgers v. Rodgers*, (1874) 22 W.R. 887, 889; *Wylam v. Clarke*, (1876) W.N. 68; *Borthwick v. The Evening Post*, (1888) 37 Ch. D. 449, 460, C.A.; see *Bass v. Dawber*, (1869) 19 L.T. 626.

(50) *Joyce on Injunctions*, Vol. I, 1872, p. 255.

(51) *Ward v. Key*, 10 Jur. 792.

(52) *The London Steam Dying Co. v. Digby*, 57 L.J. Ch. 505; 58 L.T. 724; *Allen v. Oakley*, 62 L.T. 724.

If the costs of the action have been increased by an allegation in the statement of claim which is untrue, such increased costs will have to be paid by the plaintiff, although his case may be substantially established.⁽⁵³⁾ But it has been laid down that "a wrong-doer cannot be heard to complain that in proceedings hurriedly taken to stop the wrong, the plaintiff has not accurately stated his title; in such a case the defendant will not be relieved from the payment of the extra costs occasioned by the plaintiff's mistake as to his title."⁽⁵⁴⁾

If the plaintiff obtains all the relief which he seeks on an interlocutory motion in the action, he should apply to the defendant to have the costs disposed of on motion.⁽⁵⁵⁾ The case cannot, however, be so dealt with if the defendant refuses to allow the matter to be disposed of on motion, or if there is any question remaining open between the parties to be decided.⁽⁵⁶⁾

Costs of
ex parte
application.

If on an application for an *ex parte* injunction material facts have been concealed from the Court, the plaintiff will have to bear the costs of the *ex parte* application, even though the Court declines to discharge the order.⁽⁵⁷⁾

On *ex parte* applications the Court will not make an order for the payment of the costs by an absent person.⁽⁵⁸⁾ But where the defendant appears on the motion, costs may be given though not asked for by the notice.⁽⁵⁹⁾

Costs in case
of breach of
injunction.

If, upon hearing the affidavits on both sides, the Court is of opinion that the defendant is guilty of a breach of injunction, it makes an order for his committal, and he will not be discharged unless he pays the applicant's costs.⁽⁶⁰⁾

"But where the breach is not wilful or contemptuous, or if the defendant has endeavoured to set himself right, or expresses

(53) *Pierce v. Franks*, 15 L.J. Ch. 122; *Rose v. Loftus*, 47 L.J. Ch. 576.

(54) *Att. Gen. v. Tomline*, 5 C.D. 750.

(55) *Morgan v. Great Eastern Rail Co.*, (1863) 1 Hem. and M. 78; *Sonnenschein v. Barnard*, (1887) 57 L.T. 712.

(56) *Morgan v. Great Eastern Rail Co.*, (1863) 1 Hem. and M. 78; *Wilde v. Wilde* (1862) 4 De. G. F. and J. 348, C.A.

(57) *Holden v. Waterlow*, (1866) 15 W.R. 139 (Eng.).

(58) *Nokes v. Gibbon*, 3 Jur. (N.S.) 282; 5 W.R. 216 Eng.; *Cast v. Poyser*, 26 L.J. (Ch.) 353.

(59) *Clark v. Jaques*, 11 Beav. 623; *Butler v. Gardener*, 12 Beav. 525; *Kerr on Injunctions* 612. See also *Joyce on Injunctions*, Vol. II, 1872, p. 1285.

(60) *Price v. Hutchison*, 18 W.R. 204 (Eng.); 9 Eq. p. 537.

his regret for what he has done, and promises to obey the injunction, or if the plaintiff does not press for committal, the Court is generally satisfied by merely making him pay the costs of the application of bringing the breach under the notice of the Court".⁽⁶¹⁾

The costs may be directed to be paid as between solicitor and client so as to indemnify the plaintiff against the costs of the proceedings.⁽⁶²⁾

Though the motion to commit may be refused, it will generally be without costs, if the party against whom it is sought or his solicitor has been to blame in the matter.⁽⁶³⁾

The Court will not encourage motions to commit where no real case for committal is made out, but only an apology and costs are asked for, and the party so moving ought not to be allowed his costs.⁽⁶⁴⁾

Costs of frivolous motions to commit—Such motions discouraged.

An order for committal for breach of an injunction must recite the affidavit of service of the order granting the injunction, and either the affidavit of service of the notice of motion or the appearance of the defendant personally, or by counsel, upon the motion.⁽⁶⁵⁾

The order ought in strictness to be prefaced by a declaration that the act complained of is a contempt, but the absence of such a declaration is not a ground for discharging the order for irregularity.⁽⁶⁶⁾

It is not irregular to engraft upon the order a direction that the party committed shall pay the costs of his contempt, but, if the order extends to charges and expenses as well as costs, it is to that extent irregular.⁽⁶⁷⁾

(61) *Little v. Thompson*, 2 Beav. 129; 50 R. R. 124; *Lane v. Sterne*, 3 Giff. 629; *Re Bryant*, 4 C.D., p. 100; 35 L.T. 489; *Plating Co. v. Farquharson*, 17 C.D. 49; 50 L.J. Ch. 406.

(62) *Lee v. Aylesbury Urban Council*, (1902) 19 T.L.R. 106; *Slancomb v. Trowbridge Urban Council*, (1910) 2 Ch. 196, 197; 79 L.J. Ch., p. 521; *Davis v. Rhayder Granite Quarries Co.*, (1911) 131 L.T. Jo. 79.

(63) *Carrow v. Ferrier*, 17 L.T. 536; *Daw v. Eley*, 7 Eq. 49.

(64) *Plating Co. v. Farquharson*, 17 C.D. 49, 56; 50 L.J. Ch., p. 408; *Metropolitan Music Hall Co. v. Lake*, 60 L.T. 749; and see *Reg. v. Payne*, (1896) 1 Q.B. 581; 65 L.J.Q.B. 428; *In re New Gold Coast Exploration Co.*, (1901) 1 Ch., p. 863; 70 L.J. Ch., p. 357; *Scott v. Scott*, (1912) P. 248; 81 L.J.P. 117; reversed on appeal on other grounds, (1913) A.C. 417; 82 L.J.P. 74.

(65) *Stephens v. Workman*, 8 L.T. 232; 11 W.R. 503 (Eng.).

(66) *Ex parte Van Sandau*, 1 Ph. 605; 15 L.J. Bk. 13.

(67) (*Ibid.*).

"If a mandatory order or injunction be not complied with, the Court or a Judge, besides or instead of proceedings against the disobedient party for contempt, may direct that the act required to be done may be done so far as practicable by the party by whom the judgment or order has been obtained or by some other person appointed by the Court or a Judge, at the cost of the disobedient party, and upon the act being done, the expenses incurred may be ascertained in such manner as the Court or a Judge may direct, and execution may issue for the amount so ascertained and costs." (68)

Costs in case
of dismissal
of plaintiff's
suit.

A plaintiff may, notwithstanding the pendency of a motion for an injunction, obtain an order dismissing his suit with costs. (69)

Costs of
abandoned
motion.

Where notice of motion has been given, and the party giving it does not appear, he will have to pay the respondent's costs. (70)

The costs of an abandoned motion must be applied for on the next motion day after that for which notice of motion was given; otherwise they will be refused. (71)

Where a motion for an injunction has been dismissed with costs, a second motion for the same object cannot be made until the costs of the first have been paid or secured by a payment into Court. (72)

Costs of
motion—
Practice.

Costs of a motion may be given, though not asked for by the notice of motion (73) but not where the respondent does not appear. (74)

A notice of motion for an injunction must state clearly the terms of the order which will be asked for; and where the object is to discharge an order for irregularity, it is usual, but not necessary, to state the ground of the application. (75)

(68) R.S.C., O. XLII, r. 30. See *Mortimer v. Wilson*, 33 W.R. 927 (Eng.) and the English Judicature Act, 1884, S. 14.

(69) *Markwick v. Pawson*, 33 L.J. (Ch.) 703.

(70) *Berry v. Exchange Trading Co.*, (1875) 1 Q.B.D. 77.

(71) *Woodcock v. Oxford, Worcester and Wolverhampton Rail Co.* (1853) 17 Jur. 33; see *Eccles v. Liverpool Borough Bank*, (1859) John. 402; *Yettis v. Biles*, (1877) 25 W.R. 452 (Eng.).

(72) *Burdell v. Hay*, (1863) 33 Beav. 189; see *Oldfield v. Cobbett*, (1849) 12 Beav. 91; *Mortin v. Beauchamp (Earl)*, (1883) 25 Ch. D. 12 C.A.; *M'Cabe v. Bank of Ireland*, (1889) 14 App. Cas. 413; R.S.C., O. XXVI, r. 4, and the Vexatious Actions Act (1896) (59 & 60) Vict., c. 51.

(73) *Powell v. Cockerell*, (1846) 4 Hare. 557, 572; *Clark v. Jaques*, (1849) 11 Beav. 623; *Pearce v. Wycombe Rail. Co.*, (1853) 17 Jur. 660.

(74) *Pratt v. Walker*, (1854) 19 Beav. 261.

(75) *Brown v. Robertson*, 2 Ph. 173; *Lambert v. Hill*, 1 Dr. & War. 74; Dan. Ch. Pr., 4th Ed., 1443.

If it is intended to ask for the costs of the application, the notice should state such intention, otherwise, if the defendant neglect to appear, the costs of the motion will not be given.⁽⁷⁶⁾

Where an order is taken upon an affidavit of service of the notice of motion, the party moving can only obtain that which is asked by the notice of motion.⁽⁷⁷⁾

If, on appeal, the Court is of opinion that there was no foundation for the application, it will, in reversing the order made by the Court below, direct the applicant to pay the costs incurred in the original motion.⁽⁷⁸⁾ Costs in appeal.

It is the practice of Courts in England that costs will be ordered to be taxed on the higher scale where there are special grounds.⁽⁷⁹⁾ Costs, scale of

In any action against a public authority,⁽⁸⁰⁾ judgment for the defendant carries with it the right to costs as between solicitor and client.⁽⁸¹⁾ Taxation on higher scale.

But this provision does not take away the discretion of the judge to deprive the successful defendant of costs for good cause.⁽⁸²⁾

(76) *Pratt v. Walker*, 19 Beav. 261.

(77) Joyce on Injunctions, Vol. II, 1872, p. 1285.

(78) *Beardmer v. London and North-Western Rail Co.*, (1849) 13 Jur. 327.

(79) O. LXV, r. 9; see *Hudson v. Osgerby*, 32 W.R. 556; *Turton v. T.*, 42 C. D. 128 (149); *American Braided Wire Co. v. Thomson*, 44 C.D. 274, 296; 59 L.J. Ch. 425; *Rivington v. Gardon*, (1901) 1 Ch. 561; *Davies v. Davies*, 56 L.J. Ch. 620; 70 L. J. Ch. 282; *Great Western Railway Co. v. Carpalla Clay Co.*, (1909) 2 Ch. 471; 101 L. T. 383; R.S.C., O. LXV, r. 9; see *Holland v. Worley*, (1884) W.N. 90; *Turton v. Turton*, (1889) 42 Ch. D. 128, C.A. (where costs on the higher scale were given); *Hudson v. Osgerby*, (1884) 32 W.R. 566; *American Braided Wire Co. v. Thompson*, (1890) 44 Ch. D. 274, 296, C.A. (where they were refused). Costs have been given on the High Court scale where only £10 damages were recovered, the claim for an injunction having been satisfied (*Doherty v. Thompson*, (1906) 94 L.T. 626, C.A.).

(80) Under the Public Authorities Protection Act, (1893) (56 & 57, Vic., c. 61), S. 1.

(81) *Harropp v. Ossett Corporation*, (1898) 1 Ch. 525; *Fielding v. Morley Corporation*, (1899) 1 Ch. 1, C.A., affirmed, sub. nom. *Fieldon v. Morley Corporation*, (1900) A.C. 133; *Smith v. Northleach Rural Council*, (1902) 1 Ch. 197. See *Ambler (Jeremiah) & Sons, Ltd. v. Bradford Corporation*, (1902) 2 Ch. 585, C.A.

(82) R.S.C., O. LXV, r. 1; *North Metropolitan Tramways Co. v. London County Council*, (1898) 2 Ch. 145, 147; *Bostock v. Ramsey Urban Council*, (1900) 2 Q.B. 616, C.A.

Court-fees.

A suit of the nature referred to in S. 283 of the Code of Civil Procedure, ⁽⁸³⁾ instituted for the declaration of the plaintiff's right to and possession of a property attached, and for a perpetual injunction to restrain its sale in execution of a decree, is one, in which consequential relief is prayed for and therefore subject to an *ad valorem* Court-fee duty.⁽⁸⁴⁾

Sec. 20—Insolvency.

Insolvency law in British India:—

(i) Provincial Insolvency Act.

(ii) Presidency Towns Insolvency Act.

Provisions of the Presidency Towns Insolvency Act relating to costs.

Provisions of the Provincial Insolvency Act relating to costs.

Provisions of English law relating to costs.

General rule as to costs in insolvency cases—Costs follow the event.

Costs of petitioning creditor.

Costs of execution.

Costs of proving debts.

Costs of meeting.

Costs in case of withdrawal of insolvency application.

Costs provable in insolvency.

Costs of Official Assignee instituting or defending suits.

Costs occasioned by Official Assignee or Receiver employing counsel.

Costs of application for summary administration by Official Receiver.

Application for dividend and costs of the same.

Remuneration of Official Assignee.

Official Assignee to make good loss caused by his misfeasance.

Security for costs.

Appeal for costs.

Insolvency
law in
British
India:—

(i) Provincial
Insolvency
Act; (ii) Pre-
sidency
Towns Insol-
vency Act.

THE subject of insolvency is regulated mainly by two special Acts in British India—The Provincial Insolvency⁽¹⁾ Act and the Presidency Towns Insolvency⁽²⁾ Act. These Acts contain provisions as to how costs of proceedings under those Acts are to be disposed of.

(83) Act XIV of 1882.

(84) *Fulkumari v. Ghanshyam Misra*, 31 C. 511.

(1) Act III of 1907.

(2) Act III of 1909. On the subject matter of this section see Halsbury's Laws of England, Vol. II, pp. 105—108; 125—129; 321—323; Mew's Digest, Vol. II, Cols. 127, 134, 135; 649—652; 1080—1083; 1166, 1167; 1228—1230; 1232—1250, Morgan and

S. 90 of the Presidency Towns Insolvency Act provides that Provisions of the Presidency Towns Insolvency Act relating to costs. "In proceedings under this Act the Court shall have the like powers and follow the like procedure as it has and follows in the exercise of its ordinary original civil jurisdiction." Provided that nothing in this sub-section shall in any way limit the jurisdiction conferred on the Court under this Act. Subject to the provisions of this Act and rules, the costs of and incidental to any proceeding in the Court shall be in the discretion of the Court."⁽³⁾

S. 112 of the same Act provides that "the Courts having jurisdiction under this Act may from time to time make rules for carrying into effect the objects of this Act."⁽⁴⁾

In particular and without prejudice to the generality of the foregoing power, such rules may provide for and regulate—

(a) the fees and percentages to be charged under this Act and the manner in which the same are to be collected and accounted for and the account to which they are to be paid * * * ;

(d) the remuneration of the Official Assignee * * * ;

(g) the payment of the remuneration of the Official Assignee, of the costs, charges and expenses of his establishment, and of the costs of the audit of his accounts out of the proceeds of the investments in his hands ; * * * *

(h) the payment of the costs incurred in the prosecution of fraudulent debtors and in legal proceedings taken by the Official Assignee under the direction of the Court out of the proceeds aforesaid :"⁽⁵⁾

Costs of Insolvency Proceedings, just as in the case of other civil proceedings, are entirely in the discretion of the Court. "In every proceeding in the Court, the costs of that proceeding are in the discretion of the judge who has to deal with it—who has to try it. He knows the facts of the case, he knows the conduct of the parties and the nature of the controversy, and the facts of every proceeding

Wurtzburg, pp. 341—343. Marshall on Costs, pp. 40, 479; Seton on Judgments and Orders, 6th Ed., 1901, Vol. II, 1169; Daniells' Chancery Practice, 7th Ed., 1901, Chap. XVIII and Chap. II, S. X; Gordon on Costs. Reference may also be made to Baldwin on Bankruptcy; Williams on Bankruptcy, Venkoba Rao's Provincial Insolvency Act, Nair's Presidency Towns Insolvency Act.

(3) See S. 90 of Act III of 1909 (Presidency Towns Insolvency Act).

(4) S. 112 of the Presidency Towns Insolvency Act (III of 1909).

(5) Presidency Towns Insolvency Act (III of 1909), S. 112.

are, therefore, placed in the discretion of the judge who tries the proceeding.”⁽⁶⁾

If a party substantially succeeds, he is entitled to his costs.⁽⁷⁾

As regards the cost of an insolvency petition, all proceedings down to and including the making of adjudication order are at the cost of the petitioner, who, if he be a petitioning creditor, can have it taxed and payable out of the estate of the insolvent.⁽⁸⁾

Provisions
of the
Provincial
Insolvency
Act relating
to costs.

The Provincial Insolvency Act provides that “The costs of any proceeding under this Act, including the costs of maintaining a debtor in the civil prison, shall, subject to any rules made under this Act, be in the discretion of the Court in which the proceeding is had.”⁽⁹⁾

All proceedings under the Act down to and including the making of an order of adjudication shall be at the cost of the party prosecuting the same; but when an order of adjudication has been made, the costs of the petitioning-creditor shall be taxed and be payable out of the estate.⁽¹⁰⁾

Provisions of
English Law
relating to
costs.

Subject to the provisions of the Bankruptcy Act, 1883, and two general rules, the costs of and incidental to any proceeding in Court under the Act (Bankruptcy Act, 1883) shall be in the discretion of the Court: Provided that where any issue is tried by a jury the costs shall follow the event, unless, upon application made at the trial, for good cause shown, the Judge before whom such issue is tried shall otherwise order.⁽¹¹⁾

General rule
as to costs in
Insolvency
cases—Costs
follow the
event.

In the matter of awarding of costs the ordinary rule should be observed that costs should follow the event.⁽¹²⁾ If a party substantially succeeds he is entitled to his costs.⁽¹³⁾

(6) *In re Beddoe*, (1893) 1 Ch. 547 at 554 (*per* Lindley, L. J.).

(7) *Ganasham v. Moroba*, 18 B. 474 (475).

(8) See S. 90 (2) of the Presidency Towns Insolvency Act (III of 1909).

(9) Provincial Insolvency Act, III of 1907, S. 49; with regard to this section, the Select Committee that sat in connection with the Provincial Insolvency Act state:—“We propose to allow the Courts a full discretion in the matter of awarding costs, subject only to any rules made in this behalf.” See Report of Select Committee.

(10) See Rule No. 20 of the Calcutta High Court Provincial Insolvency Rules. See also Rule No. 22 of the Madras High Court Provincial Insolvency Rules.

(11) See S. 105 (1) of the Bankruptcy Act, 1883 (46 & 47 Vic., Ch. 52). As to the practice of Courts in England in the matter of costs of Insolvency Proceedings, see Rules 108-128 of the English Bankruptcy Rules.

(12) *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, 18 B. 474 (494).

(13) (*Ibid.*), p. 495.

The discretion given to Courts (in the matter of awarding costs) is one which should be exercised with reference to general principles. Where there has been no misconduct, omission or neglect (which would induce the Court to refuse costs) on the part of one who comes into Court for enforcing a legal right, the Court has no discretion but must grant him his costs.⁽¹⁴⁾

The fact that the questions of law raised in the case were not easy of solution is not a good ground for disallowing the costs of the successful litigant.⁽¹⁵⁾

As regards the costs of a petition, all proceedings down to and including the making of adjudication order are at the cost of the petitioner, who if he be a petitioning creditor, can have it taxed and payable out of the estate of the insolvent.⁽¹⁶⁾ Cost of petitioning creditor.

If the creditor's petition is dismissed, the Court has no jurisdiction to order the debtor to pay any costs.⁽¹⁷⁾

With regard to the effect of insolvency on antecedent transactions, S. 54 of the Presidency Towns Insolvency Act provides that "Where execution of a decree has issued against any property of a debtor which is saleable in execution, and before the sale thereof notice is given to the Court executing the decree that an order of adjudication has been made against the debtor, the Court shall, on application, direct the property, if in the possession of the Court, to be delivered to the official assignee, but the costs of the execution shall be a first charge on the property so delivered, and the official assignee may sell the property or an adequate part thereof for the purpose of satisfying the charge."⁽¹⁸⁾ Costs of execution.

The costs of execution do not include the expenses of cutting, carrying, thrashing, &c., of corn.⁽¹⁹⁾

The expression means "costs authorised by some provision of law."⁽²⁰⁾

(14) *Kuppuswami Chetty v. Zamindar of Kalahasti*, 27 M. 341.

(15) *Per Sundram Iyer, J.*, in *Vembu v. Srinivasa*, 12 M.L.T. 547 at 553; and he accordingly set aside in appeal the order of the lower Court, disallowing costs; see Nair's Presidency Towns Insolvency Act, p. 248.

(16) See The Presidency Towns Insolvency Act, S. 90 (2); see *Re Bright*, (1903) 1 K.B. 735.

(17) *Re a Debtor*, (1910) 1 K.B. 313, C.A.

(18) See S. 54 of the Presidency Towns Insolvency Act (III of 1909); S. 35 of the Provincial Insolvency Act (III of 1907).

(19) *Re Woodham*, 20 Q.B.D. 40.

(20) *Ibid.*

Cost of
proving
debts.

Cl. 6 of Sch. II of the Presidency Towns Insolvency Act provides that "a creditor shall bear the cost of proving his debt unless the Court otherwise specially orders."⁽²¹⁾

Costs of
meeting.

"Where on the request of creditors the official assignee summons a meeting, there shall be deposited with the written request the sum of five rupees for every twenty creditors for the cost of summoning the meeting, including all disbursements: Provided that the official assignee may require such further sum to be deposited as in his opinion shall be sufficient to cover the costs and expenses of the meeting."⁽²²⁾

Costs in case
of withdraw-
al of insol-
vency appli-
cation.

Where, an application for a declaration of insolvency having been filed, the applicant asked and obtained permission to withdraw the application absolutely, *i.e.*, without permission to renew the application, it was *held* that the Court could not make the payment by the applicant of the opposing creditors' costs a condition precedent to the granting of such permission so as to enable the Court subsequently to revive the proceedings commenced by the application, but that such proceedings were finally determined by the applicant's withdrawal.⁽²³⁾

Costs
provable in
insolvency.

Costs, though untaxed, have been held to be provable in insolvency.⁽²⁴⁾

Where costs have been awarded before the date of the receiving order, they are provable, though they have not been taxed.⁽²⁵⁾

Where a matter has been referred to arbitration, and the arbitrator awards costs, such costs are provable after the arbitrator becomes a bankrupt.⁽²⁶⁾

Costs reasonably incurred by a creditor in defending his title to his security may be deducted from the value thereof.⁽²⁷⁾

Costs of
official as-
signee insti-
tuting or
defending
suits.

If the Official Assignee institutes or defends a suit without the leave of the Court, he will not, as a general rule, be allowed the costs out of the estate.⁽²⁸⁾

(21) See Presidency Towns Insolvency Act (III of 1909), Sch. II, cl. (6); Provincial Insolvency Act (III of 1907), S. 49.

(22) Presidency Towns Insolvency Act (III of 1909), Sch. I, cl. (7).

(23) *Haider Shah v. Jamna Das*, 17 A. 156 = 15 A.W.N. (1895) 43.

(24) *Ex parte Peacock*, L.R. 8 C. A. 682.

(25) *In re Duffield*, (1872) L.R. 8 Ch. 682.

(26) *In re Smith*, (1886) 3 Morr. 179.

(27) *Ex parte Carr; Re Hoffman*, 11 Ch. D. 62.

(28) *In re Howes*, (1902) 2 K.B. 290.

The Official Assignee electing to defend the suit is personally liable for costs.⁽²⁹⁾

If the Official Assignee defends a suit, he is liable, in the event of failure, to be ordered to pay the plaintiff's costs in the same way as any other defendant, and if the estate be insufficient to pay the costs, he will have to bear them personally. It is for him to protect himself by getting a guarantee of indemnity from the parties who set him in motion.⁽³⁰⁾

The Official Assignee cannot be a party to the suit without the leave of the Court.⁽³¹⁾

The fact that leave has not been obtained by the receiver for an action brought by him is no defence to such an action, and if the receiver should prosecute or defend an action without first obtaining the leave of the Court, he will have to bear the costs.⁽³²⁾

The absence of leave is only an objection between the receiver and the Court and not between the receiver and other parties.⁽³³⁾

Where, without previously obtaining the leave of Court, the receiver acted as such, and subsequently made an application to the Court which proved unsuccessful, he will have to bear costs personally as if he were an ordinary litigant.⁽³⁴⁾ But, if he had acted *bona fide*, he would be entitled to his costs out of the estate even though the proceedings undertaken by him had been misjudged.⁽³⁵⁾

"Where the Official Assignee refuses to bring an action for the recovery of the property which a creditor alleges, to have belonged to the bankrupt, the Court will permit the creditor to bring the action in the name of the assignee upon entering into a proper indemnity; similarly the creditor can sue if the Official Assignee declines in consequence of want of funds to take proceedings if

(29) *Borneman v. Wilson*, 28 Ch. D. 53.

(30) *James Bevis v. C. A. Turner*, 7 B. 484, relied on in *Balabhadra Singh v. Radhashyam Singh*, 16 Ind. Cas. 381, referred to in *Amir Jan Naikin v. L.W.J. Rivett-Carnac*, 10 B. 350 (354).

(31) *Pramatha v. Khetra*, 32 C. 270.

(32) *Cochrane*, (1863) 2 Hyde 150 (Eng.). See, also, *In re Lalapie*, Cor. 4; *Swaby v. Dickon*, (1833) 5 Sim. 629; *In re Hoows*, (1902) 2 K.B. 290.

(33) See *Lee v. Sangster*, 26 L.J.C.P. 151.

(34) *In re Angerstain*, (1874) L.R. 9 Ch. 479.

(35) *In re Wells and Croft*, (1895) 2 Manson 41.

they indemnify the Official Assignee against all costs incurred." (36) But the refusal of the Official Assignee to sue is not a ground for ordering a new election of the Assignee. (37)

Costs occasioned by Official Assignee or receiver employing counsel.

Under the English law, (38) the consent of the committee of inspection—and not of the Court as under this Act—(39) is necessary for the employment of a legal practitioner. (40)

The consent, though not required to be in any particular form, should not be vague, as for example *where it is necessary* the trustee may employ a solicitor. (41)

It must be obtained before the employment, except in cases of urgency, when it must be shown that no undue delay took place in obtaining it. (42)

The appointment of a solicitor under whom one of the committee of inspection is a manager is improper and will be cancelled by the Court. (43)

The pleader engaged by receiver is pleader for the receiver personally and must look to him for costs. (44)

The legal practitioner must generally look to the Official Assignee for costs, (45) and has no lien on the estate for the same. (46)

The amount of costs to be incurred may be limited by the Court. (47)

(36) *Ex parte Ryland*, 2 Deac. and C. 392: *Ex parte Osborne*, 10 L.T. 355; see also *Franklyn v. Ferne*, Barnard 30.

(37) *Exp. Ryland*, 2 Deac. and C. 392.

(38) See C. Krishnan Nair's Presidency Towns Insolvency Act (III of 1909), p. 224.

(39) See S. 68 (e) of the Presidency Towns Insolvency Act (III of 1909).

(40) "Solicitor" is the term in the English Bankruptcy Act and "pleader" in S. 20, Presidency Towns Insolvency Act.

(41) See Nair's Presidency Towns Insolvency Act, p. 224.

(42) English Bankruptcy Act, (1890), S. 15 (3).

(43) *Re Gallard*, (1896) 1 Q.B. 68.

(44) *Stavie v. Evans*, 34 Ch. D. 477.

(45) *Stanier v. Evans*, 34 Ch. D. 470.

(46) *Exp. Lloyd George*, (1898) 1 Q.B. 520.

(47) *Re Duncan, etc.*, (1892) 1 Q.B. 879. A rule was obtained in certain insolvency proceedings against the purchaser of property of the insolvent to show cause why such purchase should not be set aside, and alleging improper conduct on the part of the purchaser, who was represented by two Counsel at the hearing of the rule. On taxation of costs of the purchaser, the other parties objected to the costs of two counsel on behalf of the purchaser being allowed. *Held*, that having regard to the allegations made, the Taxing Officer exercised a right discretion in allowing the costs of two counsel. *In the matter of Beer Nursing Dutt*, 24 C. 891. S. 115 of the Presidency Towns

In the case of an unsuccessful motion by the Official Receiver to administer the estate summarily, he was ordered personally to pay the costs of the respondent with liberty to take them out of the estate, if any.⁽⁴⁸⁾

Costs of application for summary administration by Official Receiver.

No suit for a dividend shall lie against the Official Assignee, but, where the Official Assignee refuses to pay any dividend, the Court may, on the application of the creditor who is aggrieved by such refusal, order him to pay it, and also to pay out of his own money interest thereon at such rate as may be prescribed for the time that it is withheld, and the costs of the application.⁽⁴⁹⁾

Application for dividend and costs of the same.

Where after the declaration of the dividend the Official Assignee did not send the amount to the party in a post-office order who promised to send the receipt by return of post, it was held to be a refusal to pay the dividend and the Official Assignee was ordered to pay the costs personally.⁽⁵⁰⁾

S. 81 of the Presidency Insolvency Act provides that "such remuneration shall be paid to the Official Assignee as may be prescribed."⁽⁵¹⁾

Remuneration of Official Assignee.

No remuneration whatever beyond that referred to in sub-S. (1) shall be received by an Official Assignee as such.⁽⁵²⁾

Insolvency Act provides that "every transfer, mortgage, assignment, power-of-attorney proxy paper, certificate, affidavit, bond or other proceedings, instrument or writing whatsoever before or under any order of the Court, and any copy thereof shall be exempt from payment of any stamp or other duty whatsoever. No stamp-duty or fee shall be chargeable for any application made by the Official Assignee to the Court under this Act, or for the drawing and issuing of any order made by the Court on such application."

(48) *Exp. Jenkins*, 2 Morr. 71; see S. 90 (2) of the Presidency Towns Insolvency Act; and see also the rules of Madras, Bombay and Calcutta High Courts and of Lower Burma Chief Court re "Costs."

(49) See Nair's Presidency Towns Insolvency Act, (III of 1909), p. 231. "No suit lies against the Official Assignee for dividends. The dividend is not a debt due to the creditor by the Official Assignee and so it cannot be attached by a *garnishee* order; and the Court has also no jurisdiction to compel him to pay the dividend to the Assignee of the dividend at the instance of such Assignee. But in case of improper refusal to pay the dividend, the Court will saddle him, on the application of the aggrieved creditor, with costs and interests." *In re Frost*, (1899) 2 Q.B. 50; Nair's Presidency Towns Insolvency Act (III of 1909), p. 231.

(50) *Exp. Jackson*, 3 Mont. D. and. D.1.

(51) S. 81 (1) of Act III of 1909.

(52) S. 81 (2) of Act III of 1909.

Remuneration of the Official Assignee is to be fixed by the rules of the High Court.⁽⁵³⁾

He is an officer of the Court and arrangements respecting his remuneration entered into with the bankrupt, solicitor, or any other person that may be employed about a bankruptcy are absolutely forbidden. It is a gross contempt of Court for the Official Assignee to enter into any such agreement with any party without the Court's knowledge.⁽⁵⁴⁾

A promise to pay the Official Assignee, made without the leave of the Court is not binding on the promisor, even though it is unconditional, as such promise is contrary to law.⁽⁵⁵⁾

In the case of a solicitor—trustee, the proper course in fixing the remuneration, is to fix his percentage or commission at such a rate as will cover his reasonable professional charges.⁽⁵⁶⁾

He is entitled to be reimbursed out of the estate all the necessary and *bona fide* expenses incurred in his management.⁽⁵⁷⁾

Official
Assignee
to make
good loss
caused by his
misfeasance.

S. 82 of the Presidency Towns Insolvency Act provides that "The Court shall call the Official Assignee to account for any misfeasance, neglect or omission which may appear in his accounts or otherwise, and may require the Official Assignee to make good any loss which the estate of the insolvent may have sustained by reason of the misfeasance, neglect or omission." ⁽⁵⁸⁾

The Official Assignee would be liable for the acts and defaults of his agents if the appointment of agents is not sanctioned by custom or usage. ⁽⁵⁹⁾

Where the Official Assignee recklessly initiates legal proceedings he would be guilty of gross negligence and be personally liable for costs. ⁽⁶⁰⁾

(53) See S. 112 (d) of the Presidency Towns Insolvency Act, Madras Insolvency Rules O. XVII, r. 154-158; Bombay Insolvency Rules, 180; Calcutta Insolvency Rules, 178, and Lower Burma Insolvency Rules, 202, deal with the remuneration of the Official Assignee.

(54) *Manick v. Surut*, 22 C. 648.

(55) *Prokash v. Adalam*, 30 C. 696.

(56) *Re Wayman*, 24 Q.B.D. 68.

(57) *Exp. Jayner*, 2 M.A. 1; *Official Assignee v. Ramalinga*, 8 M. 79 and *in re Mahomed*, 13 C. 66, may be consulted regarding his remuneration; Nair's Presidency Towns Insolvency Act (III of 1909), pp. 237-239.

(58) Presidency Towns Insolvency Act (III of 1909), S. 82. See also *Exp. Brown*, 36 W. R. 308 (Eng.).

(59) *Earl of Lichfield's case*, 1 Atk. 87.

(60) *Exp. Gordon*, 6 Morr. 262.

It would seem that the official receiver may retain a dividend, payable to a creditor who has assigned it, as security for costs ordered to be paid by the creditor to the official receiver in the bankruptcy proceedings.⁽⁶¹⁾ Security for costs.

An Appellate Court will not interfere with the discretion of the Judge unless he has proceeded in his judgment on some erroneous principle of law or on a misconception of the facts of the case.⁽⁶²⁾ Appeal for costs.

An appeal will lie upon a question of costs, when a matter of principle is involved.⁽⁶³⁾

Where a preliminary objection was successfully taken to the hearing of an appeal, the High Court refused to follow the practice adopted in bankruptcy appeals in England by depriving the respondent of costs on the dismissal of the appeal on the ground that the appellant had no previous notice of the preliminary objection.

Sec. 21.—Interlocutory Application.

Costs of interlocutory applications—General rule as to.

Costs of motions.

Costs where motion is occasioned by default of moving party.

Costs where a party is seeking an indulgence from Court.

Examples :—

- (i) Costs of application to advance a cause.
- (ii) Costs where defendant raises a new defence by amendment.
- (iii) Costs of application to set aside judgment obtained by default.
- (iv) Costs where defective decree was rectified on petition.
- (v) Costs of staying proceedings pending appeal.
- (vi) Costs of motion to discharge irregular order.
- (vii) Costs of motion to take off the file document irregularly filed.
- (viii) Costs occasioned by unnecessary evidence.
- (ix) Costs where permission was granted to file written statement out of time.
- (x) Costs where case was transferred from undefended board to defended board.
- (xi) Costs of amendment of plaint.
- (xii) Costs of unnecessary affidavits, etc.
- (xiii) Costs of setting aside *ex parte* decree.
- (xiv) Costs of motion to transfer.

(61) See *Re Mayne*, (1907) 2 K.B. 899.

(62) *Young v. Thomas*, (1892) 2 Ch. 184.

(63) *Dildar v. Bhavani*, 34 C. 878.

(64) *Imtiaz Bano v. Latafat-un-nissa*, 11 A. 328=9 A.W.N. 108, referring to *Ex parte Brooks*, L.R. 13 Q.B.D. 42 and *Ex parte Blease*, L.R. 14 Q.B.D. 123.

Costs of application which Court has no jurisdiction to entertain.

Costs where application is considered as regular suit.

Costs of miscellaneous proceeding

(a) Subject matter admitting of precise valuation.

(b) Subject-matter not admitting of precise valuation.

Costs of application for leave to appeal to Privy Council.

Costs in an originating summons.

Costs of application for appointment of receiver.

Amendment of decree or order as to costs.

Costs of
interlocutory
applications--
General rule
as to.

WHERE interlocutory applications have been ordered to stand over to the trial and are not then mentioned to the Judge, the costs of such applications are to be treated as costs in the action and taxed accordingly, and need not be mentioned in the judgment. Where interlocutory applications have been disposed of, but the costs have been reserved, such costs are not to be mentioned in the judgment or order, or allowed on taxation, without the special direction of the Judge.⁽¹⁾

“According to the practice of the Courts in England a plaintiff who obtains on an interlocutory application the relief which he seeks, should make an application to the defendant to have the costs disposed of on motion. If he does not do so, or if, on the application of the defendant to have the costs disposed of on motion, he refuses to give his consent, and no question remains open to be decided between the parties, he will not be entitled to have the costs occasioned by going on to trial. The question of costs cannot be determined in this way without the consent of the parties, but the party who refuses to consent must justify his refusal, and must satisfy the Court that he is justified in bringing the action on to trial.”⁽²⁾

When an order has been made as to the costs of an interlocutory proceeding, such costs will not, as a general rule, be

(1) *British Natural Premium Assoc. v. Bywater*, (1897) 2 Ch. 531. On the subject-matter of this section, see *Seton on Judgments and Orders*, 6th Ed., 1901, Vol. I, p. 258; *Yearly Practice*, 1914, pp. 1051, 1085, 1086, 1090-1093; *Annual Practice*, 1908, pp. 955, 956; *Gordon on Costs*, Chap. XII, pp. 116-121; Chaps. XV, XVI, pp. 133-149; *Morgan and Wurtzburg*, pp. 46-79, 93; *Halsbury's Laws of England*, Vol. XVII, pp. 620-627, 640; *Marshall on Costs*, pp. 46-61; *Daniell's Chancery Practice*, 7th Ed., 1901, Chap. XVIII.

(2) *Morgan v. Great Eastern Railway Co.*, 1 H. & M. 78; *Wilde v. Wilde*, 4 De.G. F. & J. 348; *Sonnenschien v. Barnard*, 57 L.T. 712.

interfered with by a subsequent award of the general costs of the suit.⁽³⁾

It is now settled that the costs of a motion may be granted to the moving party though they are not asked for in the notice of motion.⁽⁴⁾ Costs of motions.

The same rule, it would seem, applies to petitions. But an order for payment of costs made on motion *ex parte* is irregular.⁽⁵⁾

Where two persons move on separate notices, but for the same object and by the same counsel and the motions are refused with costs, each is answerable only for the costs of his own motion.⁽⁶⁾

However, if a defendant unsuccessfully resists a motion for an injunction, but succeeds at the trial and gets his costs of the suit, his costs of the motion will be costs in the cause.⁽⁷⁾

Parties coming for an injunction *ex parte* will, even if successful, have to pay the costs, unless they state their case fully and fairly to the Court, ⁽⁸⁾ in which case, if the Court should think that the circumstances are such that it would be necessary in the interests of justice that the applicant should have his costs, it may, in its discretion, give him the costs of the motion.⁽⁹⁾

"The result of ordering a motion to stand over on certain terms till the hearing of the cause is nearly the same as if the only order made on the motion had been that the costs might be costs in the cause. The only distinction seems to be that the Court reserves to itself the means of dealing differently with the costs of the motion from the manner in which it may deal with the costs in the cause."⁽¹⁰⁾

The party moving, although he is successful, must pay the costs of his application if it is rendered necessary by his own default; as where the plaintiff omitted to file interrogatories in Costs where motion is occasioned by default of moving party.

(3) Indian Jurist, Vol. VII, p. 216.

(4) *Powell v. Cockerell*, 4 Ha. 557; *Clarke v. Jaques*, 11 Beav. 623, in the Reporter's note to which case the earlier cases are collected; *Butler v. Gardener*, 12 Beav. 525; *Dawson v. Jay*, 2 W.R. 598 (Eng.); *Tampier v. Ingle*, 1 N.R. 159; but not unless the respondent appears (*Pratt v. Walker*, 19 Beav. 261).

(5) *Nokes v. Gibbon*, 3 Jur. N.S. 282; 5 W.R. 216 (Eng.); *Cast v. Poyser*, 26 L.J. Ch. 353.

(6) *Oakes v. Turquand*, L.R. 2 H.L. 325.

(7) *Stevens v. Keating*, 1 Mac. & G. 659; 14 Jur. 157, overruling S.C. 13 Jur. 974.

(8) *Holden v. Waterlow*, 15 W.R. 139 (Eng.).

(9) (*Ibid*).

(10) *Per Wickens, V. C.*, in *Singer v. Audsley*, 13 Eq. 405.

time;⁽¹¹⁾ or where a party applies, after the evidence is closed, for leave to file an affidavit negligently omitted to be filed before.⁽¹²⁾

Costs where a party is seeking an indulgence from Court.

The same rule in general applies, but less strictly, where the party moving, though not in default, is seeking an indulgence from the Court.⁽¹³⁾ But the right of the other party to claim such costs must not be abused.⁽¹⁴⁾

Examples :

(i) Costs of application to advance a cause.

Thus it was held that the costs of an application to advance a cause, whether successful or not, must be paid by the party applying.⁽¹⁵⁾

(ii) Costs where defendant raises a new defence by amendment.

A defendant who raises a new defence by amendment will have to pay the costs rendered necessary by his not having put in such defence at an earlier period, subject, however, to such directions as the Court may think fit to give where it sees that unnecessary or oppressive costs have been incurred by the plaintiff in opposing the application.⁽¹⁶⁾

(iii) Costs of application to set aside judgment obtained by default.

The costs of an application to set aside a judgment obtained by default must be paid by the party applying.⁽¹⁷⁾

(iv) Costs where defective decree was rectified on petition.

Where a defective decree was rectified on petition, the plaintiff, through whose omission the defect had arisen, was ordered to pay the costs of the petition.⁽¹⁸⁾

(v) Costs of staying proceedings pending appeal.

“The staying of proceedings under a decree, pending an appeal against it, is an indulgence which will only be granted under

(11) *Dalpins v. Garratt*, 4 Jur. N.S. 579, where the costs were fixed at 50s.

(12) *Douglas v. Archbutt*, 23 Beav. 298; *Connolly v. Smyth*, Ir. R. 3 Eq. 145. And see *Campbell v. Joyce*, 2 Eq. 377; *Williams v. Carmarthen Ry. Co.*, 17 W.R. 346 (Eng.); 12 L.T. 762; but see *Robb v. Connor*, Ir. R. 4 Eq. 574.

(13) *Bartlett v. Harton*, 17 Beav. 479, 482; *Cocks v. Purday*, 12 Beav. 451; *Blackman v. Cornish*, 42 L.J. Ch. 576; 21 W.R. 741 (Eng.); 29 L.T. 85; and see, also, *Sobey v. Sobey*, 15 Eq. 200; 42 L.J. Ch. 271; 21 W.R. 309 (Eng.); 27 L.T. 803.

(14) *Attorney-General v. Corporation of Halifax*, 18 W.R. 37 (Eng.).

(15) *Browne v. Lockhart*, 10 Sim. 420; but see, contra, *Carthew v. Barclay*, 10 Sim. 273, where they were made costs in the cause. See, also, *Adair v. Young*, 11 Ch. D. 136; 40 L.T. 598; *Norton v. L. & N.W. Ry. Co.*, 27 W.R. 773 (Eng.); 40 L.T. 597.

(16) *Cargill v. Bower*, 4 Ch. D. 78; 46 L.J. Ch. 175; 25 W.R. 221 (Eng.); 35 L.T. 621.

(17) *Cockle v. Joyce*, 7 Ch. D. 56; 47 L.J. Ch. 543; 26 W.R. 59 (Eng.); 37 L.T. 428; *Wright v. Clifford*, 26 W.R. 369 (Eng.); *Burgoine v. Taylor*, 26 W.R. 568 (Eng.); 38 L.T. 438; *King v. Sandeman*, 26 W.R. 569 (Eng.); 38 L.T. 461.

(18) *Williams v. Carmarthen Ry. Co.*, 17 W.R. 346 (Eng.); 19 L.T. 762.

special circumstances; and the costs of an application for that purpose must, as a general rule, be paid by the party applying, though successful." (19)

(19) *Merry v. Nickalls*, 8 Ch. 205; 42 L.J. Ch. 479; 21 W.R. 305 (Eng.); 28 L.T. 296; *Cooper v. Cooper*, 2 Ch. D. 492; *Morgan v. Elford*, 4 Ch. D. 352; 25 W.R. 136 (Eng.); *Bauer v. Mitford*, 9 W.R. 135 (Eng.); *Topham v. Duke of Portland*, 1 De. G.J. & S. 603; 11 W.R. 818 (Eng.); *Lamb v. Bames*, 23 L.T. 135; *Re Peninsular Bank, Jopp's Case*, W.N. (1867) 192 or unsuccessful (*Waldeo v. Caley*, 16 Ves. 212; *Atherton v. British Nation Assurance Co.*, 5 Ch. 720; *Grant v. Banque Franco-Egyptienne*, 3 C. P.D. 202; 47 L.J. Ch. 455; 26 W.R. 669 (Eng.); 38 L.T. 612; *Beattie v. Lord Elbury*, 23 L.T. 458; see, also, *Attorney-General v. Swansea, &c., Co.*, 9 Ch. D. 46, where the motion was withdrawn. In the case of *Chunilal v. Anant Ram*, 2 C.W.N. (Journal Portion) cxxliii, where an order was made for stay of execution pending appeal, a question arose whether the costs are to be borne by the applicant or respondent. After discussion by counsel, the Chief Justice said.—The appellant came and asked for an indulgence. He must pay the costs. That is the rule in England. Banerjee, J., agreed with order made, but differed as to the principle. The appellant had a right of appeal and to apply for stay of execution. But in this case the applicant had raised a question of jurisdiction, which had not been decided in his favour. Jenkins, J., agreed with the learned Chief Justice both as to the order and the principle. The respondent had obtained a decree and was entitled to execute it. The effect of the order is to stay his hands. The appellant clearly asks for an indulgence. Order accordingly made that the defendants do pay the costs of and incidental to the application. *Chunilal v. Anant Ram*, 2 C.W.N. (Journal Portion) cxxliii. It would appear that in this case as in every other case connected with costs no hard and fast rule can be laid down. The circumstances of each particular case must determine the nature of the order to be passed in such case. The conduct of the parties, the nature of the application and other facts connected with the application are to be taken into consideration. Thus, for instance, where a respondent opposes the application for stay of execution and in the course of such opposition raises all kinds of false and frivolous pleas, and the applicant had been put to unnecessary and extra trouble and expense in exposing the falsity of such plea—such facts may constitute good ground to order the respondents to pay the costs of the applicant. In another case which also came before the Calcutta High Court, the facts were as follows:—

"Appellants had preferred an above appeal against a preliminary decree for partition passed by the Subordinate Judge of Gaya. They made an application for stay of proceedings in the lower Court pending the decision of the High Court in the said appeal and a rule was issued. Counsel for respondents said he had no objection to the rule being made absolute, but he prayed for his costs of the hearing. The appellants in asking for an indulgence from the Court made themselves liable for the respondents' costs. See *Chunilal v. Anant Ram*, 25 C. 893. The Court ordered:—That the proceedings in the lower Court be stayed, appellants paying the respondents' costs of the hearing. *Rai Bepin Behari Mitter v. Bhugwat Sahai*, 9 C.W.N. (Journal Portion), p. xvi. In another case, in an action for wrongful dismissal the plaintiff recovered £100 by the verdict of a common jury. Mr. McCab, Q.C., supported by an affidavit applied for a stay of execution. The affidavit was in support of the statement that if the money was paid over, it would be difficult or impossible to recover it back in case the appeal against the verdict was successful. The question to be considered in the appeal was an important one for the defendants as the agreement on which the decision will be based, was in a form which would apply to other artists engaged by the defendants. He said the effect of the affidavit was

In some cases it was held that the costs should abide the event of the appeal. ⁽²⁰⁾

Where both parties obtained a benefit by the order, the costs of the application were made costs in the appeal, notwithstanding the general rule. ⁽²¹⁾

If the decree or order appealed from is reversed before the application to stay proceedings is heard, there being no longer any presumption of the correctness of such decree or order, the costs of the application will be costs in the cause. ⁽²²⁾

(vi) Costs of motion to discharge irregular order.

The party guilty of the irregularity must pay the costs of a motion to discharge an order irregularly obtained. ⁽²³⁾

(vii) Costs of motion to take off the file document irregularly filed.

So also costs of a motion to take off the file a document irregularly filed will have to be paid by the party guilty of the irregularity. ⁽²⁴⁾

(viii) Costs occasioned by unnecessary evidence.

All costs occasioned by unnecessary evidence must be paid by the party offering it. ⁽²⁵⁾

admitted by Mr. Duke who appeared for the other side. The Court granted stay of execution upon defendants paying the amount of damages into Court and amount of taxed costs to plaintiff's solicitor upon his undertaking to return such costs if the appeal was successful. Costs of present application to be the plaintiff's costs in any event. *Simpson v. Moore and Burgess Ministrels*, 2 C.W.N. (Journal Portion) cccxxi (cccxxii).

(20) *Burdick v. Garrick*, 5 Ch. 453; see *Walford v. Walford*, 3 Ch. 812; 5 Ch. 455, n. (4); 16 W.R. 1161 (Eng.); 19 L.T. 233, where no costs were given; and see *Earl of Shrewsbury v. Trappes*, 2 De. G.F. & J. 172, where Knight Bruce, L.J., said that it was not an inflexible rule that a person applying under such circumstances must pay the costs of the application. In *Morison v. Morison*, 1 Jur. N.S. 339; 3 W. R. 296 (Eng.), Stuart, V.C., refused to give costs against the petitioner, although the petition, there being no special circumstances, could not be granted; see, also, *Barrs v. Fewkes*, 1 Eq. 392; *Wilson v. West Hartlepool Ry.*, 34 Beav. 414.

(21) *Merry v. Nickalls*; *Adair v. Young*, 11 Ch. D. 136; 40 L.T. 598.

(22) *Richardson v. Bank of England*, 1 Beav. 153, or no costs of it will be given (*Pennell v. Roy*, 1 W.R. 271, (Eng.).)

(23) *Froud v. Lawrence*, 1 J. & W. 655; *Darley v. Nicholson*, 2 Dr. & War. 86; *Stephenson v. Biney*, 2 Eq. 303; 14 W.R. 788 (Eng.); 14 L.T. 432; 12 Jur. N.S. 428; *Warrick v. Queen's College, Oxford*, 16 W.R. 884 (Eng.); 18 L.T. 752.

(24) *Official Liquidators of the Southampton, &c., Steamboat Co. v. Rawlins*, 3 N. R. 349; *McKewan v. Sanderson*, 21 W.R. 307 (Eng.); 29 L.T. 206; *Spittle v. Wallon*, 11 Eq. 420.

(25) *Littlewood v. Collins*, 1 N.R. 457; 11 W.R. 387 (Eng.); *Attorney-General v. Corporation of Halifax*, 18 W.R. 37 (Eng.); *In re Star & Garter Hotel Co.*, 42 L.J. Ch. 374; 28 L.T. 258; *In re Herne Bay Waterworks Co.*, 10 Ch. D. 48.

Where there was a great delay in filing the written statement, which delay was not properly accounted for, permission was given for the filing of the written statement on condition of the defendant paying the costs of the application. (26)

(ix) Costs where permission was granted to file written statement out of time.

In the case of *Bindoomadub Mitter v. Woomeschunder Paul*, (27) which came up before the Calcutta High Court as early as 1864 it was laid down that a case entered on the Undefended Board can only be transferred to the Defended Board on payment of the costs of the adjournment, if any, thereby occasioned.

(x) Costs where case was transferred from undefended board to defended board.

Where the mortgagee brought a suit for possession at first, he was permitted at the hearing to amend his plaint so as to make it a suit for partition, on condition of his paying the costs of the defendants (28).

(xi) Costs of amendment of plaint.

In *Camille v. Donato*, (29) where a defendant having succeeded in dissolving an interim injunction, on the ground of want of parties was not allowed the costs of affidavits to the merits not read.

(xii) Costs of unnecessary affidavits, etc.

An *ex parte* decree which has been ordered to be set aside on payment of costs within a certain time remains in full force until

(xiii) Costs of setting aside *ex parte* decree.

(26) In this case a peremptory order had been made upon the defendants to file their written statements within a fortnight, it being ordered that in default the case be transferred to the undefended list. The defendants made default and thereafter applied in Chambers for leave to file their written statement. Babu Peary Lall Halder for appellants applied in Chambers for leave to file written statement. Mr. J. G. Woodroffe for the plaintiffs submitted:—This is not a chamber application, Rules and Orders 513 (3). The effect of this application, if granted, will be to vary or discharge the previous order under which this case has been transferred to the undefended list. The Court then held that the application was one which should be made in Court. The application was renewed next day in Court. Mr. S. R. Dass for the defendants applied for the leave above-mentioned. Mr. J. G. Woodroffe for the plaintiffs submitted:—The defendants have not made out a case for the order, but if granted it should be on terms that costs of the application be paid and that payment be made a condition precedent as was done in the cases (Cor. Sale, J.) of *Durgamoney Dassi v. Kumud Chunder Doss* (Suit No. 718 of 1898) and *Teja Sing v. Osmond Beeby* (Suit No. 192 of 1901). Mr. S. R. Das *contra*.—The defendants will have to pay their costs but they should not be made a condition precedent. If such order be made, he asks for a fortnight to pay the costs. The Court ordered as follows:—There has been a great delay which is not properly accounted for. But as the defendants are sued as executors, I allow them to file written statement, but I make the order subject to payment of costs of the application of the plaintiffs within a fortnight. On such costs being paid written statement may be filed. *Rajah Sreenath Roy v. Rani Hemanginey Dossee*, 6 C.W.N. (Journal Portion), p. lxxxiii; see, also, *Sm. Attarmoni Dassi v. Bepin Behari Dhur*, 9 C.W.N. Journal Portion, p. li.

(27) 2 Hyde 86.

(28) *Krishnaji Lakshman Rojvade v. Sitaram Murarrav Jakhi*, 5 B. 496; referred to in *Tapiram v. Sadhu*, 21 B. 570.

(29) 13 W.R. 358 (Eng.); 11 L.T. 584; 11 Jur. N.S. 26.

the payment of costs is made within the time fixed, and where the condition is not strictly carried out the order imposing it becomes inoperative. (30)

(xiv) Costs of motion to transfer.

As a general rule, an action instituted in one Court or one branch or division of a Court when another action as to the same matter is pending in another Court or branch or division of the Court will be transferred to the latter, and the plaintiff in the second action may have to pay the costs of the transfer; but the plaintiff in the first suit ought before giving notice of motion to ask the plaintiff in the second suit for his consent to the transfer, and if he neglect to do so may have to pay the costs of the application. (31)

Where a successful application was made by motion, which should properly have been made by summons, only the costs of a summons in Chambers attended by Counsel were allowed. (32)

Costs of application which Court has no jurisdiction to entertain.

The Court can dismiss with costs an application, which it has no jurisdiction to entertain. (33)

Costs where application is considered as regular suit.

So also, the Court may refuse with costs a motion to enforce an order which it had no jurisdiction to make. (34)

Where an application is considered as a regular suit, the Judge may decree costs as in a regular suit. (35)

Costs of miscellaneous proceeding: (a) subject-matter admitting of precise valuation.

Where the subject-matter in a miscellaneous proceeding admits of a precise valuation, costs may be calculated as in a suit on such valuation, and not the fees specified in Civil Circular 62, should be allowed. (36)

(30) *Ghulam Muhammad v. Tulsi Ram*, 60 P.R. 1904.

(31) *Lyall v. Weldhen*, 9 Ch. 287; 22 W.R. 633 (Eng.) 30 L.T. 146; *Sayers v. Corrie*, 9 Ch. 52; 43 L.J. Ch. 337; 22 W.R. 101 (Eng.); 29 L.T. 603; *Salter v. Tildesley*, 13 W.R. 376 (Eng.); 11 L.T. 759; *Orrel v. Busch*, 5 Ch. 467; 18 W.R. 588 (Eng.); 22 = L.T. 461.

(32) *Marriott v. Marriott*, 26 W.R. 416 (Eng.).

(33) *Re Issac*, 4 My. and Cr. 11. See also cases noted under S. 25 "Jurisdiction, want of," *infra*.

(34) *In re King*, 10 Sim. 605.

(35) *Roy Priyanath Chowdhry v. Prasanna Chandra Roy Chowdhry*, 2 B.L.R. A.C. 249 = 11 W.R. 104.

(36) *Karsandas Narayan v. Mathuradas Shivji*, Bom. F.J. 1896, p. 203. In this case certain moveable property was attached before judgment at the instance of the plaintiff. The present respondent, who was not a party to the suit, made an application to have the attachment raised. The Subordinate Judge raised the attachment, and threw all costs of the application on the plaintiff. He calculated costs of each party according to the valuation of the claim in the suit. Against this order the plaintiff appealed to the High Court. The judgment of the High Court was as follows—This case stands on the same footing as appeal from Order No. 34 of 1895 decided

Where third persons who are alleged to be in the possession of property sought to be attached before judgment appear to show cause in pursuance of notices issued to them and the defendant, the proceedings, in so far as they are concerned, are miscellaneous proceedings within the meaning of Civil Circular 62; and, if the subject-matter does not admit of a precise valuation, the fees specified in that circular should be awarded to them as costs. (37)

(b) Subject-matter not admitting of precise valuation.

When a Division Bench of the High Court makes an order dismissing an application for leave to appeal to His Majesty in Council with costs, the order as to costs is to be enforced by execution in the lower Court which passed the order originally. (38)

Costs of application for leave to appeal to Privy Council.

In an originating summons, parties are entitled to instruct counsel; and without any certificate the costs of one counsel must be allowed on taxation. (39)

Costs in an originating summons.

Where a rule *nisi* was obtained against the defendants to show cause why a receiver should not be appointed, and the rule was made absolute, no cause being shown against it, the Court

Costs of application for appointment of receiver.

to-day, but the subject-matter does admit of a precise valuation, *viz*, Rs. 292. Mathuradas Shivji should be allowed costs calculated on that amount as in a suit. As to the costs in this Court they should, as in that case, be added together and the applicant should bear half thereof and the opponents the other half thereof. *Karsandas Narayan v. Mathuradas Shivji*, Bom. P.J. 1896, p. 303.

(37) *Karsan Narayan v. Motibai*, Bom. P.J., 1896, 313. In this case, on an application by the plaintiff to attach before judgment certain moveable property alleged to be in the possession of the respondents, notices were issued to the latter and the defendant to show cause why attachment should not be made. Cause being shown, the Subordinate Judge dismissed the application with costs calculated according to the value of the claim in the suit. Against this order the plaintiff appealed to the High Court. Judgment was given to the following effect:—We think that the proceedings against Devji Kara and the trustees of the temple, in so far as they are concerned, are miscellaneous proceedings within the meaning of Civil Circular Order 62, and as the subject-matter does not admit of a precise valuation, that the fees specified in that order should be awarded to them respectively as costs. Their cases were separate; so they should be allowed separate costs, which we fix at Rs. 15 in each case. We direct the Subordinate Judge to re-calculate all the costs accordingly. As to the costs in this Court, those of each side should be added together, and the applicant should bear one-half thereof and the opponents the other half thereof. *Karsan Narayan v. Motibai*, Bom. P.J., 1896, p. 313.

(38) *Jogendra Chandra Sen v. Bibee Wasidunnessa Khatun*, 11 C.W.N. 856=34 C. 860.

(39) *Fatmabibi v. Shaik Hassan*, 9 Bom. L.R. 1071 at pp. 1083, 1084.

ordered that no costs should be allowed but that they should be made costs in the cause, as the rule *nisi* did not ask for costs.⁽⁴⁰⁾

Amendment
of decree or
order as to
costs.

A Court can by virtue of its inherent power provided by S. 151, or by the power vested in it under S. 152 of the Code of Civil Procedure, alter or vary the order and the decree passed by it, although the decree is apparently not inconsistent with the order in the judgment, when it finds that the language of the ordering portion of the judgment is elliptical and ambiguous, and the order and the decree do not correctly state what was actually decided.⁽⁴¹⁾

In this case, a suit was contested both in the Court of first instance and in the appellate Court by one among several defendants, and the appeal by the plaintiff was allowed and "the suit decreed with costs"; and the decree prepared in the appellate Court gave costs against all the defendants. On an application for amendment of the decree for costs made by some of the non-contesting defendants, it was *held*, upon a consideration of the whole judgment passed in appeal, that the Court in deciding the case did not really intend to saddle all the defendants with costs and as such the decree should be amended. And the Court, acting *ex propria motu*, further directed that the order in favour of the applicants should also be extended to the cases of other defendants although they did not join in the application for amendment of the decree.⁽⁴²⁾

* In proceedings before a District Judge with reference to a claim to certain property said to have been the property of a person who had died intestate, the claimant asked for an adjournment to enable her to produce evidence of her title; which adjournment was granted on condition of her paying the costs thereof, assessed at Rs. 58. On a representation being made to the District Judge by the applicant's pleader, the Judge reduced the amount of

(40) *Motichand v. Stewart Brown*, 6 C.W.N. (Journal Portion), p. xii. In this case a rule had been obtained by the plaintiffs against the defendants to show cause why a receiver should not be appointed, etc. The rule did not ask for any costs. On the rule coming on for hearing, no cause was shewn and it was made absolute, but counsel asking for costs:—His Lordship said that the usual practice would be followed. It was then stated that Mr. Justice Sale had held that a rule not having asked for costs, no costs would be allowed, but that costs should be costs in the cause. *Motichand v. J. Stewart Brown*, 6 C.W.N. (Journal Portion), p. xii.

(41) *Harmange Singh v. Ram Gopal Achari*, 20 C.L.J. 18 (following *Brijratan v. Joynarain*, 37 C. 649 (857) and *In re Swite Mellor v. Swire*, (1885) 30 Ch. D. 239).

(42) *Harmange Singh v. Ram Gopal Achari*, 20 C.L.J. 18.

the costs to Rs. 28. *Held* that it was within the power of the District Judge to alter his order as to costs.⁽⁴³⁾

A Court has the power under S. 152 of the Code of Civil Procedure to amend a decree or order as to costs even when an appeal is pending in the higher Court against it.⁽⁴⁴⁾

Sec. 22.—Interpleader Suit.

Nature of interpleader suit in general.

Provisions of the Code of Civil Procedure as to interpleader suits.

Provisions of the Code as to costs of plaintiff in interpleader suit.

General rule as to costs in interpleader suit.

Rule in equity.

Rule and practice in all divisions of the High Court in England.

Rule and practice of the Indian Courts.

Costs of proceedings in the action where applicant is a defendant, power to order.

Costs against applicant.

Costs against claimant.

Costs, where each party succeeds in part.

Costs of proceedings to get possession of subject-matter.

Costs payable in respect of an action—Set-off of.

Costs, obtaining of, on motion.

Security for costs.

INTERPLEADER suit is “ a remedy available to a person who is under a liability for any debt, money, goods, or chattels in which he claims no interest, and for or in respect of which he is or expects to be sued by two or more parties making adverse claims thereto ; the cause of the interpleader being that a defendant shall not be charged to two severally where no default is in him.”⁽¹⁾

Nature of
interpleader
suit in
general.

(43) *Eleanor Wintle v. Mahbuban*, A.W.N. (1902) 98.

(44) *Harmange Singh v. Ram Gopal Achari*, 20 C.L.J. 18 (19; ; referring *E. v. E.*, (1903) L.R. p. 88.) When the original judgment did not provide for costs of preparation of the decree in a partition suit, and an application to the Court for this purpose was granted and a clause for payment of such costs added to the decree, the application is substantially one for review of the judgment, and time runs from the date of the grant thereof. *Rakhai Das Mazumdar v. Jogendra Narain Mazumdar*, 10 C.L.J. 467 (following *Venkata v. Venkata*, 24 M. 25).

(1) *Viner's*, Abr., Vol. IX, title “Interpleader,” p. 428. On the subject-matter of this section see *Maw's Digest*, Vol. VIII, cols. 389—396 ; *Encyclopædia of the Laws of England*, Vol. VII, 371 ; 377. *Cabane on Interpleader*, 3rd Ed., pp. 92—98 ; *Merlin's Law & Practice of Interpleader*, pp. 71—86 ; *Morgan & Wurtz on Costs*, p. 221 ; *Marshall on Costs*, pp. 392—402 ; *Gordon on Law of Costs*, Chap. XXVIII ; pp. 244—249 ; *Amir Ali's Civ. Pro. Code*, 2nd Ed., 1916, p. 1174 (Notes under O. XXXV) ;

Provisions
of the Code
of Civil
Procedure
as to inter-
pleader suits.

The Code of Civil Procedure (O. XXXV) makes provision for interpleader suits. Order XXXV, r. 1 of the Code of Civil Procedure, provides for the form of the suit. It says that "In every suit of interpleader the plaintiff shall, in addition to the other statements necessary for plaints, state—(a) that the plaintiff claims no interest in the subject-matter in dispute other than for charges or costs; (b) the claims made by the defendants severally; and (c) that there is no collusion between the plaintiff and any of the defendants⁽²⁾." Rule 2 enacts that "Where the thing claimed is capable of being paid into Court or placed in the custody of the Court, the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit."⁽³⁾ Rule 3 says that "Where any of the defendants in an interpleader-suit is actually suing the plaintiff in respect of the subject-matter of such suit, the Court in which the suit against the plaintiff is pending shall, on being informed by the Court in which the interpleader suit has been instituted, stay the proceedings as against him; and his costs in the suit so stayed may be provided for in such suit; but if, and in so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader suit."⁽⁴⁾ Rule 5 says that "Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords."⁽⁵⁾

Provisions of
the Code as
to costs of
plaintiff in
interpleader
suit.

Rule 6 makes provision for the costs of a plaintiff in a properly framed interpleader suit. It says "Where the suit is properly instituted the Court may provide for the costs of the original plaintiff by giving him a charge on the thing claimed or in some other effectual way."⁽⁶⁾

Yearly Practice, 1914, Notes under O. LVII, rr. 13, 15 and 17; Annual Practice, Notes under O. LVII, rr. 13, 15 and 17; Reference may also be made to the corresponding portions of the Annual County Court Practice and Chitty's Archbold's Practice; Daniell's Chancery Practice, 7th Ed., 1901; p. 1285; Seton on Judgments and Orders, 6th Ed., 1901, Vol. I, pp. 501, 512 and 513; Simon's Interpleader.

(2) Civ. Pro. Code (Act V of 1908), O. XXXV, r. 1.

(3) Civ. Pro. Code (Act V of 1908), O. XXXV, r. 2.

(4) Civ. Pro. Code (Act V of 1908), O. XXXV, r. 3.

(5) Civ. Pro. Code (Act V of 1908), O. XXXV, r. 5.

(6) Civ. Pro. Code (Act V of 1908), O. XXXV, r. 6.

The Court or a Judge has power to make such orders as to General costs in and for the purpose of any interpleader proceedings as may rule as to costs of be just and reasonable.⁽⁷⁾ As a general rule, the applicant is interpleader allowed his costs, and, so far as the claimants are concerned, the suit. rule which ordinarily obtains in actions, that the successful party gets his costs, is followed.⁽⁸⁾

The Court or Judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for.⁽⁹⁾

The ordinary rule that the party who fails to appear, or abandons, or is unsuccessful, pays the costs of the successful party applies in interpleader matters as in other actions,⁽¹⁰⁾ and he must also, as a rule, pay the applicant's costs and charges.⁽¹¹⁾

(7) R.S.C. O. LVII, r. 15. *Rhodes v. Dawson*, (1886) 16 Q.B.D. 548, C.A., per Lindley, L.J. at p. 553. Formerly costs were not allowed until the termination of the proceedings (see *Ecod v. Bradbury*, (1844) 6 Man. & G. 981; see also *Bland v. Delano*, (1838) 6 Dowl. 293.

(8) See *Re Rogers, Ex parte Sussex (Sheriff)*, (1911) 1 K.B. 104, 110. A party who has obtained an order for costs is a judgment-creditor for the purposes of garnishee proceedings. *Hartley v. Shemwell*, *Marples v. Hartley*, (1861) 1 B. & S. 1; *Merlin on Interpleader*, p. 72.

(9) R.S.C.O. LVII rr. 5, 13. See *Yearly Practice*, Vol. I, 1914, p. 923.

(10) *Bowen v. Brameidge*, (1833) 3 Dowl. 213 (trial of issue); *Perkins v. Burton*, (1833) 2 Dowl. 108 (non-appearance of claimant); *Dabbs v. Humphries*, (1835) 3 Dowl. 377; *Wills v. Hopkins*, (1835) 3 Dowl. 346; *Hyland v. Lennox*, (1891) 28 L.R. Ir. 286 (abandonment); *Jones v. Regan*, (1840) 9 Dowl. 580; *Melville v. Smark*, (1841) 3 Man. & G. 57. "There were some early decisions of the common law courts under which each party had to pay their own costs where no blame attached to any one or in the absence of improper conduct in either party; see *Oram v. Sheldon*, (1835) 3 Dowl. 640; *Beswick v. Thomas*, (1827) 5 Dowl. 458; *Morland v. Chitty*, (1833) 1 Dowl. 520; *Jones v. Lewis*, (1841) 8 M. & W. 264; *Lambert v. Cooper*, (1837) 5 Dowl. 547. In *Steel v. Rowe*, (1890) 90 L.T. Jo. 10, it appears to have been held in chambers that there was no power to order costs against a claimant who did not appear, but this is contrary to *Perkins v. Burton*, *supra*, and is not followed in practice. It was held under the Interpleader Act (Stat. (1831) 1 & 2 Will. 4, c. 58) that where the claimant appeared merely to object to the irregularity of the proceedings and not to litigate his claim, there was not a sufficient appearance under that Act to make him liable for costs (*Grasebrook v. Pickford*, (1842) 10 M. & W. 279.) But where, though he had made no affidavit in support of his claim, he was represented by counsel on the hearing of the summons, who after hearing the stakeholder's case, consented to an order barring the claim, and asked that no action should be brought by or against either party, it was held that there was a sufficient appearance to justify the making of an order for costs (*Rooda v. Gun and Shot, and Griffin's Wharves Co., Ltd.*, (1873) 28 L.T. 635). These cases appear to infer that there is no power to order costs against a claimant who does not appear at all, but this is not in accordance with the present practice." (*Halsbury's Laws of England*, Vol. XVII, p. 625).

(11) See *Halsbury's Laws of England*, Vol. XVII, pp. 621, 622. See, also, *Kimberley v. Hickman*, (1846) 1 Saund. & C. 90 (where a claimant had neglected to proceed to trial

Rule in
equity.

In interpleader suits in equity the plaintiff (*i.e.*, the applicant for relief) was ordinarily given his costs if he conducted himself properly, and was allowed, if necessary, to recover them from the defendant who succeeded, the latter in turn being entitled to recover them, together with his own costs, from the defendant who failed.⁽¹²⁾

The plaintiff may also be allowed to deduct his costs from the fund in Court,⁽¹³⁾ and he is not liable for the interest lost to the successful party after payment of the fund into Court.⁽¹⁴⁾

Rule and
practice in all
divisions of
the High
Court in
England.

Where the stakeholder has acted properly,⁽¹⁵⁾ he is allowed his costs out of the fund or subject-matter in dispute, and the claimant who is in the wrong has to indemnify to that extent the claimant who is entitled to the fund.⁽¹⁶⁾

"Moreover, in addition to his costs, the stakeholder is allowed any charges to which he may be entitled, *e.g.*, as warehouseman or auctioneer, out of the fund or other subject-matter of the dispute, both costs and charges being allowed as a first charge on the fund."⁽¹⁷⁾

Where, however, the applicant has unnecessarily caused any portion of the costs, he may be disallowed that portion, and may be ordered to pay the costs occasioned by his misconduct.⁽¹⁸⁾

as directed by the order, on an application by the execution creditor that he should proceed to trial at the next assizes and pay the costs occasioned by his default, together with the costs of the application. *Held* that the claimant must pay the costs occasioned by his default, but that the costs of the application ought to be made costs in the cause.)

(12) *Hendry v. Key*, (1756) 1 Dick. 291.

(13) *Crawford v. Fisher*, (1842) 1 Hare 436, 444; *Meux v. Bell*, (1841) 1 Hare 73, 98.

(14) *East India Co. v. Campion* (1837), 4 Cl. & Fin. 616, H.L.; see also *Campion v. Calvin*, (1836) 3 Bing. (N.C.) 17.

(15) For cases as to costs where the conduct of the stakeholder was questioned, see *Scottish Union Insurance Co. v. Steele*, (1864), 9 L.T. 677; *Symes v. Magnay*, (1855) 20 Beav. 47.

(16) *Cotter v. Bank of England*, (1834), 2 Dowl. 728; *Duear v. Mackintosh*, (1834) 2 Dowl. 730; *Symes v. Magnay*, (1855) 25 Beav. 47; *Laing v. Zeden*, (1874) 9 Ch. App. 736; *Searle & Co. v. Mathews*, (1833) W.N. 176; *Reading v. London School Board*, (1866) 16 Q.B.D. 686; *Goodman v. Blake*, (1887) 19 Q.B.D. 77.

(17) *Attenborough v. St. Catharine's Dock Co.*, (1878) 3 C.P.D. 450, 466, C. A.; *De Ryothschild Frieres v. Morrison Kekewich & Co.*, *La Banque de Paris et des Pays Bas v. Same*, *La Banque de France v. Same*, (1890) 24 Q.B.D. 750, C.A.; *Harwood v. Betham*, (1892) 1 L.J. (Ex.) 180.

(18) *Searle & Co. v. Matthews*, (1883) W.N. 176.

As a general rule, a plaintiff in a properly instituted interpleader suit is entitled to his costs. In such case he is entitled to a lien for his costs on the fund, and is not forced to take his chance of getting them from the defendant, against whom the Court decides.⁽¹⁹⁾ An interpleader suit with a prayer for declaration of the titles of the several sets of defendants in the disputed land by the tenant against the landlords in whose favour he has executed separate *Kabulyats* is not maintainable.⁽²⁰⁾

An interpleader suit is not improperly constituted merely because one of the defendants does not claim the whole of the subject-matter.⁽²¹⁾

(19) *Secretary of State v. Mir Muhammad*, (1863) 1 M.H.C.R. 360, 361; and see *Bombay Baroda and Central India Railway v. Sassoon*, (1893) 18 B. 231.

(20) *Shelley Bonnerjee v. Raj Chandra*, 37 C. 552 = 5 Ind. Cas. 577 = 11 C.L.J. 577 = 14 C.W.N. 784. See, also, *Ameer Ali's Civ. Pro. Code*, (1908), 2nd Ed., 1916, p. 1174.

(21) *The Secretary of State v. Mir Muhammad Husain*, 1 M.H.C.R. 360 (*Hoggart v. Cutts*, Cr. & P. 197, observed upon). Scotland, C.J., said in the course of the judgment:—As a general rule it is clear that the plaintiff in a properly instituted interpleader suit is entitled to his costs. In such case, indeed, it has been ruled that he is entitled to a lien for his costs on the fund, and is not forced to take his chance of getting them from the defendant against whom the Court decides (*Campbell v. Salomons*, 1 Sim. & S. 462, *per* Sir John Leach, V.C.). Then, are the circumstances here such as to warrant us in saying that the plaintiff acted unreasonably or improperly in filing the present bill? Clearly not. (His Lordship here stated the circumstances which led to the suit and proceeded thus:) But Mr. Stokes objects that in order to warrant an interpleader suit each of the defendants must claim the whole of the subject-matter of the suit. That very argument appears to have been used, and used unsuccessfully, in *Hamilton v. Marks* (5 De. G. & S. 638, 642, 643), and it would require very conclusive authorities to induce me to assent to a doctrine so inconvenient and unreasonable. The only case cited on the point was *Hoggart v. Cutts* (Cr. & P. 197), the marginal note to which seems, no doubt, to support Mr. Stokes' contention. But that note ("Where a fund in the hands of a stakeholder was contested by three parties, one of whom claimed the whole of it, and the other two claimed it in certain proportions, and the stakeholder filed a bill of interpleader against the three claimants, the Court, at the hearing, dismissed the bill with costs as against one of the parties claiming a part of the fund, and decreed that the other two parties should interplead as to the other part") does not appear warranted by the facts of the case. There Thodey, a defendant, sold an estate, which the first defendant *Cutts* purchased, paying a deposit. Then *Hoggart*, the plaintiff, an auctioneer, by *Thodey's* direction, put up the estate again, and *Vickers*, another defendant, bought it and paid a deposit. The question was who was entitled to the deposits? Clearly this and other questions could not be decided in that suit of *Hoggart v. Cutts*, as between *Cutts* and *Vickers* on the one hand and *Vickers* and *Thodey* on the other. "The bill," said Lord Cottenham, "is a proper bill as between *Hoggart*, *Cutts* and *Thodey*: there can in that suit be no question about *Hoggart's* conduct. He is a mere auctioneer employed to sell the estate, and has a right to make *Cutts* and *Thodey* determine between themselves which of them is entitled to a fund in which he claims no personal interest. The suit, however, cannot be sustained as to *Vickers* also; and if I am to decide which of the defendants *Cutts* or *Vickers*, is

In a recent Bombay case, certain bags of rape seed were delivered to the plaintiff Railway Company at Punjab by the 4th defendant for carriage to Bombay, the consignee being one X. While the goods were in transit, the consignor ordered the Company to deliver the goods to Y, his agent, instead of to the original consignee X. Before the goods were delivered to Y, the defendants 1, 2 and 3, to whom X had, in the meanwhile, assigned the goods for valuable consideration, claimed them from the Company. The plaintiff Company thereupon instituted the present suit against the defendants and prayed (1) that the defendants should be required to interplead, (2) for an injunction restraining the defendants from suing them as regards the goods. *Held* that the plaintiff Company was entitled to their costs, the suit being a properly constituted interpleader suit, that they had a charge on the goods in respect of freight and costs of suit, that the goods must be returned to the 4th defendant (consignor) subject to this charge, and that the plaintiffs were not entitled to wharfage and demurrage as claimed in the plaint.⁽²²⁾

to be dismissed from the suit, I have no hesitation in retaining Cutts, because he is the first purchaser, and because the case as to him is the more simple." The bill was therefore dismissed as to Vickers. That was the decision in *Hoggart v. Cutts*, and I think that it neither justifies the marginal note nor supports Mr. Stokes' argument. *The Secretary of State v. Mir Muhammad Husain*, 1 M.H.C. 360 at pp. 361 and 362.

(22) *Bombay, Baroda and Central India Railway Company v. Jacob Elias Sassoon*, 18 B. 231. Parsons, J., said in the course of the judgment:—"I think that, on the authorities, cited by the learned counsel for the plaintiffs, this is a properly constituted interpleader suit. In *Mason v. Hamilton* (5 Sim. 19) the bill filed stated that the plaintiff had no interest in the goods except his lien for wharfage and warehouse rent, and Sir L. Shadwell, the Vice-Chancellor, said that the bill stated a plain case of interpleader. The case of *Mitchell v. Hayne* (5 Sim. and St. 63) is discussed in *Bignold v. Audland*, (11 Sim. 23) and the result is said to be this: "Where a plaintiff represents not merely that he has a lien with respect to which two other persons have adverse rights, but that there is a further question to be litigated adversely between himself and one of them, that is not a case of interpleader." In *Cotter v. Bank of England*, (3 Moo. and Se. 180) it was held that the bank, who retained a lien on certain bullion in respect of freight and charges, had no interest in the subject-matter of the suit within the meaning of those words in Statute 1 and 2 William IV, c. 58. In *Attenborough v. St. Katherine's Dock Co.* (3 C.P.D. 450) the defendants claimed no interest in the wines, the subject-matter of the suit, other than the usual dock rents and charges: Bramwell, L.J., said: "Defendants do not claim any interest in the subject-matter of the suit, for their alleged right of lien is not an interest in the wine," and it was held that the case fell within the Interpleader Act, and the defendants' costs and charges were made a first charge on the fund. The language of Ss. 470 and 471 of the Code of Civil Procedure (XIV of 1882) is almost identical with that of Statute 1 and 2 William IV, c. 58, and the above rulings clearly apply. The personal relief asked for is nothing more than an injunction restraining the defendants from suing the plaintiffs, and that is contained in the form of plaint

Where, instead of interpleading, the stakeholder litigates with both parties separately, he loses the benefit of the former procedure and may have to pay costs as against one of the parties instead of being allowed his costs out of the fund.⁽²³⁾ Costs against applicant.

But the matter is one for the discretion of the Court,⁽²⁴⁾ and in a proper case, as on the trial of an action, the successful party may be deprived of his costs.⁽²⁵⁾

According to the practice of the English Courts, the claimant is only liable for costs and charges subsequent to the date of his notice of claim.⁽²⁶⁾ Costs against claimant.

Under the same practice "Where the order directs a sale by the sheriff unless the claimant gives security within a stated time,

in an interpleader suit given in the form No. 104 of the 4th schedule to the Civil Procedure Code. I find the first issue in the affirmative. Strictly speaking, in my opinion, so much of the second and fourth issues as relates to the amount of the charges has been improperly raised in this suit, in which the title only to the thing claimed has to be adjudicated. No doubt a lien can be declared for charges, but the amount of those charges, if disputed, ought, I think, to form the subject of a separate proceeding between the adjudicated owner and the person who seeks to make the goods liable. As, however, here the parties interested have gone to trial on those issues without an objection on the part of any of them, I will proceed to determine them. The charge for freight comes to Rs. 1,072—5, and this is admitted to be correct and due. The plaintiffs, however, seek, further, to charge the goods with the sum of Rs. 6,693—4 for wharfage and demurrage, and this charge is disputed. The rules of the said company allow of such a charge being made when goods are not taken delivery of by their owners within a certain time after notice of arrival; the rates charged being exceedingly high that they may act as a kind of penalty so as to ensure the speedy removal of goods. The present is not a case of that kind. The goods remained on the plaintiffs' premises, not by reason of any neglect or default of their owner to take delivery of them, but by the act of the plaintiffs themselves, who kept and refused to deliver them for their own protection and benefit. They did not even place them in the custody of the Court, as they could have done under the provisions of S. 472. All that they could possibly be entitled to, would be a reasonable warehouse rent for the time the goods remained with them, and I might have been able to have awarded them that had they claimed it, and given evidence in proof of the amount. They do not, however, do this, and I think, the claim they have made is inadmissible and unproved." *Bombay, Baroda and Central India Railway Company v. Jacob Elias Sassoon*, 18 B. 231 at pp. 234—236.

(23) *Laing v. Zedan*, (1874) 9 Ch. App. 736.

(24) R.S.C., O. LVII, r. 15.

(25) *Field v. Rivington*, (1889) 5 T.L.R. 642, C.A.; see, also, *Swaine v. Spencer (Stephen)*, (1841) 9 Dowl. 347. As to what is good cause for depriving a successful party of his costs, see *Sutcliffe v. Smith*, (1886) 2 T.L.R. 881, C.A.; *Huxley v. West London Extension Rail Co.*, (1889) 14 App. Cas. 26, 32; *Forster v. Farquhar*, (1893) 1 Q.B. 564, C.A.; *Granville and Co. v. Firth*, (1903) 72 L.J. (K.B.) 152, C.A.

(26) *Gaskell v. Sefton*, (1845) 14 M. & W. 802; *Goodman v. Blake*, (1883) 19 Q.B.D. 77.

and the security is not given till the last moment or not at all, the claimant, though ultimately successful on the issue, must pay the sheriff's charges between the date of the order and his giving security or sale, as the case may be, since it is for his benefit that the goods were kept, but he may be entitled to have such costs included in the costs given him against the execution creditor."⁽²⁷⁾

Costs, where each party succeeds in part.

Where the claimant succeeds in substance as against an execution creditor, though it happens that he is not entitled to all the goods claimed, he is, as a rule, entitled to the costs of the issue.⁽²⁸⁾

And where the claimant succeeds as to part, and the execution creditor as to the other part, the costs may be divided and ordered to be taxed on that principle without reference to consideration as to which party was plaintiff and which defendant.⁽²⁹⁾

So also on a stakeholder's interpleader, if each of the claimants succeeds in part, each party may have to pay his own costs.⁽³⁰⁾

Costs of proceedings to get possession of subject-matter.

The costs of the successful party include the costs of an application to take the money out of Court⁽³¹⁾ or to obtain the subject-matter of the dispute from the stakeholder⁽³²⁾ where such an application is necessary.

Costs payable in respect of an action—Set-off of.

In a sheriff's interpleader there is no power to order costs payable by the claimant to the execution creditor as a result of the trial of the issue, to be set-off against the costs payable by the execution creditor under an order made in the original action.⁽³³⁾

Costs, obtaining of, on motion.

Plaintiff could obtain his costs at once on motion, unless his right to interplead was disputed, in which case he would have to set down the cause.⁽³⁴⁾

(27) *Malone v. Ross*, (1900) 2 I.R. 586, C.A.

(28) *Plummer v. Price*, (1878) 39 L.T. 657, C.A.

(29) *Lewis v. Holding*, (1840) 9 Dowl. 652; *Dixon v. Yates*, (1833) 5 B. & Ad. 319; *Clifton v. Davis*, (1856) 6 E. & B. 392 where the claimant succeeded as to five-sixths and the execution creditor as to the remaining sixth; overruling, *Staley v. Bedwell*, (1839) 10 Ad. & El. 145; *Cummins v. Kavanagh*, (1890) 25 I.L.T. 24.

(30) *Carr v. Edwards*, (1839) 8 Dowl. 29 (where the plaintiff to an issue claimed £183, part of a sum of £492-17s-6d. in the hands of a stakeholder, the defendant to the issue claiming the whole amount a verdict being found for the plaintiff for £50. Held, that each party must pay his own costs).

(31) *Cusel v. Pariente*, (1844) 7 Man. & G. 527; *Meredith v. Rogers*, (1839) 7 Dowl. 596.

(32) *Barnes v. Bank of England*, (1836) 7 Dowl. 319.

(33) *Barker v. Hemming*, (1880) 5 Q.B.D. 609, C.A.

(34) *Jones v. Gilham*, G. Coop. 49.

Where the conflicting claim is withdrawn after suit brought, plaintiff may have his costs up to that time.⁽³⁵⁾

As a rule no costs in matters arising out of interpleader proceedings are allowed till the termination of the proceedings.⁽³⁶⁾

In considering whether parties to an interpleader issue ought to be required to give security for costs, the rules applicable to ordinary litigants ought to be observed. At the same time in applying these rules the question whether a party to the issue shall be treated as plaintiff or defendant must be decided by the real merits of the case, and not by the mere form of the issue itself.⁽³⁷⁾

Where, therefore, the plaintiff in the issue is not really more so than the defendant, security for costs will not be ordered from him.⁽³⁸⁾ Nor will a plaintiff against whom a receiving order has been made be ordered to give security.⁽³⁹⁾

A foreigner, resident out of the jurisdiction, will usually be ordered to give security if he is really plaintiff in the issue.⁽⁴⁰⁾

Sec. 23.—Interrogatories

General rule as to costs of interrogatories,

Provisions of the Code of Civil Procedure regarding interrogatories,

Practice as to interrogatories,

Costs of interrogatories.

(i) Indian Law.

(ii) English Law and Practice.

“In adjusting the costs of the cause or matter, inquiry shall be made into the propriety of exhibiting interrogatories, and if it is the opinion of the taxing officer, or of the Court or Judge, either with or without an application for inquiry, that interrogatories have been exhibited unreasonably,

General rule as to costs of interrogatories.

(35) *Glynn v. Locke*, 3 D. & War. 11; sup. p. 502; *Symes v. Magnay*, 20 Beav. 47. And see *Mason v. Hamilton*, 5 Sim. 19; and as to payment by plaintiff of costs needlessly incurred or increased, see *Crawford v. Fisher*, 1 Ha. 436; *E. & W. India Dock Co. v. Littledale*, 7 Ha. 57; *Jones v. Farrell*, 1 D. & J. 208.

(36) *Hood v. Bradbury*, (1844) 6 M. & G. 981.

(37) *Rhodes v. Dawson*, (1886) 16 Q.B.D., per Lindley, L.J., at p. 553.

(38) (*Ibid*).

(39) (*Ibid*).

(40) *Benazec v. Bessett*, (1845) 1 C.B. 313; *Webster v. Delafie*, (1849) 7 C.B. 187, and *Attenborough v. London and St. Katharine Docks Co.*, (1878) 3 C.P.D., per Bramwell, L.J.

vexatiously, or at improper length, the costs occasioned by the interrogatories and the answers thereto shall be paid in any event by the party in fault.”⁽¹⁾

Where the hearing stands over for want of parties, it was held that “ the costs of the day will not be allowed, the bill having prayed a discovery of parties, and the answer having stated that no others were interested.”⁽²⁾

Provisions of
the Code of
Civil Procedure
regarding interro-
gatories.

The Code of Civil Procedure provides that “ In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties, and such interrogatories when delivered, shall have a note at the foot thereof stating which of such interrogatories each of such parties is required to answer ; Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose; Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.”⁽³⁾

Practice as to
interrogato-
ries.

“ A plaintiff may interrogate with a view to obtain information or admission *in support of his own case*, and this right extends with proper qualifications not only to his original case, but also to any answer which he has to make to the defendant's case. But the right is always subject to the qualification that the interrogatories must be directed to a case on which the plaintiff has already determined and to which he has committed himself. He cannot be allowed to put fishing questions in order to try whether he can discover any flaw in the defendant's case or suggest any answer to it.⁽⁴⁾ Discovery is not limited to giving the party a knowledge of that which he does not already know, but includes the getting an

(1) Seton on Judgments and Orders, 6th Ed., 1901, Vol. I, p. 68 ; on the subject matter of this section, see, also, Yearly Practice, 1914, p. 402 ; Rules of the Supreme Court in England, O. XXI, r. 3 ; Amir Ali's Code of Civil Procedure (O. XI and Notes thereunder) 2nd Ed., 1916, pp. 777-799 ; Bray, Discovery ; Annual Practice, Notes under O. XXXI ; Yearly Practice, Notes under O. XXXI ; Halsbury's Laws of England, Vol. II, p. 56 ; Marshall on Costs, p. 59 ; Daniell's Chancery Practice, 7th Ed., 1901, Ch. XXX, pp. 1534-1605, also Chap. XVIII.

(2) *Rajchunder Mozumdar v. Gooroodas Mozumdar*, Sittings after 3rd Term 1828. Cl. R. (1829), 331 ; Morley's Digest of Indian Cases, Vol. I, p. 110.

(3) The Code of Civil Procedure (Act V of 1908), O. XI, r. 1.

(4) *Ali Kader Syud Hossain Ali v. Gobind Dass*, 17 C. 840, 848 ; *Bemolamoney Dassee v. Helodhur Bullubh*, 1 Boulm. 618.

admission of anything which he has to prove on an issue between himself and his opponent ;⁽⁵⁾ to facilitate proof or save expense ; ⁽⁶⁾ and to diminish the burden of proof.⁽⁷⁾ So one party may be asked as to any admissions he may have had tending to support his opponent's cause of action.⁽⁸⁾ And discovery may be had of the names of persons to make them parties, and the names and securities of prior incumbrances.⁽⁹⁾ The interrogatory must be as to facts, and must not ask for conclusions of law, inference of facts, or construction of a document."⁽¹⁰⁾

Rule 2 of the Code makes provision for particular interrogatories to be submitted. "On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court. In deciding upon such an application, the Court shall take into account any offer, which may be made by the party sought to be interrogated, to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs."⁽¹¹⁾

Rule 3 deals with costs of interrogatories. "In adjusting the costs of the suit inquiry shall, at the instance of any party, be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or the Court, either with or without an application for inquiry that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs

Costs of
interroga-
tories
(i) Indian
Law.

(5) *Att.-Gen. v. Gaskill*, 20 Ch. D. 528 ; *Kennedy v. Dodson*, (1895) 1 Ch. 334, 341.

(6) *Grumbrecht v. Parry*, 32 W.R. (Eng.) 204 ; *Hall v. L. & N.W. Ry. Co.*, 35 L. T. 850. So it is admissible to interrogate to facts which will inform the party as to evidence to be obtained : *Att.-Gen. v. Gaskill*, 20 Ch. D. 528, the names of the persons who may give evidence in his favour ; *Hall v. Liardet*, W.N. (1875), 83, the names of persons present at an alleged slander and so forth.

(7) *Att.-Gen. v. Gaskill*, 20 Ch. D. 528.

(8) *Hodsol v. Taylor*, L.R. 9 Q.B. 79 ; and see *Brid v. Malzy*, 1 C.B.N.S. 308 ; but see as to admissions, Ss. 22 and 23 of the Evidence Act.

(9) *Union Bank of London v. Manby*, 13 C. D. 239 (incumbrance in mortgage suits) ; *Hancocks v. Lablache*, 3 C.P.D. 202 (defendant's husband) ; *West of England Bank v. Nicholls*, 6 C.D. 613 (prior securities) ; *Eyre v. Rodgers*, 40 W.R. (Eng.) 137 (names of defendants : tenants in ejectment actions).

(10) *Nittomoye Dasse v. Soobul Chunder Law*, 23 C. 117 (123) (where it was sought to obtain the opponent's views as to the construction of a will). See Amir Ali's Code of Civil Procedure, 2nd Ed., 1916, p. 777.

(11) Act V of 1908 (Code of Civil Procedure), O. XI, r. 2.

occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.”⁽¹²⁾

As a general rule the costs of interrogatories are made costs in the cause. This rule is apparently intended to enable them to be dealt with at a later stage.⁽¹³⁾

(ii) English
Law and
practice.

The Rules of the Supreme Court made under the provisions of the English Judicature Act provide that “the Court or Judge may, at the hearing of any cause or matter, or upon any application or proceeding in any cause or matter in Court or at Chambers, and whether the same is objected to or not, direct the costs of any pleading, notice to produce, admit or cross-examine witnesses, account, statement, procuring discovery by interrogatories or order, applications for time, or other proceeding, or any part thereof, which is improper, vexatious, unnecessary, or contains vexatious or unnecessary matter, or is of unnecessary length, or caused by misconduct or negligence, to be disallowed, or may direct the taxing officer to look into the same and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, vexatious, or to contain unnecessary matter, or to be of unnecessary length, or caused by misconduct or negligence; and in such case the party whose costs are so disallowed shall pay the costs occasioned thereby to the other parties.”⁽¹⁴⁾

“There is power to order that costs of a *viva voce* examination be paid by the party examined “in any event;”⁽¹⁵⁾ but the costs of an oppressive *viva voce* examination may be ordered to be paid by the party examining.”⁽¹⁶⁾

Sec. 24.—Judicial Officers' Protection.

General rule as to non-liability to suit of officers acting judicially for official acts done in good faith, and of officers executing warrants and orders.

Power of Court to award costs in suit against Judicial Officers—Effect of Judicial Officers' Protection Act.

Liability of Collector for costs of unnecessary enquiry applied for by him.

Liability of Government for acts of Survey authorities.

(12) O. XI, r. 3 of the Code of Civil Procedure (Act V of 1908).

(13) Yearly Practice, 1914, p. 402.

(14) Yearly Practice, 1914, pp. 1144, 1145. Rules of the English Supreme Court, O. LXV, r. 27 (20).

(15) *Vicary v. G.N. Ry. Co.*, (1882) 9 Q.B.D. 168.

(16) Yearly Practice, 1914, p. 402.

FOR the protection of Magistrates and others acting judicially, the Judicial Officers' Protection Act enacts as follows :—“ No Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially, shall be liable to be sued in any Civil Court, for any act done or ordered to be done by him in the discharge of his judicial duty whether or not within the limits of his jurisdiction ; provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of : and no officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially, shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same.”⁽¹⁾

General rule as to non-liability to suit of officers acting judicially for official acts done in good faith, and of officers executing warrants and orders.

It has been laid down that “ the discretion as to the award of costs, which a Court has under the Civil Procedure Code, is not taken away by the fact that a party to a suit is protected under the provisions of the Judicial Officers' Protection Act, 1850.”⁽²⁾

Power of Court to award costs in suit against Judicial Officers—Effect of Jud. Off. Pro. Act.

Upon the application of the Collector, who was a party to a suit, an inquiry was held by the Subordinate Judge into the conduct of a Civil Court Ameen, who had made a local investigation in the suit. The Ameen was acquitted and the Collector ordered to pay his costs, including vakeel's fees. *Held* that, as in the case of miscellaneous proceedings, the Civil Court was competent to award such costs against the Collector.⁽³⁾

Liability of Collector for costs of unnecessary enquiry applied for by him.

(1) Act XVIII of 1850 (Judicial Officers' Protection), S. 1.

(2) *Ganesh Mahadev v. Narayan Balshet*, 4 Bom. L.R. 109 (115).

(3) *In the matter of the Collector of Tirhoot*, 14 W.R. 390. Jackson, J., said :—“ I think we ought not to interfere in this case. It seems that the Collector, who had been a party to a civil suit in the Court of the Subordinate Judge, had received information which led him to believe that the Civil Court Ameen who made a local investigation in that suit had been guilty of misconduct, and accordingly he applied to the Subordinate Judge to make an enquiry into the matter. The Subordinate Judge, however, for good or bad reasons, at that time refused to make the enquiry. Thereupon the Collector applied further to the Zillah Judge, who, on his application, directed the Subordinate Judge to hold the enquiry. Accordingly, the enquiry took place, and witnesses were examined. The result was that the Ameen was acquitted, and the Subordinate Judge did not think fit to carry the case any further, but he dismissed the Collector's application, and ordered that he should pay the costs of the Ameen, including vakeel's fees, which he fixed at 80 rupees. The Collector now comes before us, having first applied to the Zillah Judge to reverse the order, contending that the order to pay costs in such a case is not warranted by law. It appears to me that this enquiry was a preliminary enquiry under S. 171 of the Code of Civil

Liability of
Government
for acts of
Survey
authorities.

The act of the Survey authorities in demarcating lands is a necessary and legal act, and Government cannot be saddled with costs unless it can be proved that its officers are wilful wrong-doers. A mere allegation of the plaintiff, to the effect that the defendant had colluded with the Survey officers, is no reason for saddling the Government with costs.⁽⁴⁾

Sec. 25.—Jurisdiction, Want of.

Doubt under the older law.

Set at rest by the recent Codes of Civil Procedure.

English Law on the subject.

Illustrative cases.

Doubt
under the
older law.

IN the case of *Jardine Skinner v. J. W. B. Money* ⁽¹⁾ which came before the Calcutta High Court in 1870, a doubt was expressed as to "whether the High Court can give costs in a case in which it has declined jurisdiction." The Code of Civil Procedure that was then in force did not contain any specific provision that a Court may award or refuse costs in a suit or other proceeding although it may not have jurisdiction to entertain or try the same.

Procedure, and was in the nature of a miscellaneous proceeding in the Subordinate Judge's Court to which the Collector, as a party to the previous suit, was a party, the Ameen being the opposite party; and the rules of the High Court enable the Subordinate Civil Courts to award vakeel's fees within certain limits in such proceedings. It appears to me clear that the Subordinate Judge, or Judge of any Civil Court, who is required to investigate a matter of this sort, would, as in the case of miscellaneous proceedings, be competent to award costs in favour of the party who succeeded and against the opposite party, and vakeel's fees would be a proper element in such costs. It was argued that in this case the Collector came forward in the interests of justice, and that a party defending himself would not be entitled to costs, especially pleader's fees; and it is also observed that the award of costs was not in conformity with the practice of our Courts. When an officer like a Civil Court Ameen finds himself charged with misconduct or with a criminal offence, the prosecutor or promovent being no less a person than the Collector, he is quite justified in having himself defended by Counsel. We think it reasonable that the party who takes the responsibility of bringing forward and pressing such charges, and fails to substantiate them, should be made to pay the costs thereof. We think, therefore, that we ought not to interfere in this case." *In the matter of the Collector of Tirhoot*, 14 W.R. 390 (391).

(4) *Collector of Moorshedabad v. Rammohinee Dossee*, 1 Hay. 520.

(1) 14 W.R. 312 (315). N.B.—Express power is now given to the Court by S. 220 of the Code of Civil Procedure (1882)=S. 35 of the present Code (Act V of 1908) to give costs in such cases. See Woodman's Digest, 1912, Vol. I, col. 2661; on the subject-matter of this section, see Amir Ali's Code of Civil Procedure, 2nd Ed., 1916, pp. 70 and 156, Note; Morgan and Wurtzburg, p. 61.

But the present Code of Civil Procedure expressly empowers the Court to make order as to costs in cases in which it may not have jurisdiction. Section 35 of the Code provides as follows :—" Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. *The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.*"⁽²⁾

Set at rest by the recent Codes of Civil Procedure.

Similarly the English County Courts Act provides that "Where an action or matter is commenced in a County Court over which the Court has no jurisdiction, the Judge must, unless the parties agree to the Court having jurisdiction, order it to be struck out, and the Judge has power to award costs in the same manner, to the same extent, and recoverable in the same manner, as if the Court had jurisdiction therein and the plaintiff had not appeared, or had appeared and failed to prove his demand or complaint."⁽³⁾

English Law on the subject.

The following cases though decided under the older Codes of Civil Procedure may be noted as explaining or illustrating the principle contained in the above section :— When a suit is dismissed for want of jurisdiction, the Court will give costs.⁽⁴⁾

Illustrative cases.

If a suit is dismissed on the ground of want of jurisdiction, the suit having been instituted in the wrong district, the Court has jurisdiction to order that the plaintiff shall pay the costs of the defendant.⁽⁵⁾

(2) Code of Civil Procedure (Act V of 1908), S. 35. The same was the law under S. 220 of the Code of 1882 (Act XIV of 1882).

(3) St. 51 & 52 Vict., Ch. 43 (County Courts Act, 1888), S. 114 ; see Halsbury's Laws of England, Vol. VIII, S. 1377, p. 579.

(4) *Punchanun Ghose v. Brojendronarain Deb*, 1 Ind. Jur. N.S. 38 ; see, also, *Juggeshur Bunwarree Gobind v. Chunder Sircar*, Marsh 375 = 2 Hay 344.

(5) *Moharajah Juggeshur Bunwarree Gobind v. Seetchunder Sircar*, Marsh 375. The Court said in the course of the judgment :—" As the cause of action arose in Zillah Beerbhoom, and the defendant, at the time of the commencement of this suit, dwelt and still dwells in that district, the suit should have been instituted in Zillah Beerbhoom, and not in Zillah Rungpore. This suit is not for land or other immoveable property ; S. 12 of Act VIII of 1859, therefore, does not apply. The Principal Sudder Ameen, when the suit was first instituted, would, if informed of the facts, have returned the plaint to the plaintiff in order to its being presented in the proper Court ; see S. 33, Act VIII of 1859. This was not done. Issues were settled, and the suit allowed to proceed

In another case, after notice served upon, and appearance made by the defendant, it appeared that the Civil Court had no jurisdiction, but that the suit ought to have been instituted in the Revenue Court. *Held*, that the Civil Court had jurisdiction to order the defendant his costs; and that, as he had been unnecessarily brought before the Court, it ought to order him his costs.⁽⁶⁾

to trial. The Principal Sudder Ameen found the case in a stage ripe for hearing, and he acted legally in dismissing the suit when he found that he had no jurisdiction to try it. As to costs, we are of opinion that the plaintiff is liable for the whole of the costs. The Principal Sudder Ameen was competent to pass a judgment upon the issue raised as to the jurisdiction in this case; and if competent to pass a judgment, he was competent to direct by whom the costs were to be paid, under S. 187, Act VIII of 1859, notwithstanding that he had not any power to deal with the subject-matter of the suit by decree. The plaintiff brought his suit in the wrong Court. He forced the defendants' residence of Beerbhoom, to appear in a distant Court, and, though they at once took exception to the jurisdiction, he persisted in asserting that the suit was correctly brought in that district. He has, in our opinion, properly been required to pay the defendants' costs. We confirm the decision of the lower Court, and dismiss this appeal, with costs, bearing interest." *Maharajah Jugesshur Bunwarree Gobind v. Seetchunder Sircar*, Marsh 375 at pp. 376, 377. See also *Gopal Chunder Bose v. Dhurundur Roy*, Marsh 311.

(6) *Gopal Chunder Bose v. Dhurundhur Roy*, Marsh 311. The Court said in the course of the judgment:—"The plaintiffs in this suit having erroneously instituted a suit in the Court of the Principal Sudder Ameen, for a claim which, by Act X of 1859 (Bengal Code), was exclusively cognizable by the Revenue Courts, the case was struck off the file, and the plaint returned to the plaintiff, that he might proceed with it in the proper Court. The Principal Sudder Ameen having, however, overlooked the error in the first instance, and allowed the suit to be entered in the Register of Cases as provided by Act VIII of 1859, notice was served upon the defendant to appear, and he appeared accordingly; but the Principal Sudder Ameen, considering that the Court was to blame in issuing this notice, directed each party to pay his own costs. From this part of the lower Court's order the defendant has appealed, complaining that as he was obliged to enter an appearance, and employ a Vakeel at the instance of the plaintiffs, the Court should have ordered the plaintiffs to reimburse him for those expenses. The plaintiffs' pleader has argued in reply, that as the Court had no jurisdiction to try the subject-matter of the suit, it had no jurisdiction to pass an order for costs in the case. But it appears to us that as the plaintiff put the Court in motion, and procured the issue of the notice, to which the defendant was bound to appear, or run the risk of an *ex parte* decree being passed against him, he is not in a position to exonerate himself from the consequences of his own act by alleging the Court's want of jurisdiction. The Court having misapprehended or overlooked the question of jurisdiction when the plaint was presented, was bound to determine that point at the hearing; and to that extent it had jurisdiction over the case; and, therefore, it had jurisdiction also with regard to any necessary expenses incurred by the defendant up to that stage of the proceedings. It is clear that the defendant was put to the expense stated by him, through the plaintiffs' error. We think the Principal Sudder Ameen should have allowed him his costs; and we, therefore, amend his order, by awarding to defendant those costs, and the costs likewise of this appeal, in proportion to the amount he is entitled to receive from plaintiffs as costs in the Court below." *Gopal Chunder Bose v. Dhurundhur Roy*, Marsh, 311 at p. 312.

Where an action on a contract was brought in the High Court, and judgment was given to the plaintiff for Rs. 454-13-4: *Held* that as the amount so found due was less than Rs. 500, the plaintiff could not have his costs, unless the Judge who tried the cause certified that the action was fit to be brought in the High Court.⁽⁷⁾

It was further laid down in the case cited above that "the 37th clause of the Letters Patent constituting the High Court does not give the Court an uncontrolled discretion as to costs in civil suits."⁽⁸⁾

The fact that a suit eventually decreed by the Subordinate Judge for less than Rs. 1,000 would have been cognizable by the Munsiff's Court is no ground for dismissing it, although it is a ground for providing that plaintiffs should not be allowed any more for costs than they could have recovered if they had sued in the Munsiff's Court.⁹⁾

Where a Judge erroneously orders a Subordinate Judge to try proceedings in execution of a decree which are a portion of the original suit tried by himself, and the decree-holder carries on such proceeding so referred to the Sub-Judge, until the result is unfavourable to himself, and then objects in appeal on the score of non-jurisdiction, he may be required to pay all the costs incurred by the judgment-debtor in such proceedings before proceedings are instituted *de novo*.⁽¹⁰⁾

Sec. 26.—Landlord and Tenant—Rent and Ejectment Suits.

Costs.

- (i) In suits for rent.
- (ii) In ejectment suits.
- (iii) Miscellaneous—Where there is *prima facie* doubt on point of law.

Two suits for arrears of rent having been brought at one time before the same Revenue Court for the full amount of arrears due for certain years, one plaintiff suing for a ten annas and another for a six annas share of the rents, were dismissed by the Judge in

Costs (i) : In suits for rent.

(7) *Sabapati Mudaliyar v. Narayanaswami Mudaliyar*, 1 M.H.C.R. 115.

(8) *Ibid.*

(9) *Joy Kishen Doss v. J. N. Turnbull*, 24 W.R. 137 (138).

(10) *Moonshree Aftabooddeen Ahmed v. Mohinee Mohun Doss*, 15 W.R. 48.

appeal on the ground that, as the plaintiffs had collected the rents *ijmalle* up to the period for which arrears were claimed, they could not sue separately. *Held* that, in the peculiar circumstances of this case, in which both the shareholders were before the Court as plaintiffs representing the whole 16 annas of the claim, and that in suits which from the first were tried together, there was no law or procedure to prevent the Judge on appeal from doing justice between the parties.⁽¹⁾ As for the costs the Court said :—“The costs of all the Courts will abide the result of the ultimate decision of the Judge; but in awarding those costs, the Judge will be careful not to give more costs than he would have given had these suits been instituted in the first instance as one suit.”⁽²⁾

Where a landlord sued both the plaintiff and defendant jointly for rent of a holding, the defendant did not defend that suit and the landlord got against both of them a decree, the whole amount of which was paid by the plaintiff. On plaintiff suing the defendant for contribution for the amount of rent and costs paid by him (the plaintiff), it was held that the circumstance that the defendant submitted to a judgment jointly with the plaintiff established that he was jointly liable for the rent with the plaintiff and that the plaintiff's suit for contribution was maintainable.⁽³⁾

In a suit between landlord and tenant in the Court of the Collector, where the right to receive the rent was disputed on the ground that it was *bona fide* paid to a third person and that third person was brought on record and a decision was given in favour of that third person, *held* that there could be no appeal to the District Judge from the decision of the Revenue Court as between the intervenor and the plaintiff. Where under the above circumstances the plaintiff's landlord appealed to the District Judge, making both the tenants and the intervenor parties, and the District Judge reversed the decision of the Revenue Court and decreed the costs

(1) *Pyari Mohan Singh v. Mirza Gazi*, 2 B.L.R. A.C. 337=11 W.R. 270.

(2) *Ibid.*

(3) *Rama Panday v. Ramdhari Panday*, Cal. Case-law (Civil), Vol. II, p. 360. On the subject-matter of this section reference may also be made to the following works dealing with the subject of landlord and tenant :—Woodfall's Landlord and Tenant, 17th Ed., 1902; Redman and Lyon, Landlord and Tenant, 5th Ed., 1901; Fawcett's Law of Landlord and Tenant, 3rd Ed., 1905; Foa's Landlord and Tenant, 4th Ed., 1907; Halsbury's Laws of England, Vol. XVIII, pp. 402—403; Leake on Contracts, 5th Ed., 1906; Smith's Leading Cases (Notes to) 11th Ed., 1903. Reference may also be made to the provisions of the several special and local Acts of the Imperial as well as the local legislatures dealing with the subject of Landlord and Tenant.

of the suit as well as of the appeal against the intervenor, *held* that the decree of the District Judge so far as it affected the intervenor was invalid and should be set aside.⁽⁴⁾

A tender to a Collector of a balance of rent due to a zemindar was held not to be sufficient to bar an award of costs against the under-tenant on a suit for the balance brought against him by the zemindar, because, even had there been proof of an express tender to the Collector of a deposit of the whole amount of balance, that officer was not an authority competent to receive such a deposit.⁽⁵⁾

Where, in a decree for rent under Bengal Act VIII of 1869, the amount with costs amounted to less than Rs. 500, the decree-holder was held not entitled to add thereto his costs in execution proceedings in connection with the same decree (the total amount then exceeding Rs. 500) so as to enable him to take advantage of the exception under S. 58 of the Act and to save an application for execution made more than 3 years from the date of the decree, from being barred under the section.⁽⁶⁾

Where a landlord claims to eject a tenant, he claims to recover the tenant-rights in the holding, and the stamp duty chargeable on the plaint should be determined with reference to the market value of that right only.⁽⁷⁾ (ii) In ejectment suits.

A defendant is legally chargeable with that amount of stamp duty, which can legally be demanded from the plaintiff and not with the excess which he was obliged to pay through a mistake in law of the Court.⁽⁸⁾

It has been held in an old case that "if a plaintiff in ejectment recover any portion of the premises for which the action was brought, he is entitled to his costs."⁽⁹⁾

(4) *Mirza Anandram v. Mausama Begum*, 13 A. 264 = A.W.N. (1891) 107 following *Chotu v. Jitan*, 3 A. 63; *Krishna Ram v. Hingu Lal*, 4 A. 237 = A.W.N. (1882) 50; *Madho Prasad v. Ambar*, 5 A. 503 = A.W.N. (1883) 103; *Govind Ram v. Narain Das*, 9 A. 394 = A.W.N. (1887) 79 and referred to in *Nago Rao Jaideo v. Balaji Jageshwar*, 12 C.P.L.R. 1.

(5) *Neelkaunth Dass v. K. Ram Chundur*, 6 Sud. Dew. Adaw. Rep. Bengal (1850) 273 = 11 Ind. Dec. Old Series, p. 220.

(6) *Kadumbini Dabya v. Koylash Chunder Pal Chowdhury*, 6 C. 554 = 8 C.L.R. 19.

(7) *Ajudhya Chowbey v. Daibee Singh*, 3 Agra (Rev.) 5.

(8) *Ibid.*

(9) *Doe dem. Ramtonno Mookerjee v. Beebee Jeenut*, 23rd Oct. 1843, 1 Fulton, 256; Morley's Digest of Indian Cases, Vol. I, page 111. It is doubtful if this can be stated so broadly and whether there may not be several exceptions to the rule when stated so broadly. It would appear that the statement of law made in this case is to be taken as being made with reference to the particular circumstances of the case,

A decree was passed under S. 52 of Bengal Act, VIII of 1869, for arrears of rent and for ejectment if arrears were not paid within 15 days. During the pendency of the appeal preferred by the judgment-debtor the decretal amount was paid, but the appeal was dismissed with costs, and these costs were not paid within 15 days of the appellate decree. On an order from the Munsiff in execution for the attachment of the judgment-debtor's moveable property and for his ejectment from land in suit; *held* that the Munsiff's order was not without jurisdiction, as, in cases of this nature the only decree of which execution can be taken is the appellate decree which must be presumed to incorporate the terms of the original decree.⁽¹⁰⁾

(iii) Miscellaneous—
Where there is *prima facie* doubt on a point of law.

Where there was a *prima facie* doubt as to the law to be applied in case of a dispute between a landlord and tenant, and where the defence, though not successful, was not improper, the Court refused to allow costs to the successful plaintiff.⁽¹¹⁾

(10) *Thamal Marap v. Rani Abhoyeshwari Devi*, Cal. Case-law, Vol. I, p. 1491 (following 13 C. 13). One L believing his landlord's title defective, purchased the lands whereof he was tenant, before the expiration of his lease, from another party, in whom he alleged the real title to exist; taking the conveyance and bringing ejectment in the name of the lessor of the plaintiff. Judgment being subsequently signed by default; the present motion was made by the landlord for leave to enter into the common rule, and as such to defend his title. *Held*, under the circumstances that (contrary to the ordinary rule) the judgment must be set aside *without costs*. *D. D. Bissonath Day v. Edward Hilder*, (1847) G. Taylor 189=2 Ind. Dec. Old Series, p. 115.

(11) *Eastern Telegraph Co. v. Dent*, 2 C.W.N. (Journal Portion) cclxxv. In this case Mr. Justice Kennedy, after explaining the facts of the case, said:—"It was difficult to reconcile the two cases, but having regard to the decision in *Barrow v. Isaacs* it was impossible to say that there had not been a forfeiture, that case was also an authority against the equitable relief claimed by Dent Brothers. Judgment would be for plaintiffs but without costs, because it was right that defendants should contest such a case." *Eastern Telegraph Co. v. Dent and others*, 2 C.W.N. (Journal Portion) cclxxv. The following cases decided by the old Supreme and Sudder Courts relating to this branch of the subject may also be noted:—Where the zemindar failed to register the transfer of a putnee to plaintiff by right of inheritance, though called upon to do so, and dispossessed the plaintiff and alienated the putnee by way of mortgage, *held*, in a suit by plaintiff for possession, mesne profits and for registry, that the plaintiff was entitled to a decree as prayed for against the zemindar. No fee is payable for transfer of registry in cases of transfer by inheritance. The costs of the mortgagee impleaded as party must also be borne by the zamindar. *Konwur Ram Chunder Bahadoor v. Monohora Dasse*, (1846) 2 Sud. Dew. Adaw. Rep. Bengal (1846) 284=9 Ind. Dec., Old Series, p. 175. Where a decree was passed for possession of lands and mesne profits to be ascertained by enquiry in execution proceedings, but the Court allowed costs on the amount claimed in the plaint as and for mesne

Sec. 27.—Land Acquisition Cases.

Provisions as to costs in the Land Acquisition Act.

Costs in Land Acquisition cases, how calculated.

Costs, on what amount assessed.

Costs where Collector's award was enhanced by District Judge and Chief Court.

Costs where claimant is negligent in putting his case before Collector.

Costs in case of withdrawal or dismissal for default.

profits. *Held* that such costs ought not to have been awarded by the decree itself as the amount of mesne profits was not yet definitely determined. *Manick Chand Sahoo v. Hakim Chand*, 3 Sud. Dew. Adaw. Rep. Bengal (1847) 90=9 Ind. Dec., Old Series, p. 339. When plaintiffs sued to recover *mesne profits* of an estate, held that the Judge was not competent to pass a decree against them (plaintiffs) for balance of loan debt and interest payable to the defendants. *Held* further, that when the Judge had passed a decision decreeing plaintiff's possession, and charging the defendants with costs and remanding the case for more complete enquiry into *mesne profits*, which decision of his was maintained in appeal by the Sudder Court, the Judge was not competent in subsequently reviewing in appeal the lower Court's second decision as to *mesne profits*, to alter the allotment of liability for costs made in his first decision. *Bilas Singh v. Salig Ram Singh* No. 266, 13th June 1861, p. 460. Index to S.D.A.R.N.W.P. (1843—1871), p. 325. On a claim to a two annas share in the estate decreed by the Judge to the extent of one-fourth of the amount claimed, held that the Judge's finding on the facts of the case could not be disputed in special appeal, the Judge, however, should have awarded costs to the extent of the decree, and was incompetent to direct record of the plaintiff's name in the Collector's Register. Order accordingly modified. *Mussamat Choon Beebee v. Rahman Khan* No. 502, 13th July 1861, p. 559; Index to S.D.A.R.N.W.P. (1843—1871), p. 325. Where a revenue sale was set aside as illegal and the fault lay with the Collector, he is liable for all damages arising from his illegal act. But where the plaintiff who sought to set aside the sale consented not to claim his own costs and also agreed to pay such costs as are laid on Government, the Collector must be exonerated as regards costs. As regards the costs of the other defendants, plaintiff must bear the same under his engagement. *Musst. Unoopoorna Dibbea, wife of Ramgopal and mother of Puddum Lochun v. Kishenchunder Surma*, 3 Sud. Dew. Adaw. Rep. Bengal (1847) 495=9 Ind. Dec., Old Series, p. 616. When the plaintiff's suit is dismissed for his default, the defendant's costs must be payable by plaintiff under s. 2, Act XIX of 1841. An order that defendant is to bear his own costs is against that provision of law. *Gooroochurn Mullik v. Puddum Konwur Raee Chowdhree*, 4 Sud. Dew. Adaw. Rep., Bengal (1848) 215=10 Ind. Dec., Old Series, p. 139. In a suit to obtain a declaration that the *mokuraree* right of some of the defendants was liable to sale in satisfaction of an order for costs in a decree against them, the zamindar, one of the defendants, pleaded that he had cancelled the lease in consequence of the rents having fallen into arrears. *Held* that it was not open to the Court to decide as to the zamindar's right to cancel the *mokuraree*. The only question for decision was whether those defendants' rights in the *mokuraree*, whatever they were, could be sold for the realization of the costs due to plaintiff. *Rajah Mode Nurain v. Nittanund Bydr*, 4 Sud. Dew. Adaw. Rep. Bengal (1848) 356=10 Ind. Dec., Old Series, p. 242. Remand, upon application for special appeal, the lower appellate Court having erroneously applied cl. 4, s. 3, Reg. II, 1805, in refusing to inquire regarding a plea of limitation, and its award of costs appearing also to require reconsideration. *Kishenpersaud Ghose Hajraj v. Luckheenurain Mujmoodar*, 6 Sud. Dew. Adw. Rep. Bengal (1850) 411=11

Costs of investment of money deposited in respect of lands belonging to persons incompetent to alienate.

Costs paid out of compensation.

Costs incurred in apportionment of rent.

Costs of ascertaining parties entitled.

Costs of mortgagees served with notice.

Pleader's fees in Land Acquisition cases :—

(i) General rule allowed on difference between amount claimed and amount awarded.

(ii) Where claim is exorbitant and speculative.

(iii) Where subject-matter is capable of being valued.

(iv) Practice of the Allahabad High Court.

Costs, appeal as to.

Provisions as to costs in the Land Acquisition Act,

Section 26 of the Land Acquisition Act (I of 1894) enacts that "every award under this Act shall be in writing signed by the Judge, and shall specify the amounts awarded together with the grounds of awarding each of the said amounts." (1)

S. 27 makes provision for the costs of proceedings under the Act. It says that "every such award shall also state the amount of costs incurred in the proceedings under this Act, and by what persons and in what proportions they are to be paid. When the award of the Collector is not upheld, the costs shall ordinarily be paid by the Collector, unless the Court shall be of opinion that the claim of the applicant was so extravagant or that he was so negligent in putting his case before the Collector that some deduction from his costs should be made or that he should pay a part of the Collector's costs." (2)

With regard to the object of framing the above section the members of the Select Committee state in their report :—

"We are of opinion that when the Judge finds a Collector's award to have been inadequate the Collector should ordinarily pay

Ind. Dec., Old Series, p. 335. Sale of a *putnee* tenure reversed, the Collector (Mr. Edward Stirling) having refused to take any bid unless accompanied by deposit of the full amount of purchase-money offered by the party bidding. S. 9, Reg. VIII, 1819, warrants only the requisition of an immediate deposit to the extent of 16 per cent. of the purchase-money. Costs of the action, with an exception stated, awarded against the purchaser at the illegal sale, as the litigation had been caused by his proceedings in endeavours to maintain the sale, and as the Collector, by whom the sale was conducted, had left the country. *K. Mohun Burral v. L. Monsee Dasse*, 6 Sud. Dew. Adaw. Rep. Bengal (1850) 467 = 11 Ind. Dec. Old Series, p. 379 (380).

(1) Act I of 1894 (Land Acquisition), S. 26.

(2) Act I of 1894 (Land Acquisition), S. 27.

the costs of the reference, but we have inserted the clause giving discretion to the Court to give the Collector part of his costs whenever the claim of the objector proves to be extravagant.”(3)

Again S. 53 of the same Act makes the further provision that “save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under this Act.”(4)

Costs in matters under the Land Acquisition Act, should be calculated in the same way as in ordinary suits.(5)

Costs in Land Acquisition cases, how calculated.

Costs should be assessed on the amount in dispute only, *i.e.*, in excess of the Collector's award.(6)

Costs, on what amount assessed.

Where the Collector's award was enhanced by the District Judge, as also by the Chief Court, the Chief Court allowed the costs of the claimant to be paid by the Collector.(7)

Costs where Collector's award was enhanced by District Judge and Chief Court.

(3) See The Select Committee's Report on Land Acquisition Act, 1894, dated 2nd February 1893.

(4) S. 53 of Act I of 1894 (Land Acquisition). This would make S. 35 of the Code of Civil Procedure which deals with costs apply to proceedings under the Land Acquisition Act.

(5) *Dya Nand Anglo-Vedic College Management and Trusts Society v. Secretary of State for India*, 126 P.R. 1916. It was held under the older Land Acquisition Act X of 1870 that “a Judge appointed, under that Act, to perform the function of a Judge generally within the local limits of the ordinary original jurisdiction of the High Court was not to have the power to award costs in apportionment proceedings. *Ramanujam Naidoo v. Rengiah Naidoo*, 8 M.H.C. 192. But now see S. 53 of the present Land Acquisition Act, I of 1894, which enacts that the Code of Civil Procedure should apply to proceedings in Court under the Land Acquisition Act. In construing the Land Acquisition Act the following observations of Lord Truro in *East and West India Docks and Birmingham Railway Co. v. Gatliffe*, must be borne in mind. He said “these acts are to be liberally expounded in favour of the public and strictly expounded as against the Government or Company taking the land.” 3 Mag. & G. 155 cited in *Parmanand v. Secretary of State for India*, 44 P.R. 1904. In the case of acquisition of land within a Municipality, the compensation is to be assessed on the basis of the Municipal assessment, but one-sixth of the Municipal assessment for the whole area should be deducted for road cess and other costs, and taxes and ground rents should also be deducted and the balance estimated at 20 years' purchase. (Unreported Case—*Secretary of State v. Baij Nath*, (1903) 12 C.W.N. c.c.); *Tulshi Mahania v. Secretary of State for India*, Cal. Case-law, Civil, Vol. II, p. 637.

(6) *Parmanand v. Secretary of State for India*, 44 P.R. 1904.

(7) *Parmanand v. Secretary of State for India*, 44 P.R. 1904. The following observation of the Chief Court in the course of the judgment may also be noted. The Court said :—“As regards costs, we think under the ordinary rule laid down in S. 27 (2) of the Land Acquisition Act, they should be paid by the Collector. There is nothing to take the case out of that rule, and we cannot in view of the enhancements of compensation made by the Court below and by ourselves over and above the Collector's award,

Costs where claimant is negligent in putting his case before Collector.

S. 27 of the Land Acquisition enacts that negligence of the claimant in putting his case before the Collector may be ground to withhold costs or a portion of costs from the claimant. With regard to what would be such negligence in a claimant in putting his case before the Collector as would justify a deduction from the amount of costs which would otherwise be awarded to him under S. 27 of the Land Acquisition Act, the following observations may be noted :—"It is obvious that a man may omit to give facts bearing on the question of the value of his property to the Special Collector, or he may consider his lands susceptible of a limited development at one time and a more expanded one at another and in neither case is Government to blame for the insufficiency of its offer. In our opinion while the former case would probably always be negligence within the section, the latter need not be so, but may be due to an increase of knowledge."⁽⁸⁾

Costs in case of withdrawal or dismissal for default.

In a Land Acquisition case full costs can be allowed only when a suit has been dismissed on the merits. When the claim is withdrawn or dismissed for default in no event should an order for costs be made in excess of half the full fees of the suit.⁽⁹⁾

Costs of investment of money deposited in respect of lands belonging to persons incompetent to alienate.

In all cases of monies deposited to which S. 32 of the Land Acquisition Act applies, *i.e.*, in cases of investment of money deposited in respect of lands belonging to persons incompetent to alienate, "the Court shall order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the Collector, namely :—(a) the costs of such investments as aforesaid ; (b) the costs of the orders for the payment of the interest or other proceeds of the securities upon which such monies are, for the time being, invested, and for the payment out of Court of the principal of such monies, and of all proceedings

regard the claim of the applicant as extravagant. With reference to the contention of the learned Government Advocate that costs should be assessed on the amount in dispute only, *i.e.*, in excess of the Collector's award, we find that the Calcutta High Court awards pleader's costs on this principle, but our Court apparently has no fixed rule on the subject. The Calcutta rule appears to be equitable as the amount awarded by the Collector can always be withdrawn under protest by the claimant and he gets interest on it if it is not at once paid or deposited in Court. There is thus no analogy between a contest of this kind under the Land Acquisition Act, and that in a case in which an insufficient tender has been made." *Permanund v. Secretary of State for India*, 44 P.R. 1904, at pp. 139, 140.

(8) Ref. No. 29 of 1903, T.A., Bom. cited in Mr. Nanniah's Land Acquisition Act.

(9) *Nanhilal Agrari v. The Secretary of State for India*, Cal. Case-law (Civil), Vol. II, p. 355=11 C.L.J. 217.

relating thereto except such as may be occasioned by litigation between adverse claimants."⁽¹⁰⁾

Where lands are compulsorily taken by Railway Company, the Court has jurisdiction to order payment of the mortgage debts and costs out of the deposit paid in by the Company, without reference to the fact that that deposit covered other lands of the same mortgagor not subject to the mortgage.⁽¹¹⁾

A Railway Company paid a deposit into Court, and took compulsory possession of some land acquired for the purposes of their act. The land was subject to agreements for building leases, and it became necessary to apportion the rents:—*Held*, that the costs of apportioning the rents were payable by the Company; and an order was made for payment out of the money in Court.⁽¹²⁾

But it was held in earlier English case that "Where there is a bargain between a ground landlord of houses let at a gross ground rent, and a Railway Company, which has taken some of the houses, for the payment of compensation at so many years' purchase on the rents of the houses taken, the costs of apportioning the ground rents between the houses taken and those left are not payable by the Company under the Lands Clauses Act, S. 82."⁽¹³⁾

Where a tenant for life might, but for disputes between himself and his incumbrancers, have obtained an order for payment of dividends to himself of a fund in Court on a former occasion, he will not be allowed as against the Company the costs of an additional application relating to the dividends.⁽¹⁴⁾

On a petition by the tenant for life of a fund paid into Court by a Railway Company, praying for the investment of the fund and payment of the dividends to the petitioner, certain persons entitled to a charge on the real estate in respect of which the fund was paid being served with the petition and appearing, the Court refused to direct the Railway Company to pay their costs.⁽¹⁵⁾

(10) See Land Acquisition Act (I of 1894), S. 32 (2); Trevelyan on Minors, 3rd Ed., 1906, p. 324.

(11) *Martin v. L.C. & D. Ry.*, 13 L.T. 355; 14 W.R. 24 (Eng.).

(12) *In re Flower*, 36 L.J. Ch. 198; L.R. 1 Ch. 599; 12 Jur. N.S. 872; 15 L.T. 258; 14 W.R. 1016 (Eng.).

(13) *Ex parte Buck, In re Hampstead Junction Ry.*, 1 Hem. & M. 519; 33 L.J. Ch. 79; 9 Jur. N.S. 1172; 9 L.T. 374; 12 W.R. 100 (Eng.).

(14) *In re Jolliffe*, 3 Jur. N.S. 633.

(15) *In re Webster*, 2 Sm. & G. (App.) 6.

A Railway Company took lands which were vested in one for life, with remainder over, and were subject to a mortgage in fee and to mortgages of the life-estate :—*Held*, that the Company must pay the costs of the mortgagees who had been served with, and appeared upon, a petition for the reinvestment of the fund and the application of the income.⁽¹⁶⁾

When a tenant for life petitions for the interim investment of purchase monies paid in by a Railway Company under the Land Clauses Act, and for the payment to him of the dividends thereon when invested, it is not necessary for him to serve persons having charges on the inheritance prior to the life-estate, and the costs of such parties, if served, will not be allowed as against the Company.⁽¹⁷⁾

Pleader's fees in Land Acquisition cases :—
(i) General rule allowed on difference between amount claimed and amount awarded.

Pleader's costs in Land Acquisition cases can be allowed to each side on the difference between the amount claimed and the amount awarded.⁽¹⁸⁾

In Land Acquisition cases pleader's fee in the Court below can be allowed at 5 per cent. on the difference between the award of the Collector and that of the Judge.⁽¹⁹⁾

(ii) Where claim is exorbitant and speculative.

Where the claim of an objector to a Land Acquisition award is found to be exorbitant, speculative and absurdly extravagant the Counsel's fees for the Secretary of State should be allowed *ad valorem*, on the amount in appeal.⁽²⁰⁾

(16) *In re Brook's Will*, 30 Beav. 223 ; 31 L.J. Ch. 456 ; 5 L.T. 388 ; 10 W.R. 35 (Eng.).

(17) *In re Morris*, *In re Settled estates*, 45 L.J. Ch. 63 ; L.R. 20 Eq. 470 ; 23 W.R. 851 (Eng.).

(18) *Ramzur Singh v. Secretary of State for India*, 21 Ind. Cas. 270=174 P.W.R. 1913=309 P.L.R. 1913.

(19) *Ram Saran Das v. Collector of Lahore*, 9 P.W.R. 1911=9 Ind. Cas. 228.

(20) *Faiz Muhammad v. Secretary of State for India*, 34 P.L.R. 1913. Reid, C.J., and Robertson, J., said :—"Although the amount to be allowed as Counsel's fee is discretionary, we see no reason for not allowing the usual *ad valorem* fee on the amount in appeal. The learned Divisional Judge has remarked that the appellant's claim is the most absurdly extravagant claim that he ever had before him. It is not denied that the appellant was awarded for a plot of land between the two plots now in suit, compensation at the rate now awarded and his claim was exorbitant and speculative. Under such circumstances, owners have only themselves to thank if they are heavily mulcted in costs, and Counsel's fees paid by the Secretary of State are usually assessed on the value of the appeal." *Faiz Muhammad v. Secretary of State for India*, 34 P.L.R. 1913.

S. 27 of the Land Acquisition Act (I of 1894) does not authorize the Court to allow any amount for pleader's fee at its discretion. Where the subject-matter is capable of being valued, pleader's fees must be allowed on the scale laid down in the Civil rules of practice or on such other scale, as may be in force for the particular Court.⁽²¹⁾

Proceedings in the Court of a District Judge under the Land Acquisition Act, are not suits for money or suits for land within the meaning of Rule 457 of the Rules of the 4th of April 1894, for the Courts subordinate to the High Court for the North-Western Provinces. A pleader's fee in such proceedings should be calculated according to Rule 461 of the Rules.⁽²²⁾

(iii) Where subject-matter is capable of being valued.
(iv) Practice of the Allahabad High Court.

(21) *Ehambara Gramany v. Munisami Gramany*, 31 M. 328.

(22) *Kanhaiya Lal v. Secretary of State for India*, 14 Ind. Cas. 214. The following extract from the judgment may also be noted:—"This appeal arises out of proceedings held in the Court of the District Judge on a reference made by the Collector under the Land Acquisition Act of 1894. The only question is whether the pleader's fee has been calculated correctly in the Court below. The appellant contends that the pleader's fee should have been calculated under Rule 461 of the Rules of the 4th of April 1894. The respondent contends that the fee was rightly calculated under Rule 457 of the Rules of the 4th of April 1894, so far as it is relevant to the present case, is as follows:—"In suits or in appeals from original or appellate decrees in suits for money, effects or other personal property or for land or other immovable property of any description when such suits or appeals are decided on the merits after contest 'here (follows the scale of fees). Rule 461 is as follows: 'In appeals from orders and in other cases' (here follows the scale of fees). It is agreed that the decision in the present case was arrived at on the merits after contest. The question is whether the proceedings in the Court below should be regarded as a suit for money or for land. There was certainly no suit for land. There was only a claim for money awarded as compensation for land taken under the Act. There is no definition of the word 'suit' in the rules, but we think that proceedings taken under the Land Acquisition Act cannot be regarded as a suit within the meaning of Rule 457. The proceedings are not started by a plaintiff, nor are they started by any one who is in the position of a plaintiff. They are started by a reference by the Collector made at the instance of a person who is dissatisfied with the Collector's decision. Throughout the Act, the proceedings in the District Judge's Court are referred to as an inquiry. There is no provision in the Land Acquisition Act like S. 261 of the Indian Succession Act, which provides that contentious proceedings under the Succession Act shall take the form of a regular suit. The only provision in the Land Acquisition Act, to which the respondent can refer in support of his contention that such proceedings are suits, is S. 54. That section provides that, subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees, an appeal shall lie to the High Court from the award or from any part of the award of the Court in any proceedings under this Act. This section does not say that the decision of the Court is a decree. It calls the decision an award and makes the award appealable according to the provisions of the Code of Civil Procedure applicable to appeals from original decrees. We were referred to the decision of this Court in *Shao Rattan Rai v. Mohri*, 21 A. 354, in that case it was decided that an appeal from an award made by the District Judge under the Land Acquisition Act must be stamped as an appeal from

Costs, appeal
as to.

Under S. 25 of the Land Acquisition Act an award of costs is a part of the award and is appealable as such under S. 54 of the Act. (23)

Sec. 28.—Legal Practitioners Act.

Costs of reference to High Court under Legal Practitioners Act.

Costs of
reference to
High Court
under Legal
Practitioners
Act.

A District Judge has no power to award costs in a matter referred by him to the High Court under the Legal Practitioners Act. (1)

The High Court alone has power to give directions as to the award of costs incurred between the date of the petition and the date of reference to the High Court. (2)

an original decree. That case does not assist the respondent, for it is admitted that there may be a decree in proceedings which cannot be described as a suit. We have come to the conclusion that proceedings in the District Judge's Court under the Land Acquisition Act are not suits for money or suits for land within the meaning of rule 457 of the rules of the 4th of April 1894. The pleader's fee should, therefore, have been calculated under Rule 461." *Kanhaiya Lal v. Secretary of State for India*, 14 Ind. Cas. 214.

(23) *Bhambara Gramany v. Munisami Gramany*, 31 M. 328. The following ruling under the older Act X of 1870 may also be noted. It was held in that case, that "an appeal did not lie, under Act X of 1870, on the question of the amount of costs, which the Judge was to determine in the same way as was done in suits by the taxing officer," *Sreemutty Bamasoondaree Dabee v. W. Verner, Collector, under Act X of 1870, for the Town of Calcutta*, 22 W.R. 136=19 B.L.R. 189. The Court said in the course of the judgment:—"It has been contended that the decision as to costs is wrong. I think an appeal does not lie on the question of the amount of costs. By S. 35 the subject of appeal is the amount of the compensation. The Act does not clearly lay down what is to be done about costs, or how the amount of them is to be determined, but it seems to me that the Judge is to determine the amount of costs incurred by either party in the same way as it is done in suits by the taxing officer. In similar proceedings in England the taxing officer determines the amount of the costs. I think there is no appeal under this Act on a question of costs, and there is no analogy between this and an appeal from a judgment of the Court where the question of costs may be gone into. The general rule in such cases is that the quantum to be allowed is left to the taxing officer. What the Court deals with on an appeal is not whether the proper amount has been allowed, but whether the allowance has been made on a proper principle here there is no appeal either as to the amount or the principle on which the costs have been allowed, but only as to the amount of compensation to be awarded." See *Sreemutty Bamasoondaree Dabee v. W. Verner, Collector of Calcutta*, 22 W.R. 136 (136)=19 B.L.R. 189.

(1) *Venkata Rao v. Marwadi Motiram*, 1 L.W. 937.

(2) *Venkata Rao v. Marwadi Motiram*, 1 L.W. 937. In this case the respondent filed a petition before the District Judge complaining of the conduct of the present petitioner. The Judge thereupon referred the matter to the High Court and the reference was duly disposed of. The order of the High Court provided for the costs of the present respondent in the matter of the said reference, but was silent as to the costs incurred before

Sec. 29.—Misjoinder of parties and causes of Action.

Costs in case of dismissal of suit for misjoinder.

Defendants not confining their defence simply to misjoinder.

Scale of costs.

Plaintiff allowed to elect on payment of costs.

When a suit is dismissed for misjoinder, the payment of the defendant's costs by the plaintiff is the legal result of such dismissal.⁽¹⁾

Costs in case of dismissal of suit for misjoinder.

Where a plaint had been rejected as having been filed against several persons who had different defences, it was held to be within the discretion of the Judge, in appeal, to dismiss the suit and saddle the plaintiff with the costs of all the defendants, notwithstanding that all the latter, except one set, admitted the claim, and retired from the contest.⁽²⁾

In a suit on a mortgage against A, the executrix under the will of the mortgagor and entitled to a life estate in the property. B, C and D, the reversioners under the will, were also joined as defendants. They pleaded that they were not necessary parties, but joined A in disputing the claim in suit. The Court below decreed the claim in full with costs against A but dismissed the

Defendants not confining their defence simply to misjoinder.

the District Judge. The respondent then applied to the District Judge for the said costs and had the same granted to him. Against the said order granting costs the petitioner preferred this Civil Revision Petition under S. 115 of the Civ. Pro. Code. The Court (Kumarasamy Sastri, J.) said in the course of the judgment :—" The District Judge had no power to award costs in a matter referred by him to the High Court under the Legal Practitioners Act. The High Court in disposing of the reference provided for costs, and if the counter-petitioner wanted to get any costs incurred by him in the lower Court he should have got directions from the High Court as to the costs incurred by him between the date of his petition against the legal practitioner and the date when the Judge referred matters to the High Court. The Legal Practitioners Act does not authorise the District Court to award any costs. I set aside the order of the District Judge with costs in this and the lower Court." *Venkata Rao v. Marwadi Motiram*, 1 L.W. 937 (1938).

(1) *Muthra Pershad v. Bunde Roy*, 5 N.W.P. 20.

(2) *Kossella Koer v. Beharee Patuck*, 12 W.R. 70. Glover, J., said :—" The other objection taken is that the appellants ought not to have been saddled with the costs of all the defendants in the first Court. This also was a matter for the discretion of the Courts below, and it appears to us that that discretion was properly exercised. If the plaintiffs chose to bring into Court different parties who all have different defences, and if the result was the rejection of their claim, they have only themselves to thank, and we cannot see that they have any reason to claim exemption from payment of all the costs." *Kossella Koer v. Beharee Patuck*, 12 W.R. 70 (71).

suit with costs as against B, C and D. *Held*—That if the rever-
sioners had confined their defence to merely pleading that they were
unnecessary parties, the decree of the lower Court could not be
questioned; but they having disputed the plaintiff's claim in
common with A, and having been unsuccessful therein, the proper
order for costs would be to award them pleader's fees, not upon the
full amount of the claim, but upon one half of that amount.⁽³⁾

Scale of
costs.

In a suit against 34 defendants to recover 3,820 beegahs of land,
13 came in and defended separately, each in respect of his own
portion of the land claimed. The suit was dismissed for multifari-
ousness. Fixing a certain valuation for the suit so far as it was
dismissed, the Judge allowed each defendant full costs upon that
valuation, and vakeel's fee, being, in many instances, greater than
the value of the property in dispute. *Held*, that this could not be
a just and equitable way of awarding fees, and that the best plan
in the present case was to allow each defendant in respect of a
plot exceeding 40 beegahs a fee of five gold mohurs; of a plot
exceeding 20 beegahs, and not exceeding 40 beegahs, three gold
mohurs; and of a plot less than 20 beegahs, two gold mohurs.⁽⁴⁾

(3) *Tara Prosunno Mukherjee v. Satish Chandra Singh*, 4 C.W.N. 90. The
power given by S. 220, Civ. Pro. Code., to a Court to apportion costs in any manner it
thinks fit, is subject to the controlling power of the appellate Court. *Tara Prosunno
Mukherjee v. Satish Chandra Singh*, 4 C.W.N. 90.

(4) *Rajah Rooddur Narain Roy v. Coomar Narain Patnaick*, 13 W.R. 320.
Norman, J., said in the course of the judgment:—A discussion arose as to the principle
on which the costs were to be calculated. The Judge found that, as regards property
to the value of 2,300 rupees, different defendants had submitted to decrees, and he took
5,440 rupees as the value of the suit so far as it was dismissed. Having done that, he
allowed to each defendant full costs upon a valuation of Rs. 5,440, and as a con-
sequence, to fifteen defendants a vakeel's fee of Rs. 257 each. Practically speaking,
the vakeel's fee allowed is, in a very large number of instances, much greater than the
whole value of the property in respect of which the successful defendants came into
Court. It is clear that this cannot be said to be a just and equitable way of awarding
payment of fees according to the rules of this Court. The defendants by this means
got costs as upon a total valuation of 79,600 rupees, not at the rate of five per cent.
on the first 5,000 rupees, two per cent. on the next 15,000 rupees, one per cent. on the
next 30,000 rupees or up to 50,000 rupees, and half per cent. on the 29,600 rupees
exceeding the sum of 50,000 rupees, but for every separate defendant costs are calculated
at the maximum rate of five per cent. on the first 5,000 rupees or 5,440 rupees. Now, if
the separate defendants having separate interests had set up distinct defences and succeeded
thereon—in other words, if the Judge had gone on to try this case notwithstanding the
objection of multifariousness and dismissed the whole of it as against each defendant
separately upon the merits—under rule 7 it would appear that the costs of each defendant
would have been allowed at a rate according to the value of his separate interest to be
ascertained by reference to the scale in rule 1. It is said, and said with some truth, that,
owing to the peculiar form of the present suit, the defendants have been put to greater

In *Gokibai v. Lakhmidas* (5), which was also a case of misjoinder of causes of action, the Court ordered the plaintiff to elect, directing that she might proceed with either claim subject to her paying any costs specially caused to the defendant by the misjoinder. (6)

Plaintiff allowed to elect on payment of costs.

Sec. 30.—Mortgage Suits.

Provisions of the Code of Civil Procedure regarding mortgage-suits and costs therein :—

- (a) Preliminary decree in foreclosure suit.
- (b) Final decrees in foreclosure suit.
- (c) Power to enlarge time.
- (d) Discharge of debt.
- (e) Preliminary decree in suit for sale.
- (f) Power to decree sale in foreclosure suit.
- (g) Final decree in suit for sale.
- (h) Recovery of balance due on mortgage.
- (i) Preliminary decree in redemption suit.
- (j) Final decree in redemption suit. Power to enlarge time in redemption suits.
- (k) Costs of mortgages subsequent to decrees.
- (l) Application of proceeds.
- (m) Application of the above provisions to charges.

Costs in mortgage suits—Mortgagees entitled to add his costs to his security.

Costs, right to, extends to persons claiming through mortgagees.

expense than would have been the case if the plaintiff had shown that, as regards each one of the defendants, the plaintiff sought to recover only the property held by such defendant separately. There is no doubt that that is what he meant and what the opposite parties understood him to have meant notwithstanding the defective form of his plaint. We think, however, that it is fair that each defendant should be allowed a larger sum by way of costs than if the plaintiff had confused his claim against each defendant to the land held by him. But there is no doubt that the amount awarded by the Judge must very greatly exceed anything that these small holders can have paid or been expected to pay to their vakeels in the Judge's Court. We think, that, in a case of this kind, it would have been a convenient course to have taken a valuation, say, double that of the amount at which the entire land claimed was originally valued in the suit, and allowed to the several successful defendants costs in a proportion equal to their shares upon that valuation. We think the best plan in the present case will be to allow each defendant who defended the suit in respect of a plot of land exceeding 40 beegahs a vakeel's fee of five gold mohurs ; to each defendant who succeeded in respect of a plot of land exceeding 20 beegahs and not exceeding 40 beegahs, a fee of three gold mohurs ; and to the defendants who succeeded in respect of a plot of land less than 20 beegahs, a vakeel's fee of two gold mohurs. The intervenors appear to have come in of their own accord. There has been no adjudication as to their rights, and there seems to be no reason why they should be allowed any costs. The decrees of the lower Court will be modified accordingly. Each party will bear his own costs of this appeal. *Rajah Rooddur Narain Roy v. Coomar Narain Patnaik*, 13 W.R. 320 (321).

(5) 14 B. 490 (492). *N. B.* :—This case has been dissented from in *Jankibai v. Shrinivas Ganesh*, 38 B. 120.

(6) See *Amir Ali's Civil Procedure Code*, 2nd Ed., 1916 p. 624.

Costs as against puisne incumbrancers—Prior mortgagee can only add his costs to his debt.

Costs, when personally recoverable from mortgagor.

Costs, items of, allowed to mortgagee.

Costs allowed to mortgagee—Examples.

Costs where right to redeem is disputed.

Exception to rule about mortgagee's right to costs—In gross cases mortgagee may be ordered to pay costs.

Costs when refused to mortgagee.

Costs unnecessarily incurred would be disallowed.

Costs awarded against mortgagee—Examples.

Costs irrelevant to mortgage.

Costs incurred by improper joinder of parties.

Costs caused by omission to join a necessary party.

Costs where mortgagee refuses proper tender.

Costs where mortgagee to whom nothing is due commences foreclosure suit—He must bear such costs.

Costs, rule as to—That accounting party who cannot prove disbursements will have no costs.

Costs of equitable mortgagee—He has same rights as to costs as legal mortgagee.

Costs—Only one set allowed to owner of share and his incumbrancers.

Costs by way of remuneration for work done by himself—How far mortgagee entitled to charge for.

Costs of preparing security not mortgagee's costs which can be added to security.

Costs of assignments made behind his back; nor costs of deeds not necessary to security or copies of security on discharge of debt.

Costs of redemption.

Costs and expenses incurred under S. 83 of the Transfer of Property Act.

Subsequent mortgagees, liability of.

Court-fee and jurisdiction.

Rule making powers of High Court.

Interest on costs.

Set-off of costs against mortgage-debt.

Provisions of the Code of Civil Procedure regarding mortgage suits and costs therein.

THE following are the important provisions of the Code of Civil Procedure⁽¹⁾ regarding suits on mortgage and costs in such suits:—

(a) Preliminary decree in foreclosure suit,

“In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a decree—(a) ordering that an account be taken of what

(1) Act V of 1908, O. XXXIV, rr. 1 to 15. On the subject-matter of this section, see Fisher on Mortgages, 5th Ed., Ss. 1863—1931, pp. 890—912; (to the excellent

will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or (b) declaring the amount so due at the date of such decree, and directing (c) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property, but (d) that, if such payment is not made on or before the day to be fixed by the Court, the defendant shall be debarred from all right to redeem the property.”⁽²⁾

Where, on or before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in r. 10, ⁽³⁾ the Court shall pass a decree —(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and, if so required, (b) ordering him to re-transfer the mortgaged

(b) Final decree in foreclosure suit.

analysis in which work the authors are much indebted in the preparation of this section). Coote's Law of Mortgage, 5th Ed., Vol. II, pp. 866—879; Encyclopædia of the Laws of England, Vol. IX, Heading “Mortgage” pp. 379—382; Ashburner on Mortgage; Gour's Law of Transfer in British India, Vol. II; commentaries on the Transfer of Property Act by Nanniah and Kasturi Ranga Iyengar published in the Lawyer's Companion Series, Notes on the chapter on Mortgages; Code of Civil Procedure, O. XXXIV, and Notes thereon in Sanjiva Rao's Commentaries; Morgan and Wurtzburg, pp. 221—240; Halsbury's Laws of England, Vol. XXI, pp. 156; 231—244; 295—296; 317—318.

(2) Civ. Pro. Code (Act V of 1908), O. XXXIV, r. 2. Where costs have been distinctly and separately ordered in a foreclosure decree, they cannot be considered as part and parcel of the money due upon the mortgage. Therefore, where such a decree is afterwards confirmed by an order absolute for foreclosure and the mortgagee obtains possession thereunder, he is still entitled to proceed with execution as to costs. *Damodar Das v. Budh Kuar*, 10 A. 179=8 A.W.N. 68 referred to in *Mukund Lal Parwar v. Seth Mangaljeet*, 12 C.P.L.R. 78 (81); *Dhondur Pandit v. Mahant Doulatpuri*, 3 N.L.R. 97 (100); *Shaffar Khan v. Satyanunda Das Gupta*, 13 C.W.N. 742 (743) and distinguished in *Rajkumar Singh v. Sheo Narayan Sahu*, 35 C. 431 (432)=12 C.W.N. 364=8 C.L.J. 152.

(3) Of O. XXXIV of the Civ. Pro. Code (Act V of 1908),

property as directed in the said decree, and, also, if necessary, (c) ordering him to put the defendant in possession of the property.⁽⁴⁾

Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree, that the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property.

(c) Power to enlarge time.

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time, postpone the day fixed for such payment.⁽⁵⁾

(d) Discharge of debt.

On the passing of a decree under sub-r. (2) (6) the debt secured by the mortgage shall be deemed to be discharged.⁽⁷⁾

(e) Preliminary decree in suit for sale.

In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in clauses (a), (b) and (c) of r. 2⁽⁸⁾ and also directing that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid, together with subsequent interest and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same.⁽⁹⁾

(f) Power to decree sale in foreclosure suit.

In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff or of any person interested either in the mortgage money or in the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit including the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms.⁽¹⁰⁾

(g) Final decree in suit for sale.

Where on or before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent

(4) Civ. Pro. Code (Act V of 1908), O. XXXIV, r. 3, cl. 1.

(5) Civ. Pro. Code (Act V of 1908), O. XXXIV, r. 3, cl. 2.

(6) Cited *supra*.

(7) Civ. Pro. Code (Act V of 1908), O. XXXIV, r. 3, cl. 3.

(8) Of O. XXXIV of the Code of Civil Procedure cited *supra*.

(9) Civ. Pro. Code (Act V of 1908), O. XXXIV, r. 4, cl. 1.

(10) Civ. Pro. Code (Act V of 1908), O. XXXIV, r. 4, cl. 2.

costs as are mentioned in r. 10, ⁽¹¹⁾ the Court shall pass a decree—
 (a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and, if so required, (b) ordering him to re-transfer the mortgaged property as directed in the said decree, and also, if necessary (c) ordering him to put the defendant in possession of the property ⁽¹²⁾.

Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in r. 4 (12-a) of O. XXXIV of the Code of Civil Procedure (12-b).

Where the net proceeds of any such sale are found to be ^(h) Recovery of balance due on mortgage. insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount ⁽¹³⁾.

(11) Of O. XXXIV of the Code of Civil Procedure (Act V of 1908).

(12) Civ. Pro. Code (Act V of 1908), O. XXXIV, r. 5, cl. 1.

(12-a) See Civ. Pro. Code (Act V of 1908), O. XXXIV, r. 5, cl. 2.

(12-b) Act V of 1908.

(13) Civ. Pro. Code (Act V of 1908), O. XXXIV, r. 6. "Formerly the only amount recoverable under this rule was the "amount due on the mortgage" and which, of course, meant the principal and interest secured by the mortgage. But did it also include the costs awarded in the suit? On this point the Allahabad High Court had decided that the costs awarded could not be considered as forming part of the money due upon the mortgage, *Damodar v. Budhkuar*, 10 A. 179; *Ram Lal v. Silchund*, 23 A. 439; dissented from in *Kushal Singh v. Shrinivas Rao*, 2 C.P.L.R. 94; *Mukundlal v. Seth Mangaljeet*, 12 C.P.L.R. 78 (81); and if so, it followed that they could not be recovered under the section. But this view appears to have been subsequently abandoned, for it was subsequently held by the majority of the Full Bench that a decree drawn up strictly in accordance with the provisions of r. 4 could not direct the costs of the suit to be recovered otherwise than out of the mortgaged property. It then follows that under a decree so framed, the costs adjudged must be regarded as forming a portion of the mortgage-money. And this view is in consonance with that taken by the Calcutta High Court which has maintained that while the Court has no doubt power under S. 220 of the Code of Civil Procedure to give the costs against the mortgagor personally, yet it by no means follows that this is to be presumed in every case; the question is essentially one of the construction of the decree, which should adjudge how the costs are to be recovered. Thus in a Calcutta case where the decree ran thus: "It is ordered that the defendant shall pay to the plaintiffs the sum of Rs. 2,550 claimed and costs Rs. 312, total Rs. 2,862 within two months from the date of the signing of the decree...If the defendant do not pay the amount within the time prescribed, they will lose their right of redeeming the property mortgaged, and possession thereof will be given to the plaintiff;" it was held that reading the decree as a whole both sums of money were payable by the judgment-debtor, and that, therefore, the decree-holders were entitled to their costs of the suit from him,

(i) Preliminary decree in redemption suit.

In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree—(a) ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or (b) declaring the amount so due at the date of such decree, and directing (c) that, if the plaintiff pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff in possession of the property, but (d) that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold.⁽¹⁴⁾

(j) Final decree in redemption suit.

"Where, on or before the day fixed, the plaintiff pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in r. 10,⁽¹⁵⁾ the Court shall pass a decree, (a) ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound

personally, or from his properties other than those mortgaged. *Rutnessur v. Jusoda*, 14 C. 185. But in a case where a decree in addition to the usual clauses contained a clause to the following effect—"it is further ordered that the defendant aforesaid do pay to the plaintiffs aforesaid the sum of Rs. 876-8, the amount of costs incurred by them in this Court," it was held that the words were not by themselves sufficient to create a personal liability. *Maqbul Fatima v. Lalla Prasad*, 20 A. 523 (F.B.); *Chiranji v. Moti Ram*, (1898) A.W.N. 33, *overruled*. There can be no doubt that the term "amount due on the mortgage" was intended to include also the costs awarded by or incurred after the decree, *Ganesh v. Sidhakaran*, 13 C.P.L.R. 74. This was clear from the language used in S. 92, Transfer of Property Act paragraph 1 (now r. 7, of O. XXXIV, Civ. Pro. Code), and S. 94, Transfer of Property Act (now r. 10 of O. XXXIV, Civ. Pro. Code.). And indeed an express provision has been made to that effect in S. 86. But all the same the clause was not commendable for its perspicacity and its present substitute "the amount due to the plaintiff" is an improvement made to enable the plaintiff to apply for the recovery of not only the balance of the mortgage money, but also the interest and costs decreed in the mortgage suit." Gour's Transfer of Property Act, 4th Ed., Vol. II, pp. 1537-1539.

(14) Civ. Pro. Code (Act V of 1908), O. XXXIV, r. 7.

(15) Of O. XXXIV of the Code of Civil Procedure (Act V of 1908).

to deliver up, and, if so required, (b) ordering him to re-transfer the mortgaged property as directed in the said decree, and, also, if necessary, (c) ordering him to put the plaintiff in possession of the property.⁽¹⁶⁾

Where such payment is not so made, and the mortgage is not simple or usufructuary, the Court shall, on application made in that behalf by the defendant, pass a decree that the plaintiff and all persons claiming through or under him, be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the plaintiff to put the defendant in possession of the property.⁽¹⁷⁾

On the passing of a decree under sub-r. (2) ⁽¹⁸⁾ the debt secured by the mortgage shall be deemed to be discharged.⁽¹⁹⁾

Where such payment is not so made, and the mortgage is not by conditional sale, the Court shall, on application made in that behalf by the defendant, pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same.

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time, postpone the day fixed for payment.⁽²⁰⁾

Power to
enlarge time
in redemption
suits.

In finally adjusting the amount to be paid to a mortgagee in case of foreclosure or sale or redemption, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure or sale or redemption up to the time of actual payment.⁽²¹⁾

(b) Costs of
mortgagee
subsequent
to decree.

The proceeds of the sale of mortgaged properties "shall be brought into Court and applied as follows:—*first*, in payment of all expenses incident to the sale or properly incurred in any attempted sale; *secondly*, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith; *thirdly*, in payment of all interest due on

(b) Applica-
tion of
proceeds.

(16) Civ. Pro. Code (Act V of 1903), O. XXXIV, r. 8, cl. 1.

(17) Civ. Pro. Code (Act V of 1903), O. XXXIV, r. 8, cl. 2.

(18) Cited *supra*.

(19) Civ. Pro. Code (Act V of 1903), O. XXXIV, r. 8, cl. 3.

(20) Civ. Pro. Code (Act V of 1903), O. XXXIV, r. 8, cl. 4.

(21) Civ. Pro. Code (Act V of 1903), O. XXXIV, r. 10.

account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made; *fourthly*, in payment of the principal money due on account of that mortgage; and *lastly*, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.⁽²²⁾

(m) Application of the above provisions to charges.

"All the provisions contained in this order ⁽²³⁾ as to the sale or redemption of mortgaged property shall, so far as may be, apply to property subject to a charge ⁽²⁴⁾ within the meaning of S. 100 of the Transfer of Property Act."⁽²⁵⁾

Costs in mortgage suits—
Mortgagee entitled to add his costs to his security.

It is a general rule, concerning the costs of mortgage suits whether for redemption, or for foreclosure, or otherwise relating to questions between the mortgagor and mortgagee, that the latter is entitled to be repaid such of the costs as originally fall upon himself.⁽²⁶⁾

With the principal and interest costs form part of a single debt, and are all payable in the same priority.⁽²⁷⁾

Costs are considered a part of the mortgage money⁽²⁸⁾ and the mortgagee may insist upon their being paid before redemption. And if they are not paid, he can refuse to deliver possession of the mortgaged property or allow the mortgagor to redeem. If the mortgagor does not pay the price of redemption or pays in part, the mortgagee may proceed to obtain a final decree for foreclosure or sale according to the nature of the mortgage.⁽²⁹⁾

The mortgagee is generally allowed to add to his debt all such costs as have been incurred by him in any proceeding for the

(22) Civ. Pro. Code (Act V of 1908), O. XXXIV, r. 13, cl. 1.

(23) O. XXXIV of the Civ. Pro. Code (Act V of 1908).

(24) Civ. Pro. Code (Act V of 1908), O. XXXIV, r. 15.

(25) Act IV of 1882.

(26) *Re Griffith Jones & Co.*, 53 L.J. Ch. 303. See Fisher on Mortgage, 5th Ed., 1897, pp. 830, 881.

(27) *Bank of New South Wales v. O'Connor*, 14 A.C. 273, 278; *National Provident Bank v. Games*, 31 C.D. 582. He may also add to his debt the costs of his trustee, who is made a defendant to a foreclosure suit. (*Browne v. Lockhart*, 10 Sim. 426), and the costs of the mortgagee's appeal when the decision appealed from is reversed (*Addison v. Cox*, 8 Ch. App. 76).

(28) *Subhana v. Krishna*, 15 B. 644.

(29) See Gour's Transfer of Property Act, 4th Ed., 1915, Vol. II, p. 1554.

recovery of the estate, or for the establishment or defence of the mortgage title.⁽³⁰⁾

Nothing short of misconduct will deprive the mortgagee of this right⁽³¹⁾ of adding costs to his security.

The mere fact that the mortgage contains a declaration that the "total amount to be recovered by the mortgagees under the deed of mortgage shall not exceed" so much, does not preclude the mortgagee from adding arrears of interest and costs beyond that sum.⁽³²⁾

The reason of the rule as to how costs are made a portion of the secured debt, and how the payment of which is enforced before the mortgagor can be allowed to redeem, has been thus explained by Coote in his *Law of Mortgages*,⁽³³⁾—"Equity regards the debt as the principal—the land as the pledge, and although the land is absolutely forfeited at law, compels the mortgagee to permit his debtor to redeem; but in so doing, it adheres to the rule, that he who seeks equity shall do equity to him from whom he requires it; and, therefore, the Court will make terms with the debtor before it will permit him to redeem, in order that full justice may be done to the creditor. It is equity that the debtor shall, before redemption, pay, not merely the principal and interest of the debt, but all costs necessarily incurred by the creditor in maintaining the title to the estate".⁽³⁴⁾

A person in whom the mortgagee's interest in the security has become vested, is substituted for him in respect of the right to costs.⁽³⁵⁾

Costs, right to, extends to persons claiming through mortgagee.

Although the mortgagor himself is bound to indemnify the estate against expenses incurred in protecting the title, so long as

Costs as against puisne incumbrancers—Prior mortgagee can only add his costs to his debt.

(30) *Detillin v. Gale*, 7 Ves. 583; ——— *v. Trecothick*, 2 Ves. and B. 181; *Barnes v. Rauster*, 1 Y. & C.C.C. 403; *Dunsian v. Patterson*, 2 Ph. 341; *Lord Middleton v. Elliot*, 15 Sim. 531; including the costs of an appeal, *Addison v. Cox*, 8 Ch. App. 76; *Stanley v. Bond*, 6 Beav. 423; *Cotterell v. Stratton*, 8 Ch. App. 295, 302; *Johnstone v. Cox*, 19 C.D. 17; *Re Love*, 29 C.D. 348; *De Caux v. Skipper*, 31 C.D. 635; overruling *Clapham v. Andrews*, 27 C.D. 679; *Batchelor v. Middleton*, 6 Hare, 86; *Davenport v. James*, 7 Hare, 249.

(31) *M'Dowell v. M'Mahon*, 22 L.R. Ir. 283.

(32) *White v. City of London Brewery Co.*, 42 C.D. 237; such a proviso as the one stated above is generally construed to relate exclusively to principal (*Ibid*).

(33) Coote on Mortgages, 5th Ed., Vol. II, p. 866.

(34) *Godfrey v. Watson*, 3 Atk. 513; *Langton v. L.*, 16 Jur. 1092; 1 Jur. N.S. 1073; *Phene v. Gillan*, 5 Ha. 1; *Sandon v. Hooper*, 6 Beav. 246; 12 L.J. Ch. 309.

(35) *Clare v. Wood*, 4 Hare 81.

the equity of redemption remains with him,⁽³⁶⁾ yet as against a *puiſne* mortgagee, or other purchaser of the equity of redemption, the first mortgagee has generally nothing beyond the common right of adding the costs to his debt; ⁽³⁷⁾ even though expenses have been incurred by the argument of a question raised by the *puiſne* mortgagee, which was not material to the merits of the cause.⁽³⁸⁾

But the costs occasioned by an unsuccessful objection by the *puiſne* mortgagee impleaded as defendant to the mortgagee's right to sue may be thrown on such defendant.⁽³⁹⁾

So also the costs of a suit which the incumbrancer has been obliged to institute, by reason of subsequent dealings with the estate by the owner of the equity of redemption without giving notice of the charge may be thrown on defendant.⁽⁴⁰⁾ Costs so added share the priority of the debt of which they become part.⁽⁴¹⁾

Costs, when personally recoverable from mortgagor.

The costs awarded to the mortgagee are added to the mortgage money and have the same priority; and, unless the mortgagor expressly or impliedly promises to personally pay them, they cannot be recovered from him personally.⁽⁴²⁾ But, under section 35 of the Code of Civil Procedure, the Court has jurisdiction to decree costs to be paid by the mortgagor personally;⁽⁴³⁾ but, where it does so, the order must be clearly incorporated in the decree, for, if the decree is drawn up in the usual form, the implication would be, that the costs were not decreed to be recovered from the mortgagor personally. And it has been held that even the addition of a clause to the effect—"It is further ordered that the defendant aforesaid do pay to the plaintiffs aforesaid the sum of Rs. 876-8, the amount of costs incurred by them in this Court"—is not by itself enough to create a personal liability.⁽⁴⁴⁾ The claim which each party gets

(36) *Langton v. Langton*, 18 Jur. 1092; rev. on principal point, 1 Jur. (N.S.) 1078.

(37) *Frazer v. Jones*, 5 Hare, 475; *Philips v. Davies*, 7 Jur. 52.

(38) *Fisher on Mortgages*, 5th Ed., 1897, S. 1866, p. 832.

(39) *Tildesley v. Lodge*, 3 Jur. (N.S.) 1000.

(40) *Wise v. Wise*, 2 Jo. & Lat. 403.

(41) *Barnes v. Rawster*, 1 Y. & C.C. 401; *Johnstone v. Cox*, 19 C. D. 17; *Harpham v. Shacklock*, ib. 207, 215; *Pollock v. Lands Imp. Co.*, 37 C. D. 661, 668.

(42) *Shri Ganesh v. Keshavray*, 15 B. 625 (639).

(43) S. 35, Civ. Pro. Code, 1908 (old S. 220); *Rutnessur v. Jusoda*, 14 C. 185 (187); followed in *Damodar Das v. Budh Kuar*, 10 A. 179; *Saffarkhan v. Satyanunda*, 13 C. W. N. 742 in which, however, the personal liability was presumed.

(44) *Maqbul Fatima v. Lalita Prasad*, 20 A. 523 (F.B.); overruling *Chitrangi v. Moti Ram*, (1898) A.W.N. 33.

may be set off against the claim of the other, and, if the amount of the costs awarded to the mortgagor is larger than the mortgage debt, he is entitled to redeem at once, and to recover the balance against the mortgagee.⁽⁴⁵⁾

Where a mortgage-deed provided that the costs of any proceedings necessitated by the default of tenants in payment of rents should be deducted from the revenues, and there was no express promise by the mortgagor to personally pay those expenses. *Held*, that the mortgagee was not entitled to a decree for such costs against the mortgagor personally.⁽⁴⁶⁾

It has been recently held in a Madras case that, in a mortgage suit for sale the mortgagor is not personally liable but his liability is contingent upon the sale-proceeds of the mortgaged property

(45) *Sidu v. Bali*, 17 B. 32; see, also, S. 221, Civ.Pro. Code (1882); *Ishri v. Gopal Saran*, 6 A. 351; *Brijnath v. Juggernath*, 4 C. 742.

(46) *Shri Ganesh Dharnidhar Maharajdev v. Keshavrav Govind Kulgavkar*, 15 B. 625 (626). The Court said "as regards the next group of items, viz., the sums spent for costs of the various suits and proceedings instituted by the plaintiff, the Subordinate Judge has disallowed them all, on the ground that the proceedings were all improper and against public policy. We are unable to accept this view. The correspondence between the parties certainly indicates that some proceedings were instituted by the plaintiff at the special desire of the first defendant himself. And we cannot look upon those proceedings as of the character attributed to them by the Subordinate Judge. They may be open to some of the criticisms made upon them by him, but they are not in such a sense immoral as to require the Court to refuse to enforce the defendants' liability, if any, in respect of them to the plaintiff. The question, however, arises whether there was any such liability on the part of the first defendant to pay the costs of those proceedings to the plaintiff. The mortgage-deed itself provides that the costs of any proceedings necessitated by the default of tenants in payment of rents should be deducted from the revenues. There is no express promise by the defendant to personally pay those expenses, and in the face of the express provision in the deed for one mode of payment it is difficult to imply any other mode. And if no such implication can be drawn, it follows that as against the defendant personally the plaintiff is not entitled to claim the costs of proceedings against tenants. Upon the materials before us, however, it would appear that there were proceedings of a different nature also instituted by the plaintiff, the cost of which he claims in this suit. But the details of those proceedings cannot be ascertained from those materials and this Court is not in a position to see which, if any, of those proceedings were expressly called for or sanctioned by the defendant in the various letters to which reference has been made in argument. It appears to us that where any particular proceeding is shown to be expressly called for, or sanctioned by the defendant, the costs, properly incurred, of and incidental to that proceeding may be allowed against the defendant personally as on an implied contract. The amount of such costs must be ascertained by the Court below." *Shri Ganesh Dharnidhar Maharajdev v. Keshavrav Govind Kulgavkar*, 15 B. 625 (638-639).

proving insufficient.⁽⁴⁷⁾ In one case where the decree contained even a direction for personal recovery of costs, the Court held that the direction could not be enforced against the mortgagor personally except by an application under section 90.⁽⁴⁸⁾ But the question in such cases is one of construction. But in a decree properly worded the direction should be clear that the costs no less than the rest of the mortgage-money shall first be recoverable out of the sale-proceeds of the mortgaged property and that any balance if still due shall then be payable by the mortgagor personally in accordance with the provisions of r. 6 of O. XXXIV, Civil Procedure Code.⁽⁴⁹⁾

Costs, items
of, allowed to
mortgagees.

“ Besides the costs of the suit, in which the mortgagee's rights are immediately adjusted, as between himself and the owner of the equity of redemption, he has also a right to be repaid out of the mortgaged property, but not by the mortgagor personally,⁽⁵⁰⁾ all costs and expenses, reasonably and properly incurred in ascertaining or defending his rights, or in recovering the mortgage debt, at law or in equity.⁽⁵¹⁾”

In estimating the value of his security in the bankruptcy of the mortgagor, the mortgagee may bring into account costs expended in properly defending an action brought against him in respect of his title to the mortgaged property, after the adjudication.⁽⁵²⁾

The mortgagee will be allowed the following items:—(i) the costs of an ejectment suit,⁽⁵³⁾ (ii) of an action against the

(47) *Kamamma v. Narasimhachariu*, 17 M.L.J. 317; s. c. sub-non *Kamamma v. Kamandur*, 30 M. 464. This is in accordance with the English practice; *Sharples v. Adams*, 32 Beav. 213; *Liverpool Marine Credit Co. v. Wilson*, L.R. 7 Ch. 507.

(48) *Magbul v. Lalta Prasad*, 20 A. 523; *Rajkumar v. Sheo Narain*, 35 C. 431.

(49) *Gour's Transfer of Property Act*, 4th Ed., Vol. II, p. 1487.

(50) *Re Sneyd*, 25 C.D. 386.

(51) *Godfrey v. Watson*, 3 Atk. 517; *Detillin v. Gale*, 7 Ves. 583; *Ellison v. Wright*, 3 Russ. 453; *Dryden v. Frost*, 3 My. & C. 670; *Nat. Prov. Bank v. Games*, 31 C. D. 582; see, also, *Sclater v. Cottam*, 3 Jur. (N.S.) 630; *Re Robertson*, 19 Q.B.D. 1; *Re Roberts*, 43 C.D. 52; *Field v. Hopkins*, 44 C.D. 524; *Exp. Lickorish*, 25 Q.B.D. 176. So where mortgagee was an auctioneer, he was not allowed profit charges. *Thompson v. Rumball*, 3 Jur. 53.

(52) *Carr, Exp.*, 11 Ch. D. 62.

(53) *Lewis v. John*, 9 Sim. 366; *Horlock v. Smith*, 1 Coll. 293; *Sandon v. Hooper*, 12 L.J. (N.S.) Ch. 309; 6 Beav. 246.

mortgagor's surety for the debt,⁽⁵⁴⁾ though the fruits of it be lost by the surety's insolvency; (iii) the cost of defending the security against an action at law;⁽⁵⁵⁾ (iv) costs of taking out administration⁽⁵⁶⁾ to the mortgagor, or to a person interested under his will, as a necessary party; ⁽⁵⁷⁾ (v) costs of obtaining a stop order, in pursuance of the mortgage deed, upon a fund in Court, the subject of the mortgage unless the application were unnecessary.⁽⁵⁸⁾ (vi) The costs of taking and keeping possession of and of insuring and advertising for sale, or otherwise getting the benefit of the mortgaged property, will fall under "just allowances" ^(58-a) to be made to the mortgagee.

The mortgagee will not be ordered to pay, or forfeit his right to costs in the absence of misconduct in the following cases (i) by a mere *bona fide* extension of his claim beyond that to which the Court adjudges him to be entitled, ⁽⁵⁹⁾ or (ii) by stipulating that the accounts required shall be furnished at the cost of the mortgagor where they are of a special nature.⁽⁶⁰⁾ (iii) Nor will he be made to pay the costs occasioned by a dispute as to a fact, where the Court gives so much weight to the mortgagee's objection as to direct an issue, although the result be against him.⁽⁶¹⁾ But he may nevertheless be deprived of costs where his claim is unfounded, although *bona fide*.⁽⁶²⁾

"The mortgagee has also been allowed the costs incurred in the following particulars as general expenses of managing

(54) *Ellison v. Wright*, 3 Russ. 458; approved C.A. in *Nat. Prov. Bank v. Games*, 31 C.D. 582. The right to the costs of an action on the covenant against the mortgagor, except for this authority was doubted by Kindersley, V.-C.; but the principle stated appears clearly to cover it, and the admission of the doubt would open many well-settled questions as to mortgagees' costs. See *Merriman v. Bonner*, 10 Jur. (N.S.) 534.

(55) *Lomax v. Hide*, 2 Vern. 185; *Ramsden v. Langley*, id. 536.

(56) As to costs of administration by a person interested in the equity of redemption without any express request by the mortgagee, see *Saunders v. Dunman*, 47 L.J. Ch. 338.

(57) *Hunt v. Fownes*, 9 Ves. 70.

(58) *Hoole v. Roberts*, 12 Jur. 108.

(58-a) *Wilkes v. Saunton*, 7 Ch.D. 188.

(59) *Loftus v. Swift*, 2 Sch. & Lef. 657; *Alexander v. Simms*, 20 Beav. 123; *Cottrell v. Stratton*, 8 Ch. App. 295; *Re Watts*, 22 Ch. D. 5.

(60) *Norton v. Cooper*, 5 De G.M. & G. 728.

(61) *Wilson v. Metcalfe*, 3 Mad. 45 (Eng.).

(62) See *Credland v. Potter*, 10 Ch. App. 8; *Kinnaird v. Trollope*, 42 C.D. 610; *Bird v. Wenn*, 33 C.D. 215. See Fisher's Law of Mortgage, 5th Ed., 1897, p. 885.

the estate,—renewing leases,⁽⁶³⁾ making necessary repairs,⁽⁶⁴⁾ or permanent improvements,⁽⁶⁵⁾ or in establishing his security,⁽⁶⁶⁾ in preserving the estate by payment of head rent,⁽⁶⁷⁾ or from deterioration⁽⁶⁸⁾ or for the redemption of land tax,⁽⁶⁹⁾ or in perfecting the mortgagee's title as by payment of the fines and fees,⁽⁷⁰⁾ also fines in a building society mortgage,⁽⁷¹⁾ discounts on the renewal of bills of exchange secured by the mortgage discounts,⁽⁷²⁾ also the costs of the mortgagee's solicitor on paying off the mortgage, and making out a list of deeds,⁽⁷³⁾ and the costs of an order for the delivery of the title-deeds out of chambers, where they have been deposited in a regular suit for the administration of the mortgagee's estate;⁽⁷⁴⁾ but where the mortgagees were executors and engaged in an administration suit, and the mortgagor had no notice of the suit nor of their character of executors, and the title-deeds were afterwards in pursuance of an order in the suit deposited in the Master's Office, the costs of getting the deeds out of the office on redemption were fixed on the mortgagees."⁽⁷⁵⁾

The mortgagee will be allowed the costs of taking out administration to the mortgagor, as principal creditor, or to an incumbrancer under the will of the mortgagor, as a necessary party to foreclosure.⁽⁷⁶⁾

(63) *Lucan v. Mertins*, 1 Wils. 34; 3 Atk. 4; *Manlove v. Bale*, 2 Vern. 84; *Woolley v. Drag*, 2 Anst. 551, sup. p. 267.

(64) *Hardy v. Reeves*, 4 Ves. 480.

(65) *Godfrey v. Watson*, sup.; *Hipkins v. Amery*, 2 Giff. 292; 6 Jur. N.S. 1047.

(66) *Pelly v. Walhen*, 18 L.J. Ch. 281; 7 Ha. 551; 14 Jur. 9; affirmed 1 De G. M. & G. 16; 16 Jur. 47.

(67) *Burrowes v. Molloy*, 2 J. & L. 521.

(68) *Burrowes v. Molloy*, 2 ib. 521; *Brandon v. B.*, 10 W.R. 287 (Eng.); V. C. Kindersley.

(69) *Knowles v. Chapman*, Set. 226 Ed. 2; 467 Ed. 3; and 1070, 1080, Ed. 4.

(70) *Fish. Mtg.* 946, Ed. 3; 881, 923, Ed. 4; *Ledger v. Groom*, M.R. Set 1080, Ed. 4.

(71) *Provident, &c., Soc. v. Greenhill*, 9 Ch. D. 122; 38 L.T.N.S. 140; V. C. Bacon; *Pilkington v. Baker*, W.N. (1877) 210, V.C. Hall; *Parker v. Butcher*, 3 Eq. 762, M.R.

(72) *Fenton v. Blackwood*, 5 J.C. 167.

(73) *Wakefield v. Newbon*, 8 Jur. 735, Q.B.; 18 Jur. Pt. 2, 176.

(74) *Burden v. Oldaker*, 1 Coll. 105. And see *Reed v. Freer*, 13 L.J. Ch. 417, V.C. Knight-Bruce.

(75) *Reed v. Freer*, 13 L.J. Ch. 417, V.C. Knight-Bruce. *Coote on Mortgage*, 5th Ed., 1884, Vol. II, p. 867.

(76) *Hunt v. Fownes*, 9 Ves. 70.

Though costs thus naturally follow the redemption, it may be that where the right to redeem is disputed, and the question is doubtful, no costs will be given on either side.⁽⁷⁷⁾

Costs where right to redeem is disputed.

"There are several exceptions to the rule, under which a mortgagee is entitled to add his costs to the debt, which extend, not merely to deprive him of that right, but also to compel him to pay costs. But the Court departs from the general rule with some reluctance."⁽⁷⁸⁾

Exception to rule about mortgagee's right to costs.

"The mortgage being a security, not only for principal and interest and the ordinary charges and expenses usually provided for by the instrument, but also for the costs properly incident to a suit for foreclosure or redemption, the mortgagee's right to the benefit of the contract can only be lost or curtailed by such inequitable conduct as amounts to a violation or culpable neglect of his duty under it."⁽⁷⁹⁾

In gross cases mortgagee may be ordered to pay costs.

"The mortgagee will be refused his costs if he be guilty of gross misconduct,⁽⁸⁰⁾ as in the following cases:—denying the right of redemption, except on paying off two securities, one of which was not due,⁽⁸¹⁾ disputing the priority of a subsequently registered mortgage over an unregistered charge,⁽⁸²⁾ impeding the taking of the account,⁽⁸³⁾ delaying redemption by failing to attend at the place and time appointed for settling the matter,⁽⁸⁴⁾ claiming more than was due coupled with misconduct,⁽⁸⁵⁾ delaying (as one of three trustees in whom the mortgage was vested), redemption, by an untenable claim to receive the interest beneficially,⁽⁸⁶⁾ making an unfounded further claim after payment in full,⁽⁸⁷⁾ setting up the

Mortgagee when refused his costs.

(77) *Kirkham v. Smith*, 1 Ves. 257. Where the right to foreclose depended upon the construction of a deed, which was held to be in the nature of a Welsh mortgage, the suit was dismissed without costs (*Teulon v. Curtis*, Younge, 610).

(78) *Franklyn v. Fern*, Barn. Ch. 30; *Detillin v. Gale*, 7 Ves 586.

(79) *Cotterell v. Stratton*, 8 Ch. App. 295; *Fisher on Mortgage*, 5th Ed., 1897, p. 882.

(80) *Mocatta v. Murgatroyd*, 1 P. Wms. 393.

(81) *Credland v. Potter*, 10 Ch. 13; 18 Eq. 350. V.C. Bacon, and see *Tomlinson v. Gregg*, 15 W.R. 51, M.R.; *Harvey v. Tebbutt*, 1 J. & W. 197, 203.

(82) *Credland v. Potter*, 10 Ch. 13.

(83) *Detillin v. Gale*, 7 Ves. 586.

(84) *Cliff v. Wadsworth*, 2 Y. & C.C. 598.

(85) *Snagg v. Frizell*, 1 J. & L. 383.

(86) *Cliff v. Wadsworth*, 2 Y. & C.C. 598.

(87) *Gregg v. Slater*, 22 Beav. 314; 25 L.J. Ch. 440; 2 Jur. N.S. 24.

mortgage deed as an absolute conveyance, ⁽⁸⁸⁾ making an unsustained charge of fraud; ⁽⁸⁹⁾ abuse of trust reposed in him by mortgagor and manifest intention to get the estate into his own hands, ⁽⁹⁰⁾ fraudulent and unfair dealing, ⁽⁹¹⁾ permitting by negligence a fraud to be perpetrated, though personally innocent of fraud, ⁽⁹²⁾ improperly resisting a suit (by subsequent incumbrancer) to rectify a mistake affecting the security, ⁽⁹³⁾ rendering a redemption suit necessary by refusing as mortgagee in possession to render an account, ⁽⁹⁴⁾ increasing the costs by making unnecessary parties or by adducing unnecessary evidence; (where this has been done the mortgagee must pay such costs, and will not get them over though he may get the general costs), ⁽⁹⁵⁾ dealing with the mortgagor behind the back of an incumbrancer whose claim was known to him, and attempting to deprive him of his security, ⁽⁹⁶⁾ making a claim under an illegal contract, ⁽⁹⁷⁾ or by the loss of vouchers causing unnecessary costs of account." ⁽⁹⁸⁾

But a mortgagor will lose his right to costs which he claims against the mortgagee, if, upon an action for redemption and containing charges of oppression and misconduct, and praying that he may be fixed with the costs of the suit, the mortgagor consents to an immediate decree for an account reserving costs, but without making the special circumstances of the cases a part of the reference to chambers. ⁽⁹⁹⁾

In some cases where the right of redemption is doubtful, the suit is dismissed without costs. ⁽¹⁰⁰⁾

(88) *Baker v. Wind*, 1 Ves. 160.

(89) *West v. Jones*, 1 Sim. N.S. 218, and see *Cockell v. Taylor*, 15 Beav. 127.

(90) *Thonnhill v. Evans*, 2 Atk. 330.

(91) *Morony v. O'Dea*, 1 Ba. & Be. 109, 121n.

(92) *Hiorus v. Boltom*, 16 Beav. 259.

(93) *Harryman v. Collins*, 18 ib. 11; 18 Jur. 501; affirmed L.J. March 18, 1854, Set. 1060, Ed. 4.

(94) *Powell v. Trotter*, 1 Dr. & Sm. 383.

(95) *Coles v. Forrest*, 10 Beav. 552; *Cockell v. Taylor*, 15 Beav. 127; *Audsley v. Horn*, 26 Beav. 195, and see *Booth v. Creswicke*, 8 Sim. 352; 8 Jur. 323; 13 L.J. Ch. 217.

(96) *Taylor v. Baker*, Dan. 82.

(97) *Johnson v. Williamshurst*, 1 L.J. Ch. 112, V.C.E.

(98) *Price v. P.*, 15 ib. 13. M.R.; see Coote on Mortgage, 5th Ed., Vol. II, p. 871.

(99) *Dunston v. Patterson*, 2 Ph. 341.

(100) *Kirkham v. Smith*, 1 Ves. 8. 257; *Teulon v. Curtis*, Yo. 610.

"It is the duty of the mortgagee so to choose his remedy as not to incur unnecessary costs."⁽¹⁰¹⁾

Costs unnecessarily incurred would be disallowed.

It is essential to the claim of the mortgagee, that his proceedings have been reasonable, for the allowance of the costs is in the discretion of the Court.⁽¹⁰²⁾

No costs will be given in respect of an unnecessary act,⁽¹⁰³⁾ or of improper or useless litigation by the mortgagee. The following are some of the more important English cases, where the Courts acting on the above principle disallowed costs to the mortgagee :— (i) where⁽¹⁰⁴⁾ having only a title in equity, he defended an action by the legal owner for the recovery of the estate, (ii) where he sues for rent in an action in the name of a person who has no right to sue, (iii) where⁽¹⁰⁵⁾ he sues a purchaser under the power of sale, for specific performance of the contract, if the suit, being dismissed with costs, appear to have been improper, and was not sanctioned by the mortgagor ; though counsel have advised that the purchaser could not rescind the contract, (iv) where⁽¹⁰⁶⁾ the mortgagor having refused to redeem because the mortgagee has lost the title-deeds, the latter brings ejectment. Nor will the mortgagee have the costs of litigation arising out of the wrongful act of a stranger, although it be directed against the mortgaged estate.⁽¹⁰⁷⁾

Where a suit was not originally commenced as, but was afterwards turned into a foreclosure suit, so much of the costs as were incurred before it assumed that form, including the costs of the trial of an issue, by which the plaintiff was found to be mortgagee, were thrown upon him ; the bill in its original form having been liable to be dismissed with costs."⁽¹⁰⁸⁾

So it has been held by the English Courts that "where the County Court has jurisdiction and both parties reside in the same circuit, only County Court scale of costs will be allowed."⁽¹⁰⁹⁾

(101) See Fisher's Law of Mortgage, 5th Ed., 1897, p. 885.

(102) Fisher on Mortgages, 5th Ed., 1897, §. 1896, p. 896.

(103) *Re Macken*, 2 Jo. & Lat. 16 ; *Dryden v. Frost*, 3 Myl. & Cr. 670.

(104) *Burke v. O'Connor*, 4 Ir. Ch. R. 418.

(105) *Peers v. Ceeley*, 15 Beav. 209.

(106) *Lord Middleton v. Elliot*, 15 Sim. 531.

(107) *Doe d. Holt v. Roe*, 6 Bing. 447 ; *Owen v. Crouch*, 5 W.R. 545 (Eng.).

(108) *Smith v. Smith*, Cooper, 141 ; *Briant v. Lightfoot*, 1 Jur. 20 ; *Phillips v. Davies*, 7 Jur. 52 ; and see *Hogan v. Baird*, 4 Dru. & War. 296 ; *Bernard v. Sadlier*, 4 Ir. Eq. R. 61.

(109) *Crozier v. Dowsett*, 31 C.D. 67.

The same rule applies to the case of any particular costs incurred by the mortgagee in the suit unnecessarily.⁽¹¹⁰⁾

Costs
awarded
against
mortgagee—
Examples.

The power of giving costs against the mortgagee has been exercised in the following cases: (i) where the mortgagee has been guilty of gross misconduct or oppression,⁽¹¹¹⁾ or (ii) even where without improper motives, he has caused expenses to be incurred which cannot justly be thrown upon the mortgagor. (iii) If the mortgagee sets up an unjust defence,⁽¹¹²⁾ or (iv) if he resists a suit to redeem on the ground of a foreclosure, collusively obtained,⁽¹¹³⁾ or (v) if he resists any just claim to redeem,⁽¹¹⁴⁾ he will be liable to so much of the costs as his improper conduct has caused, though he may be allowed the ordinary costs of redemption.⁽¹¹⁵⁾ (vi) Where the mortgagee set up an adverse title and failed, he was ordered to pay the whole costs of the suit.⁽¹¹⁶⁾ (vii) If the contract under which he claims be illegal,⁽¹¹⁷⁾ or (viii) if he has been guilty of improper conduct in attempting to deprive another of the benefit of his security, by a dealing behind his back, he may be refused his costs.⁽¹¹⁸⁾ (ix) A similar order has been made where a mortgagee, whose presence was necessary to complete the redemption, and might have removed the difficulty which caused the suit neglected to attend at the appointed time and place; though, not having actively opposed the redemption, he was not ordered to pay the costs.⁽¹¹⁹⁾ (x) A mortgagee will also be made to pay the costs occasioned by a claim which he makes, but fails to establish, or

(110) *Marsack v. Reeves*, 6 Mad. 109; *Fletcher, Exp.*, Mont, 454; *Coc v. Stanley*, 4 Jur. (N.S.) 942.

(111) *Mocatta v. Murgatroyd*, 1 P. Wms. 393; *Baker v. Wind*, 1 Ves. 160 and see *Thornton v. Court*, 3 De. G.M. & G. 293; *England v. Codrington*, 1 Ed. 169; *Tomlinson v. Gregg*, 15 W.R. 51 (Eng.); *Tarn v. Turner*, 39 C.D. 456.

(112) *Ibid.*

(113) *Hall v. Heward*, 32 C.D. 430, 436.

(114) See *Squire v. Pardoe*, 66 L.T. 243; *Henderson v. Astwood*, (1894) A.C. 150, 162.

(115) *Harvey v. Tebbutt*, 1 J. & W. 197; *Price v. Berrington*, 7 Hare 394. See *Harryman v. Collins*, 18 Jur. 501; and see *Malone v. Geraghty*, 3 Dru. & War. 248, 250; *Whitfield v. Parfitt*, 4 De. G. & S. 240; *Whitbread v. Smith*, 3 De. G.M. & G. 727.

(116) *Roberts v. Williams*, 4 Hare 129; *National Bank of Australasia v. United Hand-in-Hand, etc., Co.*, 4 App. Ca. 391.

(117) *Johnson v. Williamshurst*, 1 L.J. Ch. 112.

(118) *Taylor v. Baker*, Dan. 82.

(119) *Cliff v. Wadsworth*, 2 Y. & C.C.C. 598. See *Fisher's Law of Mortgage*, 5th Ed., 1897, p. 884.

(xi) by charges of fraud or connivance which he cannot substantiate;⁽¹²⁰⁾ or (xii) of a suit by a *puisne* mortgagee for an account of the produce of a sale, if the defendant has refused to account and the balance be found against him;⁽¹²¹⁾ (xiii) as well as of inquiries into the mortgagor's claim for dilapidations, and (xiv) of evidence of the mortgagee's refusal to account; or he may be deprived of his costs to the hearing.⁽¹²²⁾

"If the costs incurred are altogether irrelevant to the mortgage, they will not be allowed, as in the instance of the costs attending a deed executed by the mortgagee to a *cestui que trust* who lends him the money,⁽¹²³⁾ and in a case⁽¹²⁴⁾ in which a devisee of a mortgagee filed his bill against the heir and executor of the mortgagor for foreclosure, and also against the heir-at-law of the mortgagee for establishing the will, it was ordered that the plaintiff should pay the heir of the mortgagee his costs, and that he should not be entitled to have them from the estate;⁽¹²⁵⁾ as the heir of the mortgagee is not a necessary party to an action for foreclosure by the devisee of the mortgagee.⁽¹²⁶⁾ Nor will the mortgagee be allowed the costs of his petition for leave to bid at the sale of the mortgaged estate.⁽¹²⁷⁾

The costs incurred by an improper joinder of parties, whether as plaintiffs or defendants, must be paid by the mortgagee.⁽¹²⁸⁾

If any difficulty arises from a party's omission to join a necessary party to the suit, the party in wrong should forfeit his costs.⁽¹²⁹⁾

(120) *Montgomery v. Calland*, 14 Sim. 79; *Oockell v. Taylor*, 15 Beav. 127; *Green v. Briggs*, 6 Hare 632; *West v. Jones*, 1 Sim. (N.S.) 218; *Gregg v. Slater*, 25 L.J. (N.S.) Ch. 440.

(121) *Tanner v. Heard*, 23 Beav. 555; see 3 Jur. (N.S.) 427.

(122) *Sandon v. Hooper*, 6 Beav. 246; *Powell v. Trotter*, 1 Dr. & Sm. 388.

(123) *Martin Demandant*, 5 Bing. 160.

(124) *Shipp v. Wyatt*, 1 Cox. 353. See Fisher's Law of Mortgage, 3rd Ed., p. 1006; 4th Ed., p. 914.

(125) *Wilson v. Metcalfe*, 3 Madd. 45 (Eng.).

(126) *How v. Figures*, 1 Rep. in Ch. 32; 1 Eq. Ca. Apr. 318, P.L. 5.

(127) *Ex parte Williams*, 1 Dea. & Chit. 489; see Coote on Mortgage, 5th Ed., Vol. II, p. 870.

(128) *Pearce v. Watkins*, 5 De. G. & S. 317; *Booth v. Creswicke*, 8 Jur. 323.

(129) *Muhammad v. Abdulla*, 24 M. 171 (175).

Costs where mortgagee refuses proper tender.

If the mortgagee refuses a proper tender, even if it be made under protest,⁽¹³⁰⁾ or proceeds after payment of all that is due, he does so on peril of paying the costs incurred after the payment or tender.⁽¹³¹⁾

Costs where mortgagee to whom nothing is due commences foreclosure suit—He must bear such costs.

"If the mortgagee institutes a foreclosure suit, and upon taking the accounts it be shown that nothing was due at the filing of the suit; or if he drives the mortgagor to institute a suit under like circumstances, he must bear⁽¹³²⁾ the whole expense of the suit; and so if the costs be only occasioned in part by the accounts and inquiries relating to the mortgage debt, and the mortgagee has suppressed facts, a knowledge of which would have led to the discovery that he was overpaid (such as the fact that he has been in possession); or if, being a defendant, he denies by his answer that he is satisfied, when nothing remains due, he must pay the costs of so much of the proceedings as have been caused by his denial or false suggestion.⁽¹³³⁾

So where, knowing that he is already overpaid, the creditor contests the mode of taking the accounts and fails;⁽¹³⁴⁾ or having sold the mortgaged property, he asserts that the surplus, after paying principal, interest, and costs, is much less than is found due from him on the master's certificate;⁽¹³⁵⁾ or causes subsequent proceedings by keeping money and receiving rents, long after his right to receive them as mortgagee in possession has ceased,⁽¹³⁶⁾ he will be allowed such costs only as arose whilst he filled the character of a creditor, and must pay the rest."

(130) *Greenwood v. Sutcliffe*, (1892) 1 Ch. 1.

(131) *Shuttleworth v. Lowther*, 7 Ves. 598; *Cliff v. Wadsworth*, 2 Y. and C.C.C. 598; *Harmer v. Priestly*, 16 Beav. 569; *Morley v. Bridges*, 2 Coll. 621; *Greg v. Slater*, 22 Beav. 314. And to save the expense of coming to the Court on further consideration, a direction that the mortgagee shall pay the costs, if the sum due does not exceed the tender, may be added to the decrees at the hearing. (*Hosken v. Sincock*, 11 Jur. (N.S.) 477). See, also, *Smith v. Green*, 1 Coll. 564; so decided, although the decree is expressed to be by consent. And see S.C., 2 Coll. 626 n. *Sentance v. Porter*, 7 Hare 426; *Hodges v. Croydon Canal Co.*, 3 Beav. 86; *Gammon v. Stone*, 1 Ves. 339. And see *Broad v. Selfe*, where, under the circumstances, no costs were given on either side to the hearing (9 Jur. N.S. 886).

(132) *Binnington v. Harwood*, T. & R. 477; *Morris v. Islip*, 23 Beav. 244; *O'Neill v. Innes*, 15 Ir. Ch. R. 527.

(133) *Montgomery v. Galland*, 14 Sim. 79; *Snagg v. Frizell*, 3 Jo. & Lat. 383; *Ashworth v. Lord*, 35 C.D. 545; and see, also, *Kinnaird v. Trollope*, 42 C.D. 610.

(134) *Skirrett v. Athy*, 1 Ba. & Be. 434.

(135) *Charles v. Jones*, 35 C.D. 544.

(136) *Archdeacon v. Bowes*, 19 Price 353.

"A person who, whether his true character be that of a mortgagee or not, places himself in the position of an accounting party, and so undertakes a duty which he cannot perform, by reason of the loss of vouchers for sums which he has paid, will not have the costs of taking the accounts." (137)

Costs, rule as to—That accounting party who cannot prove disbursements will have no costs.

"An equitable mortgagee, whether with or without a memorandum of deposit, has the same right in equity to add his costs to his debt as a legal mortgagee." (138)

Costs of equitable mortgagee—He has same rights as to costs as legal mortgagee.

The owner of a share of an estate and his incumbrancers have but one set of costs, which is received by the first incumbrancer. (139)

Costs—Only one set allowed to owner of share and his incumbrancers.

"In the absence of express agreement, a mortgagee cannot, under "just allowances" or "costs, charges, and expenses," include remuneration for work done by himself. (140)

Costs by way of remuneration for work done by himself—How far mortgagee entitled to charge for.

It would seem, however, that where the mortgagee is a member of a firm which has done work which would be properly chargeable against the mortgagor, the other partners will be allowed their share of the profits of the transaction, although the mortgagee partner will have to bring into account his share. (141)

Whether a mortgagee can stipulate for the right to charge for services seems doubtful; (142) but in the absence of a pre-existing

(137) *Price v. Price*, 15 L.J. Ch. 13.

(138) *Queen v. Chambers*, 4 Y. & C. 54; *Lewis v. John*, 9 Sim. 266; *Connell v. Hardie*, 3 Y. & C. 582; *Wade v. Ward*, 4 Dr. 602. On this point see Fisher's Law of Mortgage, 5th Ed., 1897, ss. 1879—1883, pp. 888—890.

(139) *Remnant v. Hood*, 27 Beav. 613; *Equitable Insurance Co. v. Fuller*, 7 Jur. (N.S.) 307; *Ward v. Yates*, 1 Dr. & S. 80.

(140) *Matthison v. Clarke*, 3 Drew. 3; *Barrett v. Hartley*, 2 Eq. 789; *Furber v. Cobb*, 18 Q.B.D. 494, 509; *Re Wallis*, 25 Q.B.D. 176; *Re Doody*, (1893) 1 Ch. 129. As to inability of director of a public company which is a mortgagee to charge for collecting rents, see *Kavanagh v. Workingmans, etc., Society*, (1896) 1 Ir. Rep. 56.

(141) *Re Doody*, (1893) 1 Ch. 129; *Wellby v. Still*, (1893) W.N. 98; *Eyre v. Wynn Mackenzie*, (1894) 1 Ch. 218.

(142) See *Pro. French v. Baron*, 2 Atk. 120; *Scott v. Brest*, 2 T.R. 238; *Chambers v. Goldwin*, 9 Ves. 254, 271; *Leith v. Irvine*, 1 M. & K. 277; *James v. Kerr*, 40 C.D. 449, 459; *Field v. Hopkins*, 44 C.D. 524, 530; *Eyre v. Wynne, Mackenzie*, (1894) 1 Ch. 218; *Cont. Broad v. Selfe*, 11 W.R. 1036 (Eng.); *The Benwell Tower*, 72 L.T. 664; *Comyns v. C.*, L.R. 5 Eq. 583; *Re Edwards*, 11 Ir. Ch. 367.

fiduciary relationship⁽¹⁴³⁾ between the parties it is difficult to see why a mortgagee should not be able to make such a stipulation, which would be clearly allowable in the case of a trustee."⁽¹⁴⁴⁾

Costs of preparing security not and incident to, preparing the mortgage, are not mortgagee's costs, mortgagee's costs which the payment of which may be insisted upon in a foreclosure suit."⁽¹⁴⁵⁾ Costs which can be added to security.

According to the practice of the English Courts "the costs of, and incident to, preparing the mortgage, are not mortgagee's costs, the payment of which may be insisted upon in a foreclosure suit."⁽¹⁴⁵⁾

Costs of assignments made behind his back; nor costs of deeds not necessary to security or copies of security on discharge of debt.

It has also been held by the English Courts that "the mortgagor cannot be saddled with the costs of an assignment by the mortgagee (being the costs of making the assignment, and not such as arise from the joinder of parties to a suit in consequence thereof), where the assignment has been made without the mortgagor's knowledge, and without his being first called upon to pay or procure payment of the mortgage-debt."⁽¹⁴⁶⁾ Nor to the costs of such deeds as are not necessary for the security of the mortgagee such as a declaration of trust where the mortgagee is a trustee; ⁽¹⁴⁷⁾ nor on discharge of the mortgage to the costs of making a copy of it, though the mortgagee may at the mortgagor's cost make a fair copy of the draft security to keep until redemption."⁽¹⁴⁸⁾

Costs of redemption.

As regards the costs of a suit for redemption the usual rule is that they are payable by the plaintiff, ⁽¹⁴⁹⁾ unless the mortgagee forfeits them for his misconduct or any other reason. In a normal case, however, the mortgagee's costs are added to the mortgage money which must be paid on the due date, failing which the former practice was to foreclose the mortgage, the Court being incompetent to extend the time for a redemption by paying the costs of the adjournment.⁽¹⁵⁰⁾ But in this respect the procedure has now been modified by the Act.⁽¹⁵¹⁾ The costs should be assessed on the value of the subject-matter of the suit and not on the

(143) See *Eyre v. Hughes*, 2 C.D. 148; and see *James v. Kerry*, 40 C.D. 449; *Gossip v. Wright*, 32 L.J. Ch. 648, 653.

(144) *Fisher on Mortgage*, 5th Ed., 1897, S. 1895, p. 896.

(145) *Fisher on Mortgage*, 5th Ed., 1897, S. 1899, p. 897.

(146) *Radcliffe, Re*, 22 Beav. 201.

(147) *Martin v. Baxter*, 5 Bing. 160; 2 Mo. & P. 240.

(148) *Re Wade and Thomas*, 17 Ch. D. 348.

(149) *Beckett v. Sutton*, 19 Ch. D. 646; *Subhana v. Krishna*, 15 B. 644.

(150) *Ladu v. Babaji*, 7 B. 532; *Mahant Ishwargar v. Chudasama*, 13 B. 106; *Subhana v. Krishna*, 15 B. 644 (646).

(151) S. 93, Transfer of Property Act (IV of 1882).

amount of the original debt.⁽¹⁵²⁾ In other words, the amount is payable on the value of only the equity of redemption and not on the value of the mortgagee's interest.⁽¹⁵³⁾

"Unless otherwise ordered, there shall be paid into Court, in addition to the sum deposited under section 83 of the Transfer of Property Act, or any subsequent section, a sum sufficient to provide for the fees and charges of the Accountant-General and the Bank of Bengal, and for the mortgagee's costs of obtaining payment out of Court; and also when such payment is made under section 83, a further sum to provide for the mortgagee's costs of transferring the property, and causing such transfer to be registered, such costs to be estimated and certified by the Taxing Officer."⁽¹⁵⁴⁾

The mortgagee has the right to costs from the estate not only as against the mortgagor but also all subsequent incumbrancers.⁽¹⁵⁵⁾

In a suit for redemption the jurisdiction of the Court depends upon the nature of the plaintiff's claim. If his title to the property is undisputed, but the question is one of redemption, the value of the subject-matter for purposes of jurisdiction, is not the market value of the land but the amount of the mortgage-money.⁽¹⁵⁶⁾ If on the other hand, he has further to establish his title to the property, then the question of jurisdiction must depend on the value of the property and not on the amount of the mortgage.⁽¹⁵⁷⁾ The Courts are divided on the question whether the Court being once rightly seized of the case is empowered to pass a decree for a sum beyond its own pecuniary jurisdiction. According to the Calcutta High Court this cannot be done⁽¹⁵⁸⁾ though the contrary has been held in some other Courts.⁽¹⁵⁹⁾

As regards Court-fee, the proper valuation of a suit to redeem a mortgage is the amount of the mortgage admitted by the plaintiff to be binding on him and not that of the mortgages set up by

(152) *In re Sanderson*, 7 Ch. D. 176.

(153) *In re Sanderson*, 7 Ch. D. 176 (179); Gour's Transfer of Property Act, 4th Ed., Vol. II, p. 1549.

(154) Calcutta Rules No. 2, cited in Gour's Transfer of Property Act, Vol. II, 4th Ed., p. 1306. See, also, Rule 683 of the Bombay Rules.

(155) *Upperton v. Harrison*, 7 Sim. 444; *Burnes v. Racester*, 1 Y. & C.C.C. 401; Gour's Transfer of Property Act, Vol. II, 4th Ed., p. 1568.

(156) *Kubair Singh v. Raja Ram*, 6 N.L.R. 164.

(157) *Kallan Das v. Naval Singh*, 1 A. 620.

(158) *Mausa Ram v. Umra*, 134 P.W.R. 1911=11 I.C. 198; *Onkar v. Lakshmi-chand*, 5 N.L.R. 130.

(159) *Ijfatulla v. Chandra*, 34 C. 854, F.B.; *Ramjit v. Ramudar*, 16 C.L.J. 77.

the defendant. On an appeal by the mortgagor for a reduction of the price of redemption the appellant must pay *ad valorem* Court-fee,⁽¹⁶⁰⁾ but whether the maximum fee payable is limited by the principal amount secured by the mortgage depends upon the meaning of the word "suit" in S. 7 (9) of the Court Fees Act. If it includes an appeal, then the maximum fee should not exceed that paid in the first Court;⁽¹⁶¹⁾ otherwise it should be paid *ad valorem*.⁽¹⁶²⁾ But the Court Fees Act is so imperfectly worded that neither view is directly supported by it, and either view is equally possible and plausible.

But the Court-fee payable in a suit for redemption is assessed on the principal of the mortgage-money and not on the intrinsic value of the right involved.⁽¹⁶³⁾ So even where the plaintiff claimed in addition to redemption an account from the mortgagee of the profits received by him during his possession, the Court-fee payable would be the same, namely, on the principal amount secured by the mortgage and no *ad valorem* duty could be claimed on the surplus sought to be recovered from the mortgagee.⁽¹⁶⁴⁾

Rule-making
powers of
High Court.

The High Court may, from time to time, make rules consistent with the Transfer of Property Act for carrying out, in itself or in the Courts of Civil Judicature, subject to its superintendence, the provisions contained in the chapter on Mortgages and Charges.⁽¹⁶⁵⁾

Interest on
costs.

The Court is empowered to give interest on costs at any rate not exceeding 6 per cent. per annum, and "may direct that cost, with or without interest, be paid out of, or charged upon the subject-matter of the suit."⁽¹⁶⁶⁾ Interest awarded on costs will be calculated as from the date of the order unless otherwise directed.⁽¹⁶⁷⁾ If interest upon costs has not been allowed by the decree, it

(160) *Madho Das v. Ramji*, 16 A. 286; *Sudarshan v. Ram Pershad*, 33 A. 97; followed in *Sudarshan v. Ram Pershad*, 10 Ind. Cas. 402.

(161) *Dhiraj Singh v. Raja Ram*, 6 N.L.R. 164.

(162) *In re, Maatheo Prasad*, 30 A. 547; *Baji Lal v. Gobarahan*, 31 A. 265; Reference 29 M. 367; *Chapan v. Raru*, 37 M. 420.

(163) S. 7 (ix), Court Fees Act (VII of 1870).

(164) *Husani Begum v. Collector of Cawnpur*, 4 A.L.J. 375. See, also, Gour's Transfer of Property Act, 4th Ed., Vol. II, p. 1550.

(165) S. 104 of the Transfer of Property Act (IV of 1882).

(166) S. 35, Civil Procedure Code (Act V of 1908).

(167) *Taylor v. Roe*, (1894) 1 Ch. 413.

cannot be given in execution⁽¹⁶⁸⁾ unless by way of compromise.⁽¹⁶⁹⁾ And so, where the interest on costs is not allowed by the Privy Council, no interest can be given by any Court in this country.⁽¹⁷⁰⁾

In some cases the costs are set off against the amount due to the mortgagee.⁽¹⁷¹⁾ Set off of costs against mortgage-debt.

Sec. 31—Partition Suit.

Costs in partition suits—General rule that they are in discretion of Court.

Costs out of estate.

Costs up to preliminary decree.

Costs subsequent to preliminary decree.

Costs where proceedings were prolonged owing to defendant's false pleas.

Costs where several defendants join in their defence.

Costs of Hindu widow in suit for partition among members of joint family.

Costs, order as to, when allowing amendment of plaint—Converting suit for possession into one for partition.

Costs—Liability of mortgagee of share of joint property taking benefit of partition.

Costs, form of order as to—Order for execution.

Court-fees.

PARTITION suits are no exception to the general rule that the award of costs is always in the discretion of the Court. Thus, in a suit for partition, the Court has a discretion to award costs against a party who vexatiously raises a contention and fails in it.⁽¹⁾ Costs in in partition suits—General rule that they are in discretion of Court.

(168) *Pillai v. Pillai*, 24 W.R. 193, P.C.; *Bhoza Raghubar Singh v. Bhoza Roy Singh*, 3 A. 319; *Edge and Son v. Gallan and Son*, (1899) W.N. 197.

(169) *Seih Gokul Das v. Murli*, 3 C. 602.

(170) *Rammony v. Prem Chand*, 5 C.W.N. 423 (426).

(171) *Wheaton v. Graham*, 24 Beav. 483; *Cowdry v. Day*, 5 Jur. N.S. 1199; 1 Giff. 216; *Banks v. Whittoll*, 1 De G. and E. 541; *West v. Jones*, 1 Sim. N.S. 218. See, also, *Farmanund v. Gobardhan*, 23 A. 676 = A.W.N. (1906) 198 referring to *Nath Pande v. Jokhu Tewari*, 18 A. 223.

(1) *Shanmugam Pillai v. Mirakani Rowther*, 21 Ind. Cas. 746. On the subject-matter of this section see Foster on Joint Ownership and Partition, 1878, pp. 160-163; Morgan and Wurtzburg, pp. 240-244; Mew's Digest, Vol. X, Cols. 356-362; Halsbury's Laws of England, Vol. XXI, pp. 854-856; Daniell's Chancery Practice, 7th Ed., 1901, Vol. II, pp. 1119-1121; Seton on Judgments and Orders, 6th Ed., 1901, Vol. II, pp. 1881-1891; Encyclopedia of the Laws of England, 2nd Ed., Heading Partition. The following further works relating to the subject of Partition may also be usefully referred to: Bacon's Abridgment of the Law, 7th Ed., 1832. Title "Co-parceners," "Joint tenants" "and Tenants in Common." Parson's Real Property Statutes, 1902; Coke upon Littleton, 19th Ed., 1882; Dart's Vendors and Purchasers, 7th Ed., 1905, pp. 1135-1156; Lawrence on Sale under the Partition Act, 1868; Walker on Partition Act, 2nd Ed., 1882; White and Tudor's Equity Cases, 7th Ed., 1897, Vol. I, pp. 181-222; Morgan's Chancery Act and Orders, 6th Ed., 1885.

So, also, where an ill-conditioned person files a plaint for partition solely for the purpose of inflicting injury upon his joint holders, the Court will, in the exercise of its discretion, mulct him in the entire costs.⁽²⁾

Costs out of
estate.

Where the dispute between the parties in a partition suit is as to the custom of the family or the property to be divided, or the shares of the several parties, and a decree for partition is made, the usual rule is to allow the costs of all the parties to come out of the estate, unless the conduct of a party has been so objectionable as to justify depriving him of the benefit of the rule.⁽³⁾

A partition suit is brought frequently for the benefit of all the parties to it, and for that reason it would generally be unfair to require any one party to pay the costs of the litigation; but that principle does not apply where one party has been successful in a matter, the costs of which are severable from the general costs of the suit. In that case, the ordinary principle that the successful party is entitled to his costs is applicable, so far as the appeals are concerned.⁽⁴⁾

Costs up to
preliminary
decree.

Ordinarily in a suit for partition, pure and simple, the parties are to bear their own costs of the suit up to the stage of the preliminary decree. But where the defendant contests the right of the plaintiff to claim partition, he may be made liable for costs unnecessarily incurred by reason of his or her unfounded opposition.⁽⁵⁾

As the plaintiff in a partition suit commences it for his own advantage, convenience and security, and as the defendant, as joint owner, holds his undivided share always subject to the right of the plaintiff to demand partition, the parties must each bear their own costs of the suit up to the stage of the preliminary decree, and the costs of the partition should be divided between the parties in proportion to their respective shares.⁽⁶⁾

(2) *Bhoobun Mohun Dey v. Denonath Dey*, 1 Hyde, 122.

(3) *Shivshankar v. Huchaya*, Bom. P.J. 1893, p. 584.

(4) *Mohendrochandra Ganguli v. Ashutosh Ganguli*, 20 C. 762.

(5) *Satya Kumar Banerjee v. Satya Kirpal Banerjee*, 10 C.L.J. 503 (504) = 3 Ind. Cas. 247; referring to *Shama Soonduree v. Jardine Skinner & Co.*, 12 W.R. 160; *Nawab Dildar Ali Khan v. Bhowani Sahai*, 5 C.L.J. 642 and *Porter v. Loab*, (1877) 7 Ch. D. 358 (867).

(6) *Khetterpal Sritirutno v. Khelal Kristo Bhattacharjee*, 21 C. 904. (Referred to in *Nawab Dildar Ali Khan v. Bhowani Sahai Singh*, 5 C.L.J. 642 = 34 C. 878.)

In so far as the costs subsequent to the preliminary decree and up to the stage of the final decree are concerned, the cost must be borne by the parties in proportion to their respective shares.⁽⁷⁾

Costs subsequent to preliminary decree.

When the hearing of a partition suit was prolonged entirely on account of contentions raised by a defendant in which he failed, he was ordered to pay to all parties the costs of hearing on subsequent days after the first day.⁽⁸⁾

Costs where proceedings were prolonged owing to defendant's false pleas.

Where the defendant contests the right of the plaintiff to claim partition, he may be made liable for costs unnecessarily incurred by reason of his unfounded opposition.⁽⁹⁾

In this case it was held that the lower Courts ought to have charged the plaintiffs with the costs of one pleader only for all the defendants as their defences were one and the same.⁽¹⁰⁾

Costs where several defendants join in their defence.

When widows are joined as defendants, on account of their claim to maintenance out of the family estate, in a suit for partition by a co-sharer against his co-sharers, they are entitled as their costs to a percentage only on the amount claimed for maintenance, and not, under S. 2 of Regulation II of 1827, on the value placed on his claim by the plaintiff. If the claim of the widows is decided on the merits, the full percentage would be paid, in other cases one-fourth only would be paid under S. 7 of Act I of 1846.⁽¹¹⁾

Costs of Hindu widow in suit for partition among members of joint family.

It is not in every suit by a childless Hindu widow for partition that it can be taken that the suit is for the benefit of her deceased husband. Partition in itself, is in no degree a necessity or a benefit to the deceased husband. And if the widow wishes to pay the costs of a partition suit which she had brought, by sale of the property allotted to her and not merely by sale of her own limited interest therein, she must make out a distinct case of necessity, and must prove that she was driven to sue in order to protect herself and her husband's estate.⁽¹²⁾

In a suit by a brother's widow against his brothers to recover his share of joint ancestral property, defendants pleaded

(7) *Moti Lal Ghosh v. Girish Chandra Ghosh*, 6 Ind. Cas. 109 following *Dildar v. Bhawani*, 5 C.L.J. 642=34 C. 878=Cal. Case Law, Vol. II, p. 1385.

(8) *Basir Ali v. Hafiz Nazir Ali*, 13 C.W.N. 153 (154).

(9) *Satya Kumar Banerjee v. Satya Kirpal Banerjee*, 3 Ind. Cas. 247 (248)=10 C. L.J. 503 (referring to *Porter v. Lopes*, 7 Ch. D. 353, 367).

(10) *Nund Coomar Raee v. Radhanath Raee*, 5 Sud. Dew. Adaw. Rep. Bengal (1849) 418=10 Ind. Dec. Old Series, p. 963.

(11) *Ramchandra Parashram v. Bhagubai*, Bom. P.J. 1895, p. 322.

(12) *Kistokaminy Dossee v. Mirtoonjoy Dutt*, 11 B.L.R. App. 35.

separation, self-acquisition, &c. *Held* that, in the absence of some written record made of the terms of the separation at the time, the plea of separation was most improbable; and that, considering there was a certain nucleus of ancestral property from which a beginning might have been made, while, on the other hand, there was no evidence of self-acquisition by the defendants, the only inference was that the property had been acquired from the ancestral funds. Although the widow was unable to satisfy the Judge below as to each item of property for which she sued, and did not obtain a decree for the full amount claimed, yet she was held entitled to recover the whole of the costs incurred by her in a suit into which she had been forced by the defendants for the recovery of her property. (13)

Costs, order as to when allowing amendment of plaint—
Converting suit for possession into one for partition,

Where the mortgagee brought a suit for possession at first, he was permitted at the hearing to amend his plaint so as to make it a suit for partition, on condition of his paying the costs of the defendants. (14)

Costs—
Liability of mortgagee of share of joint property taking benefit of partition.

A mortgagee of a share of joint property who obtains the benefit of a partition of the property effected in a partition suit, and accepts and approves of it as part of his title, is liable in respect of a proportionate share of the charge for costs of the partition, created by the Court under an express provision of the Civil Procedure Code, even though he was not formally a party to the partition suit. (15)

(13) *Shib Pershad Chuckerbutty v. Gunga Monee Debee*, 16 W.R. 291 at p. 292. His Lordship *Jackson, J.*, said in the course of the judgment:—"Lastly, it is said that the Judge was wrong in giving the plaintiff a decree for her full costs when the whole amount of the claim was not decreed. Looking to the whole of the circumstances of the case, we think that the Judge was right to give the plaintiff her costs. There seems to be no doubt upon the evidence that the plaintiff, who, as a widow, is entitled to look to these defendants to support her and maintain her, has been turned out of her house and deprived of her share in the property by them; and even though she has not been able to satisfy the Judge as to each item of property for which she sued, it is right that she should recover the whole of the costs which she has incurred in a suit into which she was forced by the defendants for the recovery of her property." *Per Jackson, J. Shib Pershad Chuckerbutty v. Gunga Monee Debee*, 16 W.R. 291 at p. 293.

(14) *Krishnaji Lakshman Rajvade v. Sitaram Murarrav Jakhi*, 5 B. 496, referred to in *Tapiram v. Sadu*, 21 B. 570.

(15) *Khatertpal Sritirutno v. Khelal Kristo Bhuttacharjee*, 21 C. 904. S. 222 of the Civ. Pro. Code (Act XIV of 1892) is of special value in partition suits to which it is generally applied. (*Ibid.*)

Where one of the parties to a partition suit bears all the costs of the proceedings subsequent to decree, and the other parties make default in payment to him of their respective shares of the costs, he is not entitled to embody in his order against them for payment an order for execution. He must first obtain an order for payment, and, if payment be not obtained, application for execution may be made.⁽¹⁶⁾

Costs, form of order as to—Order for execution.

Where there was a dispute between the parties as to what constituted the joint family properties, and the title of the plaintiff's share in many of the properties included in the plaint was denied by the defendant, it was ruled on appeal to the High Court that the suit was maintainable upon payment of a Court-fee of Rs. 10. It was also pointed out that for the purposes of the stamp duty, the cause of action alleged in the plaint and that alone must be looked at. The appellate Court, however, differed in opinion as regards the question of costs.⁽¹⁷⁾

Sec. 32—Partnership and Company Law.

Costs in partnership suits, general rule as to.

Costs where one partner sues in the name of the firm.

Costs when partnership dissolved on ground of insanity.

Costs ordered to be paid by a partner—What is sufficient payment.

Costs of petition for winding up of company by Court.

Cost of voluntary winding up of company.

Costs of winding up, power of Court to make provision for—Practice regarding the same.

Costs of petitioner.

Costs of preliminary inquiry.

Costs where several petitions are presented for winding up of same company.

Costs of petition that is heard—English Law and practice.

Costs of petition presented in bad faith.

Costs of second petition.

Costs on withdrawal of petition.

Costs, how affected by discharge of winding up order.

Costs of provisional liquidator.

Costs, when liquidator personally liable for.

Costs of liquidator, when paid out of estate.

(16) *Brojolall Sen v. Mohendro Nath Sen*, 18 C. 199.

(17) *Mohendro Chandra Ganguli v. Ashutosh Ganguli*, 20 C. 762 approved of in *Bidhata Roy v. Ram Charitra Roy*, 6 C.L.J. 651=12 C.W.N. 37=3 M.L.T. 33; referred to in *Sripati v. Shridhar*, 15 C.P.L.R. 120 and not followed in a Reference under Court Fees Act, S. 5, 4 M.L.J. 110.

Costs of successful petitioner.
 Costs of petitioner, set off as to.
 Costs of petitioner—A charge on estate.
 Costs, priority of, when supervision order is made.
 Costs in case of appeal against order on winding up petition.
 Costs of petition for compromise between company and its creditors.
 Costs of application for staying action.
 Costs of rectification of register of members under the Companies Act.
 Costs of application for removal of name from the list of contributories.
 Costs and expenses incurred before incorporation.
 Example:—(i) Costs of preparing memorandum and articles of association.
 Costs of solicitor incurred before incorporation.
 Costs of witness attending by counsel.
 Costs, security for, from company.

Cost in
 partnership
 suits, general
 rule as to.

UNDER ordinary circumstances, the costs of a partnership suit should be paid out of the assets of the partnership, or, in default of assets, by the partners in proportion to their respective shares, unless any partner denies the fact of a partnership, or opposes obstacles to the taking of the accounts, and so renders a suit necessary, when he is usually made to pay the costs up to the hearing.⁽¹⁾

(1) *Ram Chunder Shaha v. M. C. Baniya*, 7 C. 428=9 C.L.R. 157; *Pontifer, J.*, said in the course of the judgment:—"We had some little doubt at first as to how we should deal with the costs of the suit up to this hearing. It is true that the plaint is not very artistically framed, but it is also clear that the defendants, by their written statement, asked that an account should be taken and claimed that, upon the taking of such account they would be entitled to a balance; but so far, as we can see, it appears to us that the defendants have really thrown every obstacle they could in the way of the plaintiffs having this account taken. In the examination of the principal defendant himself, a question in cross-examination was put by the plaintiffs—a very pertinent question as it seems to us—with respect to property alleged to be now belonging to this partnership, *viz.*, "which of the talooks was purchased with joint funds?" That question was objected to by the defendants and was disallowed. Under ordinary circumstances, the costs of a partnership suit should be paid out of the assets of the partnership, or in default of assets, by the partners in proportion to their respective shares in the partnership business. But when one of the partners either denies the fact of a partnership, or opposes obstacles to the taking of the accounts, and so renders a suit necessary it is usual to make such partner pay the costs up to the hearing. However, under the circumstances of this case we think that the costs of the proceedings up to this time must be dealt with as costs are ordinarily dealt with in a partnership suit: accordingly we leave them to be dealt with by the District Judge, and we make no other order concerning costs." *Ram Chunder Shaha v. Manick Chunder Baniya*, 7 C. 428 at pp. 433, 434=9 C. L. R. 157. On the subject-matter of this section, see Topham's Company Law, 2nd Edn., 1908, pp. 168 and

In suits for an account of partnership dealings and transactions, the ordinary rule is to give no costs up to the hearing; nor will this rule be departed from except in cases of gross misconduct on the part of the defendants.⁽²⁾

But where the suit is really instituted to try some disputed right, the unsuccessful litigant will be ordered to pay the costs up to the hearing of the cause.⁽³⁾

The costs of taking the accounts directed at the hearing are usually defrayed out of the partnership assets, and, if necessary, by a contribution between the partners.⁽⁴⁾

Where, in a suit to recover a sum of money on a hathchitta against several partners, some of them denied the partnership and the liability, others admitting both, and the Court found in favour of the plaintiff, those defendants that disputed the liability and the partnership were ordered to pay the costs of the other defendants.⁽⁵⁾

218; Simonson on Debenture and Debenture Stock, 4th Edn., 1913, pp. 270-274; and 563, 564; Notes on the English Companies Consolidation Act (1908) by L. Worthington, Evans and Cooper, 1909, pp. 14, 152, 167, 177, 200, 228, 236, 273; Company Law and Precedents by Arthur Stiebel, 1912, pp. 1008-1020; Law and Practice on the Companies Act by Sir Henry Burton Buckley, 8th Ed., 1902, pp. 289-293; 314-317, 340-341, etc.; Palmer's Company Precedents, 9th Ed., 1904, Vol. I, p. 1256-1259; Vol. II, pp. 650-666; Yearly Practice and Annual Practice Notes under O. LXV; Annual County Court Practice; Hand book on the Formation, Management and Winding up of Joint Stock Companies, by Gore Browne and Jordan, 30th Ed., 1909, pp. 457-460; Emden's Winding up of Companies and Reconstruction, 7th Ed., pp. 137, 138; 273-276; 281-283; 569-571; Indian Companies Act, VII of 1913, annotated by Mr. Kasturi Ranga Iyengar in the Lawyer's Companion Series, 1915, pp. 520, 521; 584-586; 777-779; etc., Chand's Law of Costs, p. 108; Morgan and Wurtzburg on the Law of Costs, pp. 244, 245, 265-281, 387, 559; Daniell's Chancery Practice, 7th Edn., 1901, Vol. II, pp. 1286-1269; Seton on Judgments and Orders, 6th Ed., 1901, Vol. III, p. 2183; Mew's Digest, Vol. III, heading 'Company' Cols. 1694-1700, 1759, 1975-1980, 1994-2003, Vol. X, heading 'Partnership' Cols. 483-485, 507; Halsbury's Laws of England, Vol. V, heading 'Companies', pp. 434; 523-527; 564-567, Vol. X, heading 'Partnership', p. 410; Lindley on Partnership, 3rd Edn. Vol. I, pp. 237, 297, 298, 515, 521; Vol. II, pp. 1298-1301; 1481-1486. The following further works relating to Companies and Partnership may also be usefully referred to; Lindley on Companies; Chadwick Healey's Joint Stock Companies; Palmer's Winding up of Companies; Manson's Law of Trading and other Companies, 2nd Ed.; Thuring. Joint Stock Companies, 5th Ed.; Brice on Ultra Vires; Hurrell and Hyde on Directors, 4th Ed.; Hamilton's Manual of Company Law; 2nd Edition.

(2) See *Hawkins v. Parsons*, 8 Jur. N. S. 452; *Parsons v. Hayward*, 4 D.G.F. & J. 474.

(3) *Warner v. Smith*, 9 Jur. 169. See as to mutual companies, *Harvey v. Beckwith*, 10 Jur. N.S. 577.

(4) Lindley on Partnership, 3rd Ed., Vol. II, p. 1031.

(5) *Juggut Chunder Roy v. Roop Chand Shaw*, 6 C. 811.

H, a partner died. The plaintiff, as Administrator-general and administrator of his estate, got a decree against the other partners for H's share in the profits of the partnership. The decree provided that the costs of all parties should be paid out of the assets of the partnership funds and that, in case the partnership assets should be insufficient to meet the plaintiff's costs, the same should be recovered by the plaintiff from the estate of H. After accounts taken, it was found that there were no partnership assets available for payment of costs. The plaintiff claimed them out of H's estate in the hands of his son. The latter objected that he was no party to the decree, and that the decree so far as it gave costs against the estate of H was altogether *ultra vires* and bad. *Held*, that the Court had no jurisdiction to order H's son to pay these monies. The effect of the closing clause of the decree was a direction or expression of opinion which was not conclusive against the person interested in disputing it, who is of right entitled to an opportunity of being heard.⁽⁶⁾

Costs where one partner sues in the name of the firm.

A partner may sue in the name of himself and co-partners, without their consent; ⁽⁷⁾ but if he sues against their consent, he must indemnify them against the costs;⁽⁸⁾ so, one partner may defend an action brought against the firm, indemnifying the firm against the consequences of so doing, if he acts against the will of the other partners.⁽⁹⁾

Costs when partnership dissolved on ground of insanity.

When the Court dissolves a partnership on the ground of insanity, it directs the costs to be paid out of the partnership assets.⁽¹⁰⁾

Costs ordered to be paid by a partner—What is sufficient payment.

If in an action costs are ordered to be paid to one partner, payment to another partner is not sufficient.⁽¹¹⁾

Costs of petition for winding up of company by Court.

S. 170 of the Indian Companies Act (VII of 1913) enacts that "On hearing the petition for winding-up by Court, the Court may

(6) *William Loudon v. Khatao Rowji*, 16 B. 515.

(7) *Whitehead v. Hughes*, 2 Cr. & M. 318.

(8) *Whitehead v. Hughes*, 2 Cr. & M. 318; *Lindley on Partnership*, 3rd Ed., Vol. I, p. 297.

(9) *Goodman v. De Beauvoir*, 12 Jur. 989 and 1037.

(10) *Jones v. Welch*, 1 K. & J. 765; *Lindley on Partnership*, 3rd Ed., Vol. I, p. 297.

(11) *Showler v. Stoakes*, 2 Dowl. & L. 3; *Lindley on Partnership*, 3rd Ed., Vol. I, p. 298.

dismiss it with or without costs, or adjourn the hearing conditionally, or unconditionally, or make any *interim* order or any other order that it deems just, but the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets. Where the petition is presented on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may order the costs to be paid by any persons, who, in the opinion of the Court, are responsible for the default.⁽¹²⁾

As a general rule, costs of winding-up must be borne in proportion to the members' interest in the assets or liability to the debts of the association.⁽¹³⁾

In an insurance company whose policies provide that to the policy-holder the funds of the company shall alone be liable, and no share-holder shall be liable beyond the amount of his shares, the costs of winding-up must be borne by the share-holders, and not paid out of the funds of the company.⁽¹⁴⁾ For the contract with the policy-holder is, that the funds of the company remaining undisposed of at the time of enforcing the agreement, that is, at the date of winding-up, and inapplicable to prior claims, shall be liable to him. Costs of realization, such as costs of sale, must be deducted; but costs of enforcing payment of calls and the like, that is, all general costs of winding-up, must be borne by the share-holders.⁽¹⁵⁾

All costs, charges and expenses properly incurred in the voluntary winding-up of a company including the remuneration of the liquidator, would be payable out of the assets of the company in priority to all other claims at the date of the winding-up.⁽¹⁶⁾

(12) Companies Act (VII of 1913), S. 170.

(13) *Preece and Evan's case*, 2 D. M. & G. 374; *London Marine Insurance Association*, 8 Eq. 176.

(14) *Professional Life Assurance Company*, 3 Eq. 668; 3 Ch. 167; *Lethbridge v. Adams*, 13 Eq. 547.

(15) *Agriculturist Cattle Insurance Co., E.P. Official Manager*, 10 Ch. 1.

(16) Act VII of 1913 (Indian Companies), S. 218. The expression "all other claims" in S. 218 of the Indian Companies Act cited *supra* means all other claims existing at the date of winding-up and does not include debts and liabilities incurred by the liquidator in the winding-up on behalf of the estate. See notes to S. 193 of the Indian Companies Act VII of 1913 by Mr. Kasturi Ranga Iyenger, in the *Lawyer's Companion Series*. If the liquidator, i.e., the estate in liquidation incurs obligations, these come first, e.g., costs which a liquidator has been ordered to pay out of the assets are entitled to priority over costs of the winding-up; and both will have priority over all other claims, being

Costs of winding up.

The liquidator is not personally liable to his solicitor for the costs of winding-up whether the liquidation is compulsory or voluntary.⁽¹⁷⁾

Power of Court to make provision for—Practice regarding the same.

The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding-up in such order of priority as the Court thinks just.⁽¹⁸⁾

In the absence of any special agreement, the costs of winding-up are generally to be paid out of the assets in the following order. (1) The costs of the petition for winding-up are to be paid first. (2) Next, the costs of realization of assets. (3) Next, the costs ordered to be paid by the liquidator, or out of the assets to a successful litigant in a suit brought or defended by the liquidator. (4) Next the general costs of the winding-up, and (5) lastly, the remuneration to the liquidator.⁽¹⁹⁾

The costs payable by the liquidator out of the assets to a successful litigant are *prima facie* to be paid immediately in full in

claims at the date of the winding-up. *Home Investment Society*, 14 Ch. D. 167; *Dominion of Canada Plumbago Co.*, 27 Ch. D. 33; *London Metallurgical Co.*, (1895) 1 Ch. 758. If the company's property is subject to mortgage it is only the equity of redemption that forms the assets; hence, costs, expenses and charges incurred in the winding-up cannot, except in so far as they have been incurred for the benefit of the mortgagees, be paid in priority to the mortgage-debt. *Regent's Canal Iron Works Co., E.P. Grissel*, 3 Ch. D. 411; see, also, *Austrian Printing Union*, (1895) 2 Ch. 891. Thus, if the liquidator realizes in the winding-up company's property which is subject to incumbrances, he is entitled to retain out of the fund the costs of realization, and any other costs he may have incurred in preserving the property, in priority to the debt due under the incumbrances, but the other costs of the winding-up including the costs of the winding up petition, not being incurred for the benefit of the incumbrancers, are to be postponed to their claims. (*Ibid.*)

(17) See *Trueman's Estate*, 14 Eq 278; *Anglo Moravian Co., E.P. Watkin*, 1 Ch. D. 130; *Dominion of Canada Plumbago Co.*, 27 Ch. D. 33.

(18) Act VII of 1913 (Indian Companies), S. 193. S. 218 of the Act which has been cited above, provides that costs, charges and expenses incurred in the winding-up including the remuneration of liquidator shall be payable in priority to all other claims. Although this section does not expressly enact as does S. 218 of the Act that the costs and expenses of winding-up shall be paid in priority to all other claims, the principle of that S. (218) applies to all cases. The absence of an express provision for payment of the costs of compulsory winding up in priority to other claims is due to the fact that it is presumed that no direction is required to the Court to do that which the justice of the case requires, and the Court will see that in the first instance the costs of winding up would be paid. See *Per Lord Cairns in Webb v. Whiffin*, L. R. 5 H. L. at p. 735.

(19) See *Emden's Winding-up of Companies*, 8th Ed., pp. 276 and 277.

priority to the general costs of liquidation. But, if the liquidator shows that other persons have a prior right to or are entitled *pari passu* with the successful litigant, payment will not be ordered without providing for the other claims. The burden of proving that immediate payment cannot be made is on the liquidator.⁽²⁰⁾

A liquidator ordered to pay the costs with liberty to pay himself out of the estate is entitled to the same priority.⁽²¹⁾

When there are several claimants for costs, the date of the order gives no priority; but payment will not be postponed indefinitely till all the claims have come in.⁽²²⁾

The liquidator is not entitled to be paid out of the assets for his remuneration, until all the costs of the winding-up including the bill of costs of any solicitor employed by him, and the costs of any provisional liquidator properly appointed, have been paid in full.⁽²³⁾

If the liquidator has paid any costs out of his pocket, he is entitled to be repaid *pari passu* with the costs similarly paid by the solicitor.⁽²⁴⁾

The liquidator's claim for remuneration cannot interfere with the rights of secured creditors.⁽²⁵⁾

As has already been noted, where the liquidator realizes in the winding up property that is subject to incumbrances, the liquidator's costs, expenses and charges of realization and preservation are to be paid out of the fund first, the principal and interest due to incumbrancers will then be paid in priority to any costs which were not incurred for their benefit.⁽²⁶⁾

(20) *London Metallurgical Co.*, (1895) 1 Ch. 758. See also *Re Pacific Coast Syndicate Ltd.*, (1913) 2 Ch. 26; *Palmer's Company Precedents*, 11th Ed., pp. 743-749.

(21) *Dominion of Canada Plumbago Co., In re.* 27 Ch. D. 33.

(22) *London Metallurgical Co.*, (1895) 1 Ch. 758.

(23) *Re Massey*, 9 Eq. 367; *Re Trueman's Estate*, 14 Eq. 278; *E.P. Percival*, 6 Eq. 519; *Webb v. Whiffin*, L.R. 5 H.L. 711.

(24) *Re Massey*, 9 Eq. 367.

(25) *Lloyd v. Lloyd (David) & Co.*, 6 Ch. D. 339; *Holroyd v. Marshall*, (1862) 10 H.L. Cas. 191; *Re Oriental Hotels Co.*, (1871) L.R. 12 Eq. 126, 133; *Re Anglo Austrian Printing and Publishing Union*, *Brabourne v. Some*, (1896) 2 Ch. 891. See, further, *Re National Provincial Insurance Corporation, Ltd.*, *Cooper v. The Corporation*, (1912) 56 Sol. Jo. 290.

(26) See *Brabourne v. Anglo Austrian Printing Co.*, (1895) 2 Ch. 891. See, also, *Marine Mansions Co.*, 4 Eq. 601; *Regent's Canal Iron Works Co.*, *E.P. Grissell*, 3 Ch. D. 411; *Perry v. Oriental Hotels Co.*, 12 Eq. 126; *Latham v. Greenwich Ferry*, (1895) W.N. 77.

The liquidator's costs of preserving the property are, as between the incumbrancers and the company, to be paid by the latter, but the liquidator is entitled to be indemnified out of the fund against any costs of preservation which may not be paid out of the company's assets.⁽²⁷⁾ But, he is not entitled to be indemnified out of the fund against costs not incurred for the benefit of the incumbrancers, such as the costs of carrying on the company's business.⁽²⁸⁾

Where part of the assets were severed from the rest to answer the claims of a creditor, upon which claim there were many incumbrances, and then a petition for payment out of Court was presented and served upon the liquidators, they were held entitled to be paid out of the fund their costs of appearing on the petition, but not their costs, charges and expenses of investigating the claims, or of an abortive attempt at an arrangement.⁽²⁹⁾

The assets will, as a general rule, be rateably distributed amongst the different solicitors, in payment of their costs. Where the liquidator changes his solicitor in the winding-up, and the assets are not sufficient to pay the whole costs, the different solicitors will, as a general rule, be paid rateably so far as the assets will extend.⁽³⁰⁾

A liquidator is not personally liable to his solicitor for the costs of the winding-up whether the liquidation is compulsory or voluntary.⁽³¹⁾

Costs of
petitioner.

If a petition for winding up of a company is successful, the petitioner's costs are a first charge on the estate and must be paid in full in priority to any costs of the liquidator.⁽³²⁾

The costs are to be paid to him without any set-off being made against calls that may be payable by him as a contributory.⁽³³⁾ But the costs are to be paid only out of the assets of the company; the petitioner is not, as between himself and debenture-holders, entitled to be paid out of assets available for the latter.⁽³⁴⁾

(27) See *Brabourne v. Anglo Austrian Printing Co.*, (1895) 2 Ch. 891. See, also, *Marine Mansions Co.*, 4 Eq. 601; *Regent's Canal Iron Works Co., E. P. Grissell*, 3 Ch. D. 411; *Perry v. Oriental Hotels Co.*, 12 Eq. 126; *Latham v. Greenwich Ferry*, (1895) W.N. 77.

(28) See *Ormerod & Co.*, (1890) W.N. 217.

(29) *Bonelli's Electric Telegraph Co., Cook's claim*, 18 Eq. 656.

(30) *Audley Hall Cotton Spinning Co.*, 6 Eq. 245.

(31) *Anglo Moravian Co., E. P. Watkin*, 1 Ch. D. 130; *Dominion of Canada Plumbago Co.*, 27 Ch. D. 33; *Re Trueman's Estate*, 14 Eq. 278.

(32) *Audley Hall Cotton Spinning Co.*, 6 Eq. 245.

(33) *General Exchange Bank*, 4 Eq. 138; see, also, *Equestrian Buildings Co.*, 1 Megone, 115.

(34) *New York Exchange*, 1 Ch. 371.

If a creditor proceeds to bring his petition to hearing after an offer made to him to pay or secure his debts and costs, he will not be given costs incurred after the offer.⁽³⁵⁾ After all the fundamental principle as to costs remains that they are in the discretion of the Court and cannot be claimed as a matter of right. Thus, costs may be refused if a creditor has appeared only to ask costs, or where the interests of the parties claiming costs are not affected or where their separate appearance is unnecessary.⁽³⁶⁾

If the petition is contested on some preliminary grounds as to which an inquiry is directed, and the result of the inquiry shows that the petitioner was correct, the costs of the inquiry must be borne by those whose opposition was the cause of the inquiry.⁽³⁷⁾

There is nothing to prevent the presentation of several petitions by several persons; and as no person can prevent the withdrawal of a petition presented by another person, and as petitions are frequently presented in order that they may be withdrawn or pressed on as may be afterwards found convenient, it has become common for several persons to present several petitions to wind up the same company. This practice, however, is discouraged as much as possible by the Courts; and persons who, without some special justification, present petitions after they know that a petition has been presented already, run great risk of having to pay the costs incurred by themselves, if not also the costs of the persons they have served.⁽³⁸⁾

Where, however, the first petition is presented by persons in the interest of the company and is of a suspicious character, a second petition is considered justifiable.⁽³⁹⁾

Where there are several justifiable petitions and a winding-up order is made, one order is usually made on all the petitions, and the costs of them all are paid by the company.⁽⁴⁰⁾

(35) See *Times Life, &c. Co.*, 9 Eq. 382; *Imperial Guardian Society*, 9 Eq. 447.

(36) *Hull and County Bank*, 10 Ch. D. 130; *Walkhan United Mines*, (1882) W.N. 134; *Star & Garter Hotel Co.*, 42 L.J. Ch. 374; *City Glass Co.*, (1874) W.N. 116; *Criterion Gold Mining Co.*, 41 Ch. D. 146; *District Bank of London*, 35 Ch. D. 576; see, also, S. 35, Civ. Pro. Code (Act V of 1908).

(37) *Re Bosworthen Mining Co.*, 26 L.J. Ch. 612.

(38) See, on this subject, *Ex parte Turner*, 3 DeG. & S. 127; *Times Fire Ins. Co.*, 30 Beav. 596.

(39) *Humber Iron Works Co.*, 2 Eq. 15; *Commercial Discount Co.*, 1 N.R. 416.

(40) (*Ibid.*) *Ex parte Walker*, 1 DeG. & Sm. 585.

In such a case one set of costs is usually allowed to the unserved creditors and one to the unserved contributories appearing and supporting the petitions. Each, however, of several petitions must be dealt with on its own merits.⁽⁴¹⁾

Costs of
petition that
is heard—
English law
and practice.

The practice of the English Courts is that if the petitioner succeeds, the petitioner and the Company will get their costs out of the estate, and the contributories and the creditors who support the petition will also get one set of costs each between them. If the petition fails the usual order is that the petitioner pays the costs of company opposing, and also two sets of costs, one to the opposing creditors, and one to the opposing contributories.⁽⁴²⁾

These rules are not inflexible; still, they have been adopted in England for many years, and apply whether the petitioner is a creditor or contributory.⁽⁴³⁾

Secured creditors can get their costs, though they do not elect to give up their security.⁽⁴⁴⁾

Creditors or contributories who support the successful party will not be allowed to share the costs if they are represented by the same solicitor as the party whom they support.⁽⁴⁵⁾ Nor will they get their costs if they have not given notice of their intention to appear as required by the rules, and have not stated therein whether they support or oppose any, and if any, what order.⁽⁴⁶⁾

If a petition *bona fide* presented by a creditor or contributory is dismissed at the instance of a majority of share-holders who desire to continue the business, the dismissal may be without costs.⁽⁴⁷⁾ But in such a case the petitioner also will not be given his costs.⁽⁴⁸⁾

(41) *European Banking Co.*, 2 Eq. 521; Lindley on Partnership, 3rd Ed., Vol. II, p. 1300.

(42) See *E.P. Baylie*, 2 Eq. 521; *New Gas Co.*, 5 Ch. D. 703; *Anglo Egyptian Navigation Co.*, 8 Eq. 660; *E.P. Nunneley*, 39 L.J. Ch. 297; *Madras Coffee*, 17 W.R. 643 (Eng.); *General Exchange Bank*, 14 L.T. 582; *Hop and Malt Exchange Co.*, (1866) W.N. 222.

(43) See *Albion Bank*, (1866) W.N. 388; *Anglo Egyptian Co.*, 8 Eq. 660; *New Gas Co.*, 5 Ch. D. 703 and other cases cited in *Emden's Winding-up of Companies*, 8th Ed., p. 269. See, also, Buckley, 9th Ed., p. 244.

(44) *Carmathen Coal Co.*, (1875) W.N. 243 = 45 L.J. Ch. 200.

(45) *Brighton Marine Palace*, (1897) W.N. 12; *Ibo Investment Trust*, (1904) 1 Ch. 26.

(46) See Buckley, 9th Ed., p. 344.

(47) *Great Northern Copper Mining Co.*, 14 W.R. 705 (Eng.); *Hoobury Bridge Coal Co.*, (1879) W.N. 51.

(48) *Tyneside Buildings Society*, (1885) W.N. 148.

If a creditor, after an offer made to secure or pay his debt and costs, proceeds with his petition to a hearing, he will not be given costs incurred after such offer, or will be ordered to pay all the costs of the petition incurred since the offer was refused.⁽⁴⁹⁾

An injunction may be granted to restrain directors from paying themselves out of the assets, costs of a petition presented by themselves, but opposed by a number of the share-holders and a minority of the directors.⁽⁵⁰⁾

If a person against whom the petitioner has made a personal charge appears and successfully refutes the charge, the costs of that person must be paid by the petitioner.⁽⁵¹⁾

A petition for winding up of company presented in bad faith will be dismissed with costs.⁽⁵²⁾

Costs of
petition
presented in
bad faith.

Thus where certain creditors, whose petition for winding-up was dismissed with costs, induced a share-holder to present a petition for the purpose of annoying the company, the petition of the share-holder was dismissed on the ground that it was presented in *bad faith*.⁽⁵³⁾

A creditor who presents a second petition knowing that a petition has already been presented, runs the risk of having to pay the costs, even though the first petition was presented by the company.⁽⁵⁴⁾

Costs of
second
petition.

(49) See Buckley, 9th Ed., pp. 345, 346.

(50) *Smith v. Duke of Manchester*, 24 Ch. D. 611.

(51) *Humber Iron Works Co.*, 2 Eq. 15; *Anglo Greek Steam Co.*, 2 Eq. 1. See, also, *Re Bamford Ltd.*, (1910) 1 I.R. 390.

(52) *Re Metropolitan Saloon Omnibus Co.*, *E.P. Hawkins*, (1859) 29 L.J. Ch. 830 = 5 Jur. (N.S.) 922. S. 166 of the Companies Act provides for a petition for the winding up of company. It runs as follows:—An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company or by any creditor or creditors, including any contingent or prospective creditor or creditors, contributory or contributories or by all or any of those parties, together or separately: provided that—etc., etc.

(53) (*Ibid.*) As to the liability of a person who presents a petition maliciously, and as to the jurisdiction of the Court to restrain the presentation of such petitions, see notes under S. 163 of the Indian Companies Act VII of 1913.

(54) See *Accidental and Marine Insurance Co.*, *E.P. Rasch*, 36 L.J. Ch. 75 = L.T. 173; *Joint Stock Coal Co.*, 8 Eq. 146; *Empire Assurance Corporation*, 16 L.T. 341; *Brooke & Co.*, (1898) W.N. 213; *Building Societies Trust*, 44 Ch. D. 140; *Standard Cement Co.*, (1890) W.N. 91, cited in Buckley, 9th Ed., p. 324.

But if the second petitioner alleges and proves fraud affecting the first petition, the first petition will be dismissed and the second petition will become the first.⁽⁵⁵⁾

If a creditor, who is in earnest about winding up, finds that a petition has been already presented but suspects fraud, before he presents a second petition, should write to the first petitioner requiring to know before a certain day whether or not he is going *bona fide* to press for an order and stating that in default of a satisfactory answer he should present another petition.⁽⁵⁶⁾

Where a second petition is presented in ignorance of the first, the petitioner will have costs up to the time he becomes aware of the existence of the first petition.⁽⁵⁷⁾ He will not be given the subsequent costs unless he has good reason to believe that the first petition was presented in bad faith.⁽⁵⁸⁾

Costs on
withdrawal
of petition.

The costs which a petitioner will be required to pay on the withdrawal of his petition before hearing will include the costs of all the creditors and contributories who appear whether they appear to support or to oppose the petition, for the Court has in such a case no means of judging whether the persons who appear to support or persons appearing to oppose are in the right.⁽⁵⁹⁾

(55) See Buckley, 9th Ed., p. 325. Also *Norton Iron Co.*, (1877) W.N. 223=47 L. J. Ch. 9; *Building Societies Trust*, 44 Ch. D. 140.

(56) See *per Jessel, M.R. in the Norton Iron Co.*, (1877) W.N. 223=47 L. J. (Ch.) 9.

(57) *General Financial Bank*, 20 Ch. Div. 276; *Building Societies Trust*, 44 Ch. D. 140; *Sheringham Development Co.*, (1893) W.N. 5.

(58) *General Financial Bank*, 20 Ch. Div. 276; *Building Societies Trust*, 44 Ch. D. 140; *Sheringham Development Co.*, (1893) W.N. 5. See Buckley, 9th Ed., p. 325. The mere advertisement of the first petition does not necessarily raise a presumption of notice. (*Marrin Bank Co.*, 38 L.T. 140). Thus where a first petition that was advertised was adjourned *sine die* on coming for hearing, and six months afterwards a creditor in ignorance of its existence presented a second petition he was held entitled to costs (*Ibid*). Where two petitions were presented, one by paid-up shareholder, and the other by shareholders who had only paid a deposit, one order was made on both the petitions and the conduct of the winding-up given to the paid up shareholder. *Constantinople and Alexandria Hotel Co.*, 13 W.R. (Eng.) 851; *English Berlin Great Market, etc.*, 19 W.R. 792 (Eng.). On the death of a petitioner before the hearing, his personal legal representative can obtain an order to carry on the petition. (*Dynevor Collieries Co.*, W.N. (1878), 199.)

(59) See *Nacupai Gold Mining Co.*, 28 Ch. D. 65; *Patent Cocoa Fibre Co.*, 1 Ch. D. 617; *British Electric Street Tramways*, (1903) 1 Ch. 725; *North Brazilian Sugar Factories*, (1877) W.N. 3=56 L.T. 229. Buckley says that the reasons for a contrary decision, *Jablochhoff Electric Light Co.*, (1893) W.N. 189=49 L.T. 566=32 W.R. 168 (Eng.) do not seem satisfactory. See Buckley, 9th Ed., p. 323.

The right of creditors and contributories who attend the hearing, to costs, is not affected by the fact that they have notice that the petitioner intends to withdraw the petition.⁽⁶⁰⁾

The Court will generally allow only one set of costs, and not two sets, one to creditors and one to contributories; for, separate sets of costs will not be given when the petition is dismissed on its merits, and no more ought to be given when it is withdrawn.⁽⁶¹⁾ But, there may be cases in which the Court may, in its discretion, allow separate sets of costs, as for instance, where the petitioner refuses to give any reason for the withdrawal of his petition.⁽⁶²⁾

As the petitioner is liable to pay the costs of the persons who appear, if he withdraws the petition before hearing, it seems he is entitled to require the company that such costs shall be paid by the company if they wish to get rid of his petition by paying his debt. If the company pay the debt without providing for the cost, he is entitled to bring on his petition to get them.⁽⁶³⁾

Costs under a winding-up order cannot be directed to be paid out of the estate if the order is subsequently discharged as invalid.⁽⁶⁴⁾ Costs, how affected by discharge of winding-up order.

A provisional liquidator though served is not entitled to appear, and, if he appears, he will not in general be given the costs of his appearance. His position is that of a receiver *pendente lite*.⁽⁶⁵⁾ Costs of provisional liquidator.

If the liquidator brings or defends an action, in the name of the company and not in his own name, and fails, he cannot be Costs, when liquidator personally liable for.

(60) *Hereford Engineering Co.*, 17 Eq. 423. But they will get only the costs incurred before hearing and the cost of attending (*Marlborough Club Co.*, 1 Eq. 216).

(61) See *per Kay, J.*, in *Criterion Gold Mining Co.*, 41 Ch. D. 146. See, also, *Peckham Tramways Co.*, 57 L.J. Ch. 462.

(62) See *North Brazilian Sugar Factories*, (1887) W.N. 3=56 L.T. 229 as explained in *Peckham Tramways Co.*, 57 L.J. Ch. 462. In *re Paper Bottle Co.*, in which the Court following *North Brazilian Sugar Factories*, (1887) W.N. 3 allowed two separate sets of costs. *Peckham Tramways Company*, (57 L.J. 461) was not cited. See Buckley, 9th Ed., p. 323. "The real difficulty, however, is that while if the petition is heard there is a winning side and a losing side and the winning side gets one set of costs, it is impossible to do justice on the same lines when no one can say which side would have won." Buckley, 9th Ed., p. 323.

(63) See *Flagstaff Co. of Utah*, 20 Eq. 268, cited in Buckley, 9th Ed., p. 323.

(64) See *Estates Investment Co.*, 8 Eq. 227; *Padstow Total Loss. Assn.*, 20 Ch. D. 137; *Arthur Average Assn.*, 3 Ch. D. 522.

(65) See *General International Agency Co.*, 36 Beav. 1=13 W.R. 363 (Eng.)=34 L.J. (Ch.) 337=5 N.R. 265. As to the liability for costs when a second petition presented, when one is already pending, see notes under S. 166 of the Indian Companies Act in the *Lawyer's Companion Series*.

ordered personally to pay the costs of his opponent. The costs should be directed to be paid out of the estate.⁽⁶⁶⁾

As regards applications in the winding-up if the liquidator applies in his own name and not in the name of the company, and fails, the order for costs will be against him personally but without prejudice to his right to apply for payment of such costs out of the assets.⁽⁶⁷⁾

Where the liquidator is respondent to an application which has succeeded, there will be no personal order against him for costs and the Court will direct the costs of the applicant to be paid out of the assets.⁽⁶⁸⁾

If the liquidator appeals from a decision in the winding-up, and the appeal is dismissed, the order will be that the liquidator do pay the costs.⁽⁶⁹⁾

If the liquidator be respondent to the appeal and also respondent to the application in the lower Court, and the appeal succeeds, the cost of the successful appellant will be directed to be paid out of the estate. The liquidator will not be personally liable for costs of the appeal or the costs in the lower Court.⁽⁷⁰⁾

(66) See *Fraser v. Brescia Trans*, 56 L.T. 771. If the company be the plaintiff and it appears that if the defendant be successful the company will be unable to pay the costs, the defendant may apply for security under S. 280 of the Companies Act. But, if the company be the defendant, the plaintiff in bringing an action against a company in liquidation, takes the risk of not recovering his costs. See Emden's *Winding up of Companies*, 8th Ed., p. 277. Buckley, 9th Ed., p. 368.

(67) *Hounslow Brewery*, (1896) W.N. 45; *Powell & Sons*, (1896) 1 Ch. 681; Cf. *Official Manager of Grand Trunk Railway v. Brodie*, 9 Hare 823=3 D.M. & G. 146; *Official Manager of Consols Insurance v. Wood*, 2 Dr. & Sm. 353=13 W.R. 492, Eng.; see, also, *Sichell's case*, 3 Ch. 119, 124; *Campbell's case*, 4 Ch. D. 470, 475; *Caldwell v. Ernest*, 27 Beav. 39. In *Bentley's case*, 12 Ch. D. 850, 851, a personal order for costs against the liquidator was refused. But Buckley says the point was not argued, and as the assets are in general sufficient, an order for payment out of assets is not objected to. See Buckley, 9th Ed., p. 369.

(68) *Salisbury Jones' case*, (1895) 1 Ch. 333, overruling *Staffordshire Co.*, (1893) 3 Ch. 523; see, also, *Marseilles Railway Small Page's case*, 30 Ch. D. 598; but see *Western Counties Co.*, (1897) 1 Ch. 617, 632, where there was a personal order against the liquidator.

(69) *E. P. Cambrian Steam Packet Co.*, 4 Ch. 112, 117; *E. P. Littledale*, 9 Ch. 257, 262; *Orgill's case*, 21 L.T. 221. The intention in such case is that he is to pay the costs whether he is or is not able to get them paid out of the assets. *Ferrao's case*, 9 Ch. 355.

(70) *Salisbury Jones' and Dub's case*, (1895) 1 Ch. 333, overruling *Staffordshire Gas Co.*, (1893) 2 Ch. 523; see, also, *Marseilles Railway Small Pages' case*, 30 Ch. D. 599.

A liquidator who desires to appeal should, in order to be safe as to costs, apply for leave to appeal to the Judge in the winding-up.⁽⁷¹⁾

Jessel, M.R., stated that it was his practice to grant leave if he thought the case a proper one for appeal. If a liquidator appealed without leave and the appeal failed, he would, as a general rule, refuse costs.⁽⁷²⁾

Where a liquidator who has incurred a personal liability in respect of the costs of an action or application, applies to be allowed out of the estate such costs and also his own costs, the Court should consider whether the proceedings in which the costs were incurred were proper or not, and in determining this question the Court shall take into consideration the fact that the liquidator is a paid agent bound to discharge his duties with reasonable care and skill, and may disallow the costs for any mistake which would not disentitle an ordinary gratuitous trustee to costs.⁽⁷³⁾

If the proceeding be in the Court which has control over the winding-up, the Judge may determine at once as between the liquidator and the estate whether to allow the costs out of the estate or not, and if he think proper to allow them and the adverse litigant (there being sufficient assets), does not object, then, commonly the order is for payment, not by the liquidator personally, but out of the estate.⁽⁷⁴⁾ But the Court of appeal would not decide whether the liquidator's costs shall be allowed out of the estate or not.⁽⁷⁵⁾

Where payment of the amount of their shares by the shareholders of the Company was not in cash as provided by S. 28 of Act VI of 1862, and the Company went into liquidation subsequently, and the official liquidator applied to make those shareholders contributories although the application was dismissed as the case was held to be governed by Act X of 1866 and not by Act VI of 1882, still, as the application was made *bona fide* in liquidation,

(71) See Emden's Winding-up of Companies, 8th Ed., p. 278, Buckley, 9th Ed., p. 370.

(72) *City and County Investment Trust*, 13 Ch. D. 475, 483; *Silver Valley Mines*, 21 Ch. D. 381, 389.

(73) *Silver Valley Mines*, 21 Ch. D. 381; *Raynes Park Golf Club*, (1899) 1 Q.B. 961; doubted in *John Twedle & Co.*, (1910) 2 K.B. 697; Cf. *E. F. Harper*, 20 Ch. D. 685.

(74) Buckley, 9th Ed., p. 369.

(75) *Silver Valley Mines*, 21 Ch. D. 381, 387, 392.

costs of each side were ordered to be paid as a first charge out of the estate.⁽⁷⁶⁾

The liquidator can appeal against an order refusing to allow him costs or ordering him personally to pay the costs of the adverse litigant.⁽⁷⁷⁾

Costs of
successful
petitioner.

The costs of a successful petitioner must be paid, even though there are calls in the winding up payable by him.⁽⁷⁸⁾

In an application for the winding up of a Company by a creditor, the Court will always be in favour of making an order for winding up by the Court. The petitioning creditor is entitled to his costs as a first charge on the assets of the Company, subject to any prior liens on the estate.⁽⁷⁹⁾

Costs of
petitioner, set
off as to.

The costs to which the petitioner is entitled cannot be set off against any call that may become due to the company from him as a contributory.⁽⁸⁰⁾

Costs of
petitioner—
A charge on
estate.

As a winding-up order operates in favour of all creditors and contributories,⁽⁸¹⁾ where a petitioner succeeds the petitioner's taxed costs including the costs of establishing his debt and of an application to stay an action pending the hearing of the winding-up petition, are a first charge on the estate and must be paid in full in priority to the costs of the liquidator.⁽⁸²⁾ But the costs can be paid only out of the assets of the company, and cannot be paid out of assets available for payment of debenture-holders.⁽⁸³⁾ The rule of priority applies only to costs of the petitioner. Other persons to whom costs might be awarded in the winding-up are not entitled to priority.⁽⁸⁴⁾

Costs, prior-
ity of, when
supervision
order is
made.

Where a supervision order is made on a petition, the costs of the liquidator incurred before the supervision order are to be paid

⁽⁷⁶⁾ *In the matter of the West Hope Town Tea Company, Limited*, 11 A. 349=9 A. W.N. 119.

⁽⁷⁷⁾ *Silver Valley Mines*, 21 Ch. D. 331; *Raynes Park Golf Club*, (1899) 1 Q.B. 961, doubted in *John Tweddle and Co.*, (1910) 2 K.B. 697.

⁽⁷⁸⁾ *General Exchange Bank*, (1887) 4 Eq. 138. See Act VII of 1913 (Indian Companies Act), S. 186, p. 572.

⁽⁷⁹⁾ *In re The Nator Rabi Tea Company*, 3 B.L.R. App. 11.

⁽⁸⁰⁾ *General Exchange Bank*, 4 Eq. 138, see, also, *Equestrian Buildings Co.*, 1 Megone 115.

⁽⁸¹⁾ *Audley Hall Cotton Spinning Co.*, 6 Eq. 245.

⁽⁸²⁾ *Anglo Austrian Printing Union*, (1895) 2 Ch. 891.

⁽⁸³⁾ *Marlborough Club Co.*, *E. P. Percival*, 6 Eq. 519.

⁽⁸⁴⁾ (*Ibid*).

in priority to the costs of the petitioner, and the petitioner's costs are to be paid in priority to the liquidator's costs incurred after the order.⁽⁸⁵⁾

The order made on a winding-up petition is appealable.⁽⁸⁶⁾ The company, by its directors, may appeal against a winding-up order notwithstanding that a liquidator has been appointed.⁽⁸⁷⁾ But, in such a case, the Court will order security for costs unless some one who is personally liable for costs is joined.⁽⁸⁸⁾

Costs in case of appeal against order on winding-up petition.

The Court of appeal will not hear creditors and contributories in support of the appeal, but it may hear them in opposition and give them costs if they succeed.⁽⁸⁹⁾

If an appeal against a winding-up order, preferred nominally by the company, but really by the directors is dismissed, the order will be for costs of the respondents to be paid out of the assets, and there will be no order as to the costs of the appellants. If the petition of appeal is merely dismissed with costs, the directors would get their costs from the assets.⁽⁹⁰⁾

The Court may, in the exercise of its discretion, disallow the costs of creditors appearing on the petition for compromise or arrangement between a company and its creditors or any class of them, if it is of opinion that they might have left the matter to the liquidators.⁽⁹¹⁾

Costs of petition for compromise between company and its creditors.

(85) *New York Exchange Co.*, (1893) 1 Ch. 371. See, also, *Sanitary Burial Association*, (1900) 2 Ch. 299.

(86) *Buckley*, 9th Ed., p. 346, see, also, S. 202 of the Indian Companies Act.

(87) *Diamond Fuel Co.*, 13 Ch. Div. 400. See, also, *Commercial Bank of South Australia*, 31 S.J. 10.

(88) *Diamond Fuel Co.*, 13 Ch. Div. 400.

(89) *New Gas Co.*, 5 Ch. Div. 703; *Consolidated South Rand Mines*, (1909) W.N. 66; (1909) 1 Ch. 491.

(90) *National Saving Bank*, 1 Ch. 547; *Diamond Fuel Co.*, 13 Ch. Div. 400. Proceedings taken under a winding-up order will be discharged if the winding-up petition is dismissed on appeal, *E. P. Williamson*, 5 Ch. 309.

(91) See *Re Albert Life Assurance Co.*, 40 L.J. Ch. 509 = 6 Ch. 381. S. 153 of the Companies Act makes provision for such a petition. It runs as follows:—"Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs. If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the

Cost of application for staying action.

If a creditor brings an action after notice of the resolution for winding-up, the Court will, unless the action is one which, in its opinion, ought to proceed, restrain the action, and require the creditor to pay the costs of the action and the application for stay.⁽⁹²⁾ But if the action be commenced without notice of the winding-up, the creditor will be allowed costs incurred before he had notice of the winding-up; such cost will be added to his debt and can be proved in the winding up.⁽⁹³⁾

An action commenced before the resolution for a voluntary winding-up, may be restrained on the same terms as to costs.⁽⁹⁴⁾

If after notice of the winding-up and an offer to allow him to prove for his debt and costs in the winding-up, the creditor proceeds with the action, he will not be allowed his costs of the application to restrain his action, and may, on the other hand, be required to pay the company's costs.⁽⁹⁵⁾

In the absence of special circumstances, a creditor who commences an action after the commencement of winding-up will be guilty of incurring costs uselessly, his action will be stayed and he will be required to pay the costs of the action and of the application for stay.⁽⁹⁶⁾

Where a liquidator, whether in a voluntary or compulsory winding-up incurred costs in an unsuccessful litigation, they are

case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on all the members or class of members, as the case may be, and also on the company, or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company. In this section the expression "company" means any company liable to be wound up under this Act (S. 153, Indian Companies Act VII of 1913)". In *Tunis Railways Co.*, 31 L.T. 264, a dissentient minority of debenture-holders were disallowed costs out of the estate.

(92) See *East Kent Shipping Co.*, 18 L.T. 748; *Freeman v. General Publishing Co.*, (1894) 2 Q.B. 380. See also S. 215 of the Indian Companies Act and Notes thereunder in the Lawyer's Companion Office Edition of the Act.

(93) See *Keynshan Co.*, 25 Beav. 123; *Peninsular Banking Co.*, 35 Beav. 280. The Court may, in such a case, while restraining the action require the liquidator, to give access to the proceedings. (*Ibid.*).

(94) See *Keynshan Co.*, 33 Beav. 123. See *In re Life Association of England*, 10 Jur. N.S. 762=12 W.R. 1069 (Eng.).

(95) *Rose v. Garden Lodge Co.*, 3 Q.B.D. 235; *Freeman v. General Publishing Co.*, (1894) 2 Q.B. 380.

(96) *Re East Kent Shipping Co.*, (1868) 18 L.T. 748; *Freeman v. General Publishing Co.*, (1894) 2 Q.B. 380.

payable to the party entitled out of the assets of the company in priority to the costs of the liquidation. This rule applies equally whether the order simply directs payment of costs or directs that the costs be paid out of the assets of the company and that the liquidator do pay the costs with liberty to recoup himself out of the assets.⁽⁹⁷⁾

S. 38 of the Indian Companies Act (VII of 1913) provides for the rectification of the register of members maintained under the said Act and the costs occasioned by such rectification. It says:—
 “If the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members of a company; or default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register. The Court may either refuse the application, or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved, and may make such order as to costs as it in its discretion thinks fit”.⁽⁹⁸⁾

Thus, it will be seen that S. 38 of the Indian Companies Act like S. 35 of the English Companies Act of 1862, empowers the Court to visit the applicant with costs, and if it rectifies the register, to order costs, and damages to be paid by the Company, but gives no authority to order payment of costs by any person other than the Company; this is an indication that the section is not applicable to cases of specific performance of contract for the purchase and sale of shares.⁽⁹⁹⁾

Hence, if an application is brought within the section by showing that the applicant has a legal title, and if it is shown that the company was wrong in siding the wrong party, the Court, not being authorized to make that wrong party pay the costs, would direct the company to pay the same.⁽¹⁰⁰⁾

(97) *In re Pacific Coasts Syndicate Ltd.*, (1913) 2 Ch. 26.

(98) S. 38 of the Indian Companies Act (VII of 1913).

(99) *Ward and Henry's case*, 2 Ch. 431, 442; *Musgrave and Hart's case*, 5 Eq. 123, 199; *E.P. Sargent*, 17 Eq. 273, 276; see, also, Buckley, 9th Ed., p. 118.

(100) *E.P. Sargent*, 17 Eq. 273.

But if the application is made as part of winding-up proceedings, the Court has jurisdiction to order the person against whom the application is made to pay costs. (101)

Costs of application for removal of name from the list of contributories.

A person who unsuccessfully applies to have his name removed from the list of contributories, would, in the absence of special circumstances, have to pay costs of the contest. (102)

The Court may however, if it thinks fit, make no order as to costs not only where a contributory unsuccessfully applies to have his name taken off the list, but also in cases where the liquidator successfully applies to put a person on the list. (103)

An alleged contributory who succeeds in disputing his liability will, in a proper case, get his costs out of the estate. (104)

The liquidator's costs properly incurred will, if they are not payable by any party before the Court, be paid out of the estate. (105)

Thus where the liquidator of a company made an application in good faith to place certain share-holders on the list of contributories, and the application was dismissed, the Court ordered the cost of each side to be paid as a first charge out of the estate. (106)

Costs and expenses incurred before incorporation

Contracts entered into on behalf of a company not in existence or obligations incurred before the incorporation of a company will

(101) *Bank of Hindustan, China and Japan, E.P. Kintrea*, 5 Ch. 95. *Quære*.—Whether the rules above stated are in any way affected by the provisions of S. 35 of the Civil Procedure Code (Act V of 1908). Cf. *in re Fisher*, (1894) 1 Ch. 53. See also Mr. Kasturi Ranga Iyengar's Notes under S. 38 of the Indian Companies Act VII of 1913, in the Lawyer's Companion Series.

(102) *Gower's Case*, 6 Eq. 77; *Birbeck Life Assurance Co., Barry's Representative's Case*, 2 Dr. & Sm. 321=W.R. (Eng.) 380=5 N.R. 299; *Musgrave and Hart's Case*, 5 Eq. 193; *Andrew's Case*, 3 Ch. 161.

(103) See *Gregg's Case*, 15 W.R. 82 (Eng.); *Purdey's Case*, 16 W.R. 660 (Eng.); *Mallorie's Case*, 15 W.R. 52 (Eng.)=15 L.T. 236=26 L.J. (Ch.) 40; *Fletcher's Case*, 16 W.R. 75 (Eng.)=37 L.J. (Ch.) 49=17 L.T. 136. But the costs of an unsuccessful resistance by contributories will not be paid to them out of the estate. See *E.P. Oakes and Peek*, 3 Eq. 576, 633.

(104) *Nation's Case*, 3 Eq. 77; *Ship's Case*, 13 W.R. 450 (Eng.)=12 L.T. 728; *Emmerson's Case*, 2 Eq. 231=1 Ch. 435; *Coate's Case*, 17 Eq. 169; *Low's Case*, 9 Eq. 589.

(105) See Notes to S. 179 of the Indian Companies Act in the Lawyer's Companion Series. See, also, Buckley, 9th Ed., p. 384. *In the matter of the West Hopetown Tea Company*, 11 A. 349.

(106) *In the matter of the West Hopetown Tea Company*, 11 A. 349. Where the dispute is not between the liquidator and an alleged contributory, but between two persons, both equally solvent as to which of them is liable as a contributory, the liquidator should take no part in the dispute. *Musgrave and Hart's Case*, 5 Eq. 193.

not as a general rule bind the company when it has been duly formed. (107).

A company is not bound by any agreement entered into on its behalf before it comes into existence, and as a Company is not in existence at the date of preparing the memorandum and articles, the costs of preparing these cannot be recovered from it (108). Even by subsequent ratification, a Company cannot be bound by any such contract entered into before its incorporation (109). But it may enter into a new contract embodying the terms of the old one (110). Or it may enter into a new contract adopting the old one (111).

Example—
Costs of
preparing
memorandum and
articles of
association.

A solicitor who prepares the memorandum and articles cannot recover his costs for the same from the company when incorporated (112). Even the fees required to be paid on the registration of the company cannot be recovered after its incorporation (113).

Cost of
solicitor
incurred
before in-
corporation.

A witness examined under S. 195, Companies Act is entitled to attend by his counsel and attorney (114).

Costs of
witness
attending by
counsel.

The witness is entitled to be re-examined, and for that purpose the Court, his counsel and attorney may take notes of his examination (115). But the Court will not allow such notes to be used for an improper purpose; they should be destroyed after the examination is over (116).

(107) S. 5 of the Indian Companies Act (VII of 1913).

(108) *English and Colonial Co.*, (1906) 2 Ch. 435. See in this connection *Clin-ton's claim*, (1908) 2 Ch. 515.

(109) *Kelner v. Baxter*, (1866) 2 C.P. 164.

(110) *Re Dale and Plant*, (1899) 61 L.T. 206; *Natal Land Co. v. Pauline Colliery Syndicate*, (1904) A.C. 120.

(111) See *Evans and Cooper*, p. 94.

(112) *Re English and Colonial Produce Co. Ltd.*, (1906) 2 Ch. 435.

(113) *Re National Motor Mail-coach Co., Ltd.*, *Clenton's claim*, (1908) 2 Ch. 515 (C.A.). The adoption and confirmation by a resolution of the directors of a contract made before the incorporation of the company by persons purporting to act on its behalf does not create any contractual relation between the company and the other party to the contract, or imposes any obligation on the company towards him. *North Sydney Investment and Tramway Co. v. Higgins*, (1899) A.C. 263; *Re Johannesburg Hotel Co.*; *Ex parte Zoutpansberg Prospecting Co.*, (1891) 1 Ch. 119 (C.A.).

(114) *In re Breach-loading Armoury Co.*, *in re Merchants Co.*, 4 Eq. 458; *E.P. Henry Calisher*, 17 L.T. 5=15 W.R. 1007 (Eng.).

(115) *Cambiran Mining Co.*, 20 Ch. 376.

(116) See *Hasellins & Son*, (1891) W.N. 25.

A witness examined under S. 195 cannot be given costs of appearing by counsel or attorney⁽¹¹⁷⁾.

Persons who are summoned under the section and who refuse to attend will be ordered to pay the costs of compelling their attendance⁽¹¹⁸⁾.

Certain persons connected with a company then in course of liquidation, who were also some of the defendants in a pending suit brought by the company (and revived subsequent to the order for winding up by the Official Liquidators) for an account and for the recovery of certain sums alleged to have been paid by the promoters of the company, having been examined under an Order obtained under S. 162 of the Companies Act, 1882, applied through their counsel for costs incurred on such examination: *Held*, that no order as to such costs could be made⁽¹¹⁹⁾.

Cost, security
for from
company,

Where a limited company is plaintiff or petitioner in any suit or other legal proceeding, any Court having jurisdiction in the matter may, if it appears that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence require sufficient security to be given for those costs, and may stay all proceedings until the security is given⁽¹²⁰⁾.

(117) *In re Browne Company, Limited*, 14 C. 219; *Appleton & Co.*, (1905) 1 Ch. 749.

(118) *Trower and Lawson's case*, 14 Eq. 8; *Lisbon Steam Tramways Co.*, 2 Ch. D. 575.

(119) *In re Brown & Company, Ltd.*, 14 C. 219.

(120) Act VII of 1913 (Companies Act), S. 280. Where a liquidator is the applicant and not the company, no security can be ordered. *Strand Wood Co.*, (1904) 2 Ch. 1. Where a company was plaintiff in a suit to set aside a policy on which the defendant in the suit has already brought against the company an action at law, which was still pending, security was refused. *Accidental, etc., Insurance Co. v. Mercati*, 3 Eq. 200, Buckley, 9th Ed., p. 555. A company who is a respondent in an appeal against the decision in an action where the company, as plaintiff, succeeded, is not a plaintiff for the purposes of security for the costs of the appeal. *Star Fire v. Davidson*, 4 Fraser, 997. A company appealing from winding-up order, can be ordered to furnish security for costs. *Drummond Fuel Co.*, 13 Ch. D. 400 (412); *Photographic Artists Association*, 23 Ch. D. 370. The Court may order to furnish security up to a certain stage in the proceedings and then allow the application to be renewed. *Western of Canada Oil Co. v. Walker*, 10 Ch. 628. The Court may order security to be given at any time of the proceedings. *Lydney & Co. v. Bird*, 23 Ch. D. 358. The amount of the security to be given is usually an amount equal to the probable amount of costs payable. *Imperial Bank of China v. Bank of Hindustan*, (1866) 1 Ch. 437; see, also, *Dominion Brewery v. Foster*, (1898) 77 L.T. 507.

If a petition is presented by a limited company, ⁽¹²¹⁾ or by a person resident out of the jurisdiction, or in the case of a life insurance company by a policy-holder or a contributory, ⁽¹²²⁾ the petitioner can be compelled to give security for costs before his petition is heard; and such security can be applied for, either when the petition comes on for hearing ⁽¹²³⁾ or before; ⁽¹²⁴⁾ and the respondent does not lose his right to security by filing affidavits in opposition to the petition. ⁽¹²⁵⁾

An affidavit, showing reasonable ground for supposing that the company cannot pay the costs, will, if unanswered, induce the Court to order security to be given. ⁽¹²⁶⁾

The security which can be insisted upon depends on the nature of the case. ⁽¹²⁷⁾

In injunction suits a limited company's undertaking to abide by such order as the Court may make as to damages is not sufficient. ⁽¹²⁸⁾

An unlimited company, although insolvent, cannot be required to give security for costs. ⁽¹²⁹⁾

In an English case, in which a company was restrained from infringing a patent, the directors of the company were ordered to pay the costs of the suit. ⁽¹³⁰⁾

A foreign company ⁽¹³¹⁾, just as a limited company if there is reason to suppose that its assets will be insufficient to pay the defendant's costs, can be compelled to give security for the costs of actions instituted by it. ⁽¹³²⁾

(121) See Companies Act, 1862, S. 69.

(122) St. 33 & 34 Vict. c. 61, S. 21.

(123) *Home Ass. Assoc.*, 12 Eq. 112; *Ex parte Seidler*, 12 Sim. 106.

(124) *Atkins v. Cooke*, 3 Drew. 694.

(125) *Lindley on Partnership*, 3rd Ed., Vol. II, pp. 1300, 1301.

(126) *Southampton Steam Boat Co. v. Rawlins*, 9 Jur. N.S. 887, and 2 N.R. 544, in which *Cailland's, &c. Co. v. Cailland*, 26 Beav. 427, *contra*, was not followed.

(127) *Imperial Bank of China v. Bank of Hindustan*, 1 Ch. 437, *modifying Australian Steam Ship Co.*, 4 K. & J. 407.

(128) *Anglo-Danubian Co. v. Rogerson*, 3 N.R. 185, and 10 Jur. N.S. 87.

(129) *United Ports Co. v. Hill*, L.R. 5 Q.B. 395. *Landley on Partnership*, 3rd Ed., Vol. I, p. 521.

(130) *Betts v. De Vitre*, 5 N.R. 165, V.C.W.

(131) *Kilkenny, &c., Rail. Co. v. Fielden*, 6 Ex. 81; *Limerick, &c., Rail Co. v. Fraser*, 4 Bing. 394.

(132) St. 25 & 26 Vict. c. 89, S. 69. *Lindley on Partnership*, 3rd Ed., Vol. I, p. 515.

Sec. 33, Pauper Suit.

Provisions of the Code of Civil Procedure as to pauper suits and costs therein.

- (a) Suits may be instituted in *forma pauperis*—Procedure.
- (b) Costs where pauper succeeds.
- (c) Costs and procedure where pauper fails.

Amendment of decree as to costs on motion of Collector.

Costs of Government—It may apply for payment of Court-fees.

Government to be deemed a party.

Copy of decree to be sent to Collector.

Refusal to allow applicant to sue as pauper to bar subsequent application of like nature.

Taxation of costs.

Security for costs.

Provisions of the Code of Civil Procedure as to pauper suits and costs therein.

(a) Suits may be instituted in *forma pauperis*—Procedure.

O. XXXIII, r. (1) of the Code of Civil Procedure⁽¹⁾ which deals with suits in *forma pauperis* enacts as follows:—"Subject to the following provisions, any suits may be instituted by a pauper." The section is followed by the following explanation.—"A person is a "pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit."⁽²⁾

(1) Act V of 1908.

(2) Although the provisions in the Code only provide for suits to be brought by a pauper, it has been held that the Court has power to allow a defendant to defend in *forma pauperis*. (*Doorga Churn v. Nittokally Dossee*, 5 C. 819). O. XLIV, Civ. Pro. Code (Act V of 1908) provides for pauper appeals, and to cross-appeals in *forma pauperis*. S. 141 provides for the procedure in miscellaneous proceedings, and the provisions of Chapter XXVI of the last Code (Act XIV of 1882), which these rules replace, have been held applicable to petitions for probate, (*In re Will of Dawubai*, 18 B. 237, 239) and to suits sanctioned for removal of trustees under the Religious Endowments Act (*Gurusami v. Krishnasami*, 24 M. 419). Where an appellant had appealed from the Supreme Court, where he had sued in *forma pauperis*, without applying for an order to appeal as a pauper to the Judicial Committee, he is not liable for the costs of the appeal. *Munni Ram Awasthy v. Sheo Churn Awasthy and another*, 4th Dec. 1846, MS. Notes of P. C. Cases Morley's Digest of Indian Cases, Vol. I, p. 110. On the subject-matter of this section, see Annual Practice, 1907, pp. 172—176; Bacon's Abridgment of the Law, 7th ed., tit. "Pauper"; Chitty's Archbold's Practice, 14th ed., pp. 1182—1184; Chitty's Forms, 13th ed., pp. 592—595; Daniell's Chancery Practice, 7th ed., pp. 87—94; Daniell's Forms, 5th ed., pp. 40—44; Morgan and Wurtzburg on costs, 1882, pp. 371—377 also pp. 76 and 150; Marshall on costs, pp. 347—354; Morgan's Chancery Acts and Orders, 6th ed., p. 341; Seton's Judgments and Orders, 6th ed., pp. 1065—1067; Sidney Smith's Practice of the Court of Chancery, 7th ed., pp. 869—874; Tidd's Practice, 9th ed., pp. 97—99; Amir Ali's Code of Civil Procedure, Notes under O. XXXIII, pp. 1149—1151; Madras Jurist Vol. IV, p. 167 (*Ibid*); Vol. VII, p. 36; Morley's Digest, Vol. I, p. 110.

"Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any Court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceedings connected with the suit.⁽³⁾

Regarding costs in suits instituted in *forma pauperis*, the Code ^{(b) Costs where pauper succeeds.} of Civil Procedure provides as follows:—"Where the plaintiff succeeds in the suit, the Court shall calculate the amount of Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; such amount shall be recoverable by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit.⁽⁴⁾

"The Crown has a right to receive fees at the institution of every suit. It temporarily foregoes its right in the case of pauper plaintiffs, and thus places means in their hands to proceed to judgment against their defendants. Without the forbearance of Government to insist on its ordinary rule, the suit in such a case could not have been brought or the money realized. It is therefore reasonable that the Crown, in consideration of its giving up its rights to these fees, should have for their defrayal the first claim on the proceeds of the pauper suit."⁽⁵⁾

The order of the Court as to costs should not be a contingent one.⁽⁶⁾ The amount of Court-fees is a first charge⁽⁷⁾ on the subject-matter ⁽⁸⁾ of the suit.

(3) Civ. Pro. Code (Act V of 1908), O. XXXIII, r. 8.

(4) Civ. Pro. Code (Act V of 1908), O. XXXIII, r. 10.

(5) *Ganpat Putaya v. Collector of Kanara*, 1 B. 7, 9; the point here decided (*fol.* in *Collector of Moradabad v. Mahomed Daim*, 2 A. 196) has subsequently been made clear by the introduction of the words "shall be a first charge," etc., which were not in the Code of 1859. See *Pran Kristo v. Collector of Moorshedabad*, 15 W.R. 205; *Ramchandra v. Pitcharkanni*, 7 M. 434, at p. 436; *Ragho Prasad v. Mewa Lal*, 39 I.A. 62, P.C. = 34 A. 223 = 16 C.W.N. 433 = 15 C.L.J. 327 = 14 Bom. L.R. 212 = 22 M.L.J. 457.

(6) *Shostee Churn v. Collector of Chittagong*, 13 W.R. 155, in which case, by reason of the form of the order, the Government could get nothing from either party until *wasilat* was determined, and the parties refused to carry on the proceedings for this purpose.

(7) See *Janki v. Collector of Allahabad*, 9 A. 64; *Puthia Valappil v. Veloth Assenar*, 25 M. 733.

(8) As to the meaning of this term, see *Janki v. Collector of Allahabad*, 9 A. 64.

To enforce it the Government need not bring a separate suit, but can realize the Court-fee from the property by proceedings in execution.⁽⁹⁾

The above rule regarding the right of Government to get the Court-fee from one or other of the parties is only an enabling one, and though it indicates the manner in which the Crown may proceed to realize the debt, it does not preclude the Crown or its representatives from urging its prerogative and insisting on its rights to precedence over all their creditors.⁽¹⁰⁾

The period allowed to Government is the ordinary period allowed for execution to an individual under the Limitation Act.⁽¹¹⁾

The general rule is that persons who have been successful as paupers shall, so far as the subject-matter of their success is concerned, be liable to satisfy, out of what they recover, the amount of the fees which have been, for a time, pending the decision of their suit, remitted to them. But the Collector cannot sell the decree, that is, the whole of the plaintiff's right in the decree, which he has got, without waiting for the recovery by the plaintiff of that for which he has got his decree.⁽¹²⁾

An order under this rule⁽¹³⁾ for sale of property for the purpose of realizing Court-fees, and a sale under such order, are *ultra vires* and nullity when, in fact, there was no jurisdiction in the Court to make the order.⁽¹⁴⁾

Such costs, in addition to there being a first charge, are also recoverable from any party ordered to pay. If the pauper succeeds, the fees payable to Government are generally recoverable from the defendant.⁽¹⁵⁾

A defendant should not ordinarily be made liable to pay Court-fees on any sum greater than that decreed against him.⁽¹⁶⁾

(9) *Ram Das v. Secretary of State*, 18 A. 419.

(10) *Gayamoda Bala Dassee v. Butto Kristo Bairogee*, 33 C. 1040.

(11) *Collector of Beerbhoom v. Sreehurry*, 22 W.R. 512; *Appaya v. Collector of Vizagapatam*, 4 M. 155; *Venubai v. Collector of Nasik*, 7 B. 552; *Collector of Braach v. Desai Raghunath*, 7 B. 549.

(12) *Jotindro Nath v. Dwarka Nath*, 20 C. 111.

(13) Civ. Pro. Code (Act V of 1908), O. XXXIII, r. 10.

(14) *Balwant Rao v. Muhammad Husain*, 15 A. 324.

(15) *Jeitha Mulchand v. Gulraj Jasrup*, 8 B. 577, at p. 582.

(16) *Chandrareka v. Secretary of State*, 14 M. 163.

If the pauper fails, these fees would generally be recoverable from the plaintiff.⁽¹⁷⁾

Government may be deemed to have been a party to the suit, and therefore orders deciding any matter between Government and the party charged are open to appeal under S. 47 of the Code of Civil Procedure.⁽¹⁸⁾

As to costs and the procedure to be followed in cases where (c) Costs and the pauper fails, the Code of Civil Procedure has the following procedure where pauper provisions:—"Where the plaintiff fails in the suit or is dispaupered, or where the suit is withdrawn or dismissed,—(a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the Court-fee or postal charges (if any) chargeable for such service, or (b) because the plaintiff does not appear when the suit is called on for hearing, the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper."⁽¹⁹⁾

(17) *Jetha Mulchand v. Gulraj Jasrup*, 8 B. 577.

(18) S. 47 of Act V of 1908. See, also, *Janki v. Collector of Allahabad*, 9 A. 64; *Secretary of State v. Bhagawanti*, 13 A. 326; *Secretary of State v. Narayan*, 35 B. 448, 450.

(19) Civ. Pro. Code (Act V of 1908), O. XXXIII, r. 11. "There has been some conflict as to the meaning of the word 'fails.' It has been held that r. 10 cited above only applies where there has been a contest, or else an admission of the claim which has avoided a contest, and refers to cases of adjudicated success; and that, similarly, this rule applies only to cases of adjudicated failure, and to the other cases specified, as where the plaintiff has been dispaupered or the suit has been dismissed under O. IX, rr. 2, 3, (*Collector of Kanara v. Krishnappa*, 15 B. 77). It was held, therefore, not to apply where the parties came to an amicable arrangement under which the suit was to be dismissed. (*Ibid.*) And where an appeal in *forma pauperis* was withdrawn, it was held that no order could be made either under this rule or r. 9, and that it was not open to the Court to order the respondents to pay any fees on the strength of any agreement between the parties, (*Chandaba v. Kuver Sahab*, 18 B. 464). The last decision but one has, however, been dissented from by the Madras High Court, which has held that the words "succeeds" in the last rule and "fails" in this, refer to the ultimate decision or the result of the suit, and not to the mode in which the decision is arrived at, that it would be doing violence to the language of the section to introduce the words "after contest;" and that a pauper plaintiff is liable to pay the stamp-duty if his suit is dismissed without trial, (*Collector of Vizagapatam v. Abdul Kharim*), 21 M. 113, in which case the Court interfered under old S. 622 (now S. 115). A Full Bench of the Bombay High Court has more recently held that where there is a withdrawal as the result of a compromise, the plaintiff does not succeed within the meaning of the last rule, but "fails" within the meaning of this. (*Secretary of State v. Bhagirathibai*, 31 B. 10; and see *Secretary of State v. Narayan Balkrishna*, 29 B. 102; *Secretary of*

The terms of the above rule are mandatory, and it is obligatory upon the Court when it passes its decree to provide in that decree for payment by the plaintiff of the Court-fees.⁽²⁰⁾

Amendment
of decree as
to costs on
motion of
Collector.

In a suit brought in *forma pauperis*, the Court having in its decree omitted to make any direction for calculation of the amount of Court-fees which would have been paid by the plaintiff if he had not been permitted to litigate as a pauper, or any order that he should pay them, the Collector, though not a party to the suit, may, according to the practice of this Court, move the Court to amend its decree by the addition of the said direction and order. Such an amendment is not *ultra vires* ⁽²¹⁾.

The decisions under the older Code of Civil Procedure ⁽²²⁾ were conflicting upon the question whether where the Court omits to make an order, the Government may ⁽²³⁾, or may not ⁽²⁴⁾, apply to rectify the decree. R. 12 of the present Code ⁽²⁵⁾ now declares the right of Government to apply. An order under this rule amounts to a decree in favour of Government against the unsuccessful plaintiff for the amount of the Court-fees, and can be executed by attachment and sale of any property he possesses ⁽²⁶⁾.

Where a suit is instituted by a next friend on behalf of a minor, the latter is the plaintiff. It frequently is right to make a guardian or next friend liable for costs, but there are also cases in which it is not proper to do so. And it does not necessarily follow that

State v. Narayan, 35 B. 448). The section has now been amended to include a withdrawal." Amir Ali's Civ. Pro. Code, 2 Ed. Notes under O. XXXIII, r. 11. Where the suit of plaintiff in *forma pauperis* was dismissed for default, defendant's pleader's fee must be made payable by plaintiff. An order for each party to pay his own pleader's fee has been held not to be in accordance with S. 2, Act XXIX, 1941. *Ramdhun Mookerjee v. Musst. Sreemultee Dibbee, widow of Likhee Nurain Ghosal*, 4 Sud. Dew. Adaw, Rep. Bengal (1848) 214 = 10 Ind. Dec. Old Series, p. 137.

(20) See *Secretary of State v. Bhagvanti Bibi*, 13 A. 326, 329.

(21) *Shekh Abdul Rahim v. The Collector of Surat*, Bom. P.J. 1898, p. 406.

(22) Act XIV of 1882.

(23) *Collector of Kanara v. Krishnappa*, 15 B. 77; *Collector of Kanara v. Rambhat*, 18 B. 454.

(24) *In re Secretary of State*, 2 C.L.R. 461; *Shusti Churn v. Karmar Ali*, 1 Shome, 266, on the ground that Government is not a party to the suit.

(25) Act V of 1909, O. XXXIII, r. 12.

(26) *Jwala Sahai v. Masiat Khan*, 26 A. 346 at p. 348. This and the last rule only deal with the fees payable to Government. Costs, that is, costs of parties *inter se* against a pauper plaintiff, might, it was held, be awarded to a successful defendant. (*Jetha Mulchand v. Gulraj Jasrup*, 8 B. 577, F.B.).

because the suit is unsuccessful, the next friend is, as a matter of course, to be ordered personally to pay the costs. (27)

As has already been stated, "the Government has the right at any time to apply to the Court to make an order for the payment of Court-fees" due to it in a pauper suit. (28)

Government,
Costs of—
It may apply
for payment
of Court-fees.

An order passed on an application by Government under this rule for payment of Court-fees due to it is appealable. (29)

All matters arising between the Government and any party to the suit regarding the payment of Court-fees would be deemed to be questions arising between the parties to the suit within the meaning of S. 47 of the Code of Civil Procedure. (30)

Government
to be deemed
a party.

Where an order is made for payment of Court fees due to Government the Court should forthwith cause a copy of the decree to be forwarded to the Collector. (31)

Copy of decree
to be sent to
Collector.

An order refusing to allow the applicant to sue as a pauper would be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant would be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper. (32)

Refusal to
allow appli-
cant to sue as
pauper to bar
subsequent
application of
like nature.

"The above rule does not expressly provide for the case of withdrawal by the petitioner of his application for leave and payment by him of the Court-fees. It has, however, been held by the Calcutta High Court, (33) dissenting from the opinion of the Allahabad High

(27) *Brijessuree Dossia v. Kishore Doss*, 25 W.R. 316. The origin of the last penal clause of S. 142 of the last Code is to be found in S. 53, Reg. IV of 1827, known as Elphinstone's Code, where, however, it is made applicable to all plaintiffs alike. It was omitted from the Code of 1859, but re-enacted in that section with respect to pauper plaintiffs, not for the purpose of exempting them from paying costs to a successful defendant, but because it was deemed necessary to provide a special protection to defendants against being harassed by persons who, *ex hypothesi*, are not likely to be influenced by the fear of having to pay costs. (*Jetha Mulchand v. Gulraj Jasrup*, 8 B. 577, at pp. 580, 581). It has now been altogether omitted. It has been held that the Court has no power to impose costs of defending pauper suit on infant's estate. See *Aminchand Talakchand v. Collector of Sholapur*, 13 B. 234.

(28) Civ. Pro. Code (Act V of 1908), O.XXXIII, r. 12.

(29) *Secretary of State v. Narayan*, 35 B. 448.

(30) Civ. Pro. Code (Act V of 1908), O.XXXIII, r. 13.

(31) Civ. Pro. Code (Act V of 1908), O.XXXIII, r. 14.

(32) Civ. Pro. Code (Act V of 1908), O.XXXIII, r. 15.

(33) *Janakdhary Sukul v. Janaki Koer*, 28 C. 427; following *Skinner v. Orde*, 2 A. 241 (P.C.).

Court, (34) that if an application for leave to sue as a pauper is made, and, upon the defendant opposing it, the applicant puts in the proper Court-fee and asks the Court to treat his application as a plaint, the application should be deemed for the purpose of limitation to be a plaint presented on the date on which it was filed."

Although it is generally a condition precedent to the institution of an ordinary suit by a person whose application to sue in *forma pauperis* has been rejected that he should first pay the costs incurred by Government, the suit ought not to be dismissed for default in payment of such costs when no demand for the payment has been made either on behalf of the Government or by the Court. (35)

Taxation of costs.

Costs ordered to be paid to a person admitted to sue or defend as a pauper will, unless otherwise ordered, be taxed as in other cases. (36)

The costs of an application for permission to sue as a pauper and of an inquiry into pauperism shall be costs in the suit. (37)

Security for costs.

"An order to give security for costs, obtained in a suit filed in the ordinary course, ceases to operate as regards antecedent costs if leave is given to continue the suit as pauper, provided the leave is granted before the time for giving security has expired." (38)

Sec. 34.—Pre-emption Suits.

Decree in pre-emption suit, form of—Provision as to costs.

Costs of pre-emption suit.

Costs of improvement and stamp for sale-deed.

Costs, Set off as to.

Pleader's fees in pre-emption suits—Practice in Punjab.

Omission to pay costs—Effect.

Decree in pre-emption suit, form of
--Provision as to costs.

As to the decree in a pre-emption suit, the Code of Civil Procedure (1) provides:—"Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the

(34) *Abbasi Begam v. Nanhi Begam*, 18 A. 206; see Amir Ali's Code of Civil Procedure, 2nd Ed., 1916, Notes under O. XXXIII, r. 15.

(35) *Mrinalini v. Tinkauri*, 16 C.W.N. 641.

(36) See Encyclopædia of the Laws of England, 2nd Ed., Vol. VII, p. 193.

(37) Civ. Pro. Code (Act V of 1908), O. XXXIII, r. 16.

(38) See *Bai Laaxmi v. Harjivan Nathu*, 36 B. 415.

(1) Act V of 1908.

purchase-money has not been paid into Court, the decree shall—
 (a) specify a day on or before which the purchase-money shall be so paid, and (b) direct that on payment into Court of such purchase-money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property, to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.⁽²⁾

The defendant, who held a mortgage of certain properties under two deeds, obtained usufructuary possession in November 1889. The mortgagor executed a deed of further charge in his favour. Subsequently the defendant obtained decrees for foreclosure in respect of three deeds. In March 1892 he obtained possession in execution in respect of two deeds and in November 1894 in respect of one deed. In April 1897 the plaintiff sued him for pre-emption. *Held* under the provisions of S. 12, Oudh Laws Act, the mortgagee is entitled to be paid by the pre-emptor the costs properly incurred by him in obtaining a decree for foreclosure of the mortgage. *Held*, therefore, that the defendant was entitled to be paid the costs incurred by him in obtaining foreclosure decrees which were entered in those decrees.⁽³⁾

In the case of *Nanakchand v. Ramchand* ⁽⁴⁾ in disposing of a pre-emption suit the following observations were made as to costs by Johnstone, J.:—"Plaintiffs have succeeded in enforcing their right of pre-emption, but have lost the day in the matter of the

(2) Civ. Pro. Code (Act V of 1903), O. XX, r. 14, cl. 1.

(3) *Rai Raguraj Singh v. Raj Ragunath Singh*, 3 O.C. 184 following *Sakina Bibi v. Abdul Hafiz Khan*, 2 O.C. 108. Blennerhassett, A.C.J., said:—"S. 12 of the Oudh Laws Act provides that when the right of pre-emption arises in respect of the foreclosure of a mortgage, on completion of the purchase the person exercising the right of pre-emption shall be bound to pay to the mortgagee the amount specified in the notice mentioned in S. 10, together with interest on the principal sum secured by the mortgage, at the rate specified in the instrument of mortgage, for any time which has elapsed since the date of notice "and any additional costs which may have been properly incurred by the mortgagee." It appears that it may be inferred from the provisions of this section that the mortgagee is entitled to be paid by the pre-emptor the costs properly incurred by him in obtaining a decree for foreclosure of the mortgage, and that consequently in this case, the mortgagee is entitled to be paid the costs incurred by him in obtaining the foreclosure decrees which are entered in those decrees." See *Rai Raguraj Singh v. Raj Ragunath Singh*, 3 O.C. 184 (190, 191).

(4) 68 P.R. 1902.

price to be paid. We think the fairest order as to costs if plaintiffs pay up and take the bargain, is to direct that in the first Court and also in the second Court the parties shall bear their own costs, but that the vendees' costs in this Court shall be paid in full by plaintiffs."⁽⁵⁾

Costs of
improvement
and
stamp for
sale-deed.

Costs, Set-off
as to.

The pre-emptor is not liable to pay the cost of improvements or of the stamp for the sale-deed. The only thing which the pre-emptor could be ordered to pay is the sale price.⁽⁶⁾

Where a conditional decree in a pre-emption suit directed that the plaintiff should obtain possession with costs of suit on payment of the purchase-money within a fixed time, and that on default of such payment, the suit should stand dismissed, the plaintiff could set off the costs awarded to him, and claim possession on payment of the purchase-money less such costs.⁽⁷⁾

(5) *Nanak Chand v. Ramchand*, 68 P.R. 1902.

(6) *Bindeshuri Singh v. Pandit Balraj Sahai*, 10 O.C. 49 (50). The following observations of Evans, A.J.C., may also be noted:—"The point for decision is as below:—"If the appellant is entitled to a decree can the vendee claim (a) expenses incurred in making an embankment after he had purchased the property, or (b) the whole or any portion of the stamp paper upon which the sale-deed was endorsed. With reference to the claim under head (a) no authority is cited under which it can be held that the respondent vendee is entitled to any money expended by him in making improvements after he had purchased the villages. He purchased the villages at his own risk on a title from the vendor which he knew might be challenged by the appellant. That title was not a perfect title and was to this extent defective that it was dependant upon a right of pre-emption vested in the appellant which he might or might not exercise as he thought fit. These expenses were incurred by the defendant for his own personal benefit in the hope that he might be recouped by additional rent to be realised in proportion from land which he proposed to bring under cultivation. All that the pre-emptor is bound to pay is the actual sum expended by the vendee in the purchase and not any money expended by him after purchase. I decide this point against the respondent. As to (b) the costs of a stamp on which the sale-deed was endorsed. By S. 29 of the Stamp Act it is provided that "in the absence of an agreement to the contrary, the expense of providing stamp shall be borne by the 'grantee'". Therefore it is clear that under the law the expense of providing the stamp paper in the case of conveyance is a charge which is to be borne by the vendee. This is a charge which he has to bear if he wishes to acquire the property with respect to which a contract of sale has been arrived at and unless there is a special agreement to the contrary the cost of the stamp is not considered to be a part of the price paid. I am of opinion that the vendee-respondent cannot recover this sum from the appellant in the event of his obtaining a decree." *Bindeshuri Singh v. Pandit Balraj Sahai*, 10 O.C. 49 (56 to 58).

(7) *Ishri v. Gopal Saran*, 6 A. 351=4 A.W.N. 125, (referring to *Degumburee Dabee v. Eshan Chunder Sein*, 9 W.R. 230=B.L.R. Sup. 938; *Jugo Mohun Bukshee v. Soorendronath Roy Chowdhury*, 13 W.R. 106; *Brijnath Das v. Juggernath Das*, 4 C. 742=4 C.L.R. 122 followed in *Baldeo Parshad v. Baldeo Singh*, 3 O.C. 323 (324); *Ram Nidh v. Tulshi Ram*, 6 O.C. 23 (24); *Parmanund Raot v. Gobardhan Sahai*, 28

Where a pre-emptor deposited in Court the sum he was

A. 676 (677)=3 A.L.J. 804=A.W.N. 1906, 199, approved of in *Sankara Menon v. Gopala Pattar*, 23 M. 121 (123), referred to in *Kassa Mal v. Gopi*, 10 A. 389 (394); *Fatechand v. Panna Lall Bania*, 10 C.P.L.R. 83 (85); *Chhogmal v. Govind Prasad Gouri Shankar*, 16 C.P.L.R. 73 (75); *Baiju Singh v. Maaho Singh*, 8 O.C. 57 (58); see, also, 13 Ind. Jur. 73; 8 Ind. Jur. 635; *Balmukand v. Pancham*, A.W.N. 1887, 243). The following extract from the judgment of Mahmood, J. in the case of *Ishri v. Gopal*, 6 A. 351=4 A.W.N. 125, may also be noted as containing a full and complete exposition of the law on the subject:—The Civil Procedure Code provides that in decreeing a suit for pre-emption, “if the amount of purchase-money has not been paid into Court, the decree shall specify a day on or before which it shall be so paid, and shall declare that on payment of such purchase-money, *together with the costs* (if any) decreed against him, the plaintiff shall obtain possession of the property; but that if such money and costs are not so paid, the suit shall stand dismissed with costs.” Again, under S. 219 the Court is bound to “direct by whom the costs of each party are to be paid whether by himself or by any other party to the suit, and whether in whole or in what part or proportion.” The question, then, arises whether, when a decree for pre-emption is duly passed in accordance with the provision of the Code and costs are awarded to the plaintiff pre-emptor, he is entitled to deduct from the purchase-money to be deposited by him such sum as has been awarded to him as costs of suit. In other words, can a pre-emptor in depositing the purchase-money set-off the amount due to him as costs of the suit under the decree? Under S. 214 the pre-emptor cannot enforce his decree without depositing not only the purchase-money but also “the costs (if any) decreed against him.” The section, however, makes no provision to meet cases where costs, instead of being awarded against the pre-emptor are awarded in his favour by the decree. Nor is there anything in that section which specifically authorizes the pre-emptor decree-holder in depositing the purchase-money to set-off the amount due to him from the judgment-debtor for the costs. S. 221, indeed, authorizes the Court to “direct that the cost payable to one party by another shall be set-off against a sum which is admitted or is found in the suit to be due from the former to the latter;” and S. 247, which is one of the rules connected with the mode of executing decrees, lays down that, “when two parties are entitled under the same decree to recover from each other sums of different amounts, the party entitled to the smaller sum shall not take out execution against the other party, but satisfaction for the smaller amount shall be entered on the decree;” and “when the amounts are equal neither party shall take out execution, but satisfaction for each sum shall be entered on the decrees.” Such being the provisions of the Code, we have to determine whether the question before us falls under the purview of S. 221 or 247; and if the case does not fall under either of these sections, what rule should govern our decision in the case. We are of opinion that the case before us falls under neither of these clauses of the Code. The decree in the present case did not direct that the costs payable to the pre-emptor-decree-holder were to be set-off against the purchase-money to be deposited by him, nor could the purchase-money be regarded as “a sum which is admitted or is found in the suit to be due” from the plaintiff-pre-emptor to the defendant-vendor or defendant-vendee. The appellant before us cannot therefore claim the benefit of the former section. Nor does his case fall under S. 247, because that section clearly refers to counter-claims in suits for recovery of money, and it would be stretching the language of that section to an unjustifiable extent to hold that the purchase-money which a pre-emptor-decree-holder has to deposit, as a condition precedent to obtaining possession under his decree, is a sum which the (vendor or vendee) judgment-debtors “are entitled under the same decree to recover,” or for which they could, in any case, “take out execution.” The question then arises, whether

required to pay by the decree to the vendee less the costs awarded

there is any other provision in the Code to meet exactly the exigencies of the present case. We are of opinion that the question must be answered in the negative. Rules in regard to decrees in pre-emption suits were formulated by the legislature, as a general law of Civil Procedure for the first time in S. 214 of the Code, 1877, and it is conceivable that in introducing these new rules the form which they took fell short of comprehending all the various cases that might arise in consequence; and the case before us is one which is not provided for by any specific rule in the Code. Such being the case, we follow the example of an eminent authority, Peacock, C.J., (in *Degum-burce Dabee v. Esshan Chunder Sein*, 9 W.R. 230, in holding that we are necessarily called upon, under S. 24 of the Civil Court's Act (VI of 1871), which took the place of the old Regulation (III of 1793), to import the principles of equity in administering the rules of the Civil Procedure Code. The rules of compensation or set-off is a doctrine so consonant with the principles of justice, equity and good conscience, that it governs alike the rules of substantive and adjective law. Indeed, the principle has already been expressly adopted by the Legislature in the Civil Procedure Code itself. Section 111 provides for set-off to be pleaded as answer to a suit; S. 216 lays down the form and effect of the decree when set-off is allowed against a sum found to be due on a substantive claim; S. 221 permits that costs may be set-off against the sum found to be due in the suit; S. 246 authorizes the mutual set-off of cross-decrees; and S. 247 follows the same principle, in more general terms, in regard to cross-claims under the same decree. Is there, then, anything in the Code, or any equitable consideration which would prohibit a pre-emptor-decree-holder from availing himself of the doctrine of set-off by deducting the costs allowed to him from the purchase-money which he has to deposit under the very decree which awards him costs? The Civil Procedure Code, as we have pointed out, falls short of providing any specific rule to meet exactly the case before us. The doctrine of set-off, which owes its original to Roman jurisprudence, was well known to the civil law under the more comprehensive title of compensation, which, in the words of Story, J., may be defined to be the reciprocal acquittal of debts between two persons who are indebted, the one to the other; or, as it is perhaps better stated by Pothier, compensation is the extinction of debts, of which two persons are reciprocally debtors to one another, by the credits of which they are reciprocally creditors to one another. The civil law itself expressed it in a still more concise form—*compensatio est debiti et crediti inter se contributio*. The civil law treated compensation as founded upon a natural equity, and upon the mutual interest of each party to have the benefit of the set-off, rather than to pay what he owed, and then to have an action for what was due to himself (Story's Eq. Juris., Ss. 1438, 1439). The doctrine of compensation in the civil law, of course, has never been fully adopted either in England or in this country, probably for reasons based upon the inconvenience and delay which would arise in the trial of suits. But in the case before us there can be no such inconvenience or delay; the decree which declares the plaintiff pre-emptor entitled to obtain possession of the property in suit on payment of the purchase-money declares him, in the same breath, entitled to recover costs from those against whom the decree has to be enforced. In a pre-emption suit the purchase-money has to be deposited into the Court under the express provisions of S. 134, and it is for the Court to determine to whom such money is to be paid, whether to the defendant-vendor or to the defendant-vendee. We may take it as a settled rule of the law of pre-emption that if the pre-emptive suit has arisen and been decreed before the vendee has paid the whole or part of the purchase-money to the vendor, the Court in disbursing the purchase-money deposited, would make an order directing that the whole or part of the purchase-money (as the case may be) should be paid to the vendor or vendee, both of whom must necessarily be judgment-debtors, and as such be liable alike to payment of

to him, *held* that he had completely complied with the order of the Court.⁽⁸⁾

Where a pre-emptor, in whose favour a decree was passed, paid the purchase-money as directed, but drew out therefrom a portion in execution of the decree on account of the costs awarded to him, and on appeal the purchase-money was increased and each party was ordered to bear his own costs, *held* by Straight, J., that the payment, within the time fixed of the difference without the costs previously realised, was a sufficient compliance with the appellate

the costs awarded to the pre-emptor decree-holder. And, because the judgment-debtors, in the case before us, are jointly liable to the costs incurred by the decree-holder-pre-emptor, and it is not for him to decide to whom the purchase-money, which he has to deposit is to be paid, we hold that he is entitled, when depositing the purchase-money under the decree, to deduct from such money such sum as that decree awards to him as costs. But it is contended by the learned pleader for the respondent, in support of the lower appellate Court's judgment, that the pre-emptor-decree-holder-appellant's right to execute his pre-emption decree was contingent upon his depositing the full purchase-money within time, and that till such deposit was actually made he could not be held to be entitled to any costs whatsoever, and could not therefore deduct them from the purchase-money in making the deposit required by the decree. The argument, though plausible, has no force. It seems to aim at giving to mere formality the significance of a substantive effect. For it seems to us to involve a very untenable proposition, that for a pre-emptor-decree-holder the only way to enforce his decree is to come into Court with the full purchase money in the one hand, offering it to the judgment-debtors, and to stretch out the other hand asking them to give him the costs which the very decree, under which he is depositing the purchase money, awards him. The argument also involves the contingency that a pre-emptor should pay up the purchase-money to the judgment-debtors in ready cash, and may have to wait possibly for years before recovering from them the costs awarded to him by the Court, and it is conceivable that he may never be able to recover them at all. We cannot regard such results as consonant with the principles of justice, equity and good conscience, which we are bound to administer in such cases; and holding these views, we cannot adopt the reasoning upon which the judgment of the lower appellate Court proceeds, nor the argument urged before us in support of that judgment by the learned pleader for the respondents. The effect of our views is to apply, by analogy of Ss. 221, 247, the doctrine of set-off to the case before us—a course which is consonant in principle with that followed by Jackson, J., in the case of *Jugo Mohun Buktshae v. Soorendra Nath Roy Chowdhry*, 13 W. R. 106, long before the Legislature formulated, the rules contained in the two sections just referred to. Indeed, Pontifex, J., in the case of *Brijnath Dass v. Juggernath Dass*, 4 C. 742, seems to have adopted the principle of the rule which we have laid down, by holding that in a redemption suit "the plaintiff is entitled to set-off or deduct the amount of the costs payable to him under the decree from the mortgage-monies payable by him to the defendant," the case before the learned Judge being that of a decree which directed to plaintiff mortgagor to pay the mortgage-money and interest to defendant, and directed the defendant to pay to the plaintiff the costs of the suit." *Ishri v. Gopal Saran*, 6 A. 351 (353—357).

(8) *Ali Husain v. Amin Ullah*, 10 A.L.J. 153 = 34 A. 595 = 15 Ind. Cas. 337, following *Ishri v. Gopal Saran*, 6 A. 351; *Permanand Raot v. Gobhardhan Sahai*, 28 A. 676 = 3 A.L.J. 804; *Bechai Singh v. Shami Nath*, 8 A.L.J. Notes 27.

Court's decree, subject to the judgment-debtor's right to recover the costs previously realised from him.⁽⁹⁾

Section 7 of the Court Fees Act provides as follows regarding the Court-fees to be paid in pre-emption suits:—The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:—In suits to enforce a right of pre-emption according to the value computed in accordance with paragraph V of this section ⁽¹⁰⁾ of the land, house or garden in respect of which the right is claimed.⁽¹¹⁾

(9) *Bal Mukand v. Pancham*, 10 A. 400=A.W.N. (1888) 74. In the same case Tyrrel, J., held—"that as the pre-emptor had not at any moment of time, from the date of the institution of the suit, had a credit in any Court for the sum fixed by the appellate decree, he had failed to fulfil the condition essential to his possession of the vendee's estate under the decrees in the suit. *Balmukand v. Pancham*, 10 A. 400=A.W.N. (1888), 74.

(10) Clause V of S. 7 runs as follows:—"In suits for the possession of land, houses and gardens—according to the value of the subject-matter; and such value shall be deemed to be—where the subject-matter is land, and—(a) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, or forms part of such an estate and is recorded in the Collector's register as separately assessed with such revenue, and such revenue is permanently settled—ten times the revenue so payable; (b) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, or forms part of such estate and is recorded as aforesaid; and such revenue is settled, but not permanently—five times the revenue so payable; (c) where the land pays no such revenue, or has been partially exempted from such payment, or is charged with any fixed payment in lieu of such revenue, and nett profits have arisen from the land during the year next before the date of presenting the plaint—fifteen times such nett profits: but where no such nett profits have arisen therefrom—the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood; (d) where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate and is not separately assessed as above mentioned—the market value of the land: Provided that, in the territories subject to the Governor of Bombay in Council the value of the land shall be deemed to be—(1) where the land is held on settlement for a period not exceeding thirty years and pays the full assessment to Government—a sum equal to five times the survey-assessment; (2) where the land is held on a permanent settlement, or on a settlement for any period exceeding thirty years, and pays the full assessment to Government—a sum equal to ten times the survey-assessment; and (3) where the whole or any part of the annual survey-assessment is remitted—a sum computed under paragraph (1) or paragraph (2) of this proviso, as the case may be, in addition to ten times the assessment, or the portion of assessment, so remitted: *Explanation*.—The word "estate", as used in this paragraph, means any land subject to the payment of revenue, for which the proprietor or farmer or raiyat shall have executed a separate engagement to Government, or which, in the absence of such engagement, shall have been separately assessed with revenue." Act VII of 1870. (Court Fees), S. 7, cl. 5.

(11) Court Fees Act (VII of 1870), S. 7, cl. (6).

In a suit for pre-emption, unless the land in suit is a definite share in an estate paying revenue to Government, or is recorded in the Collector's register as separately assessed, the stamp must be calculated on the value of the land ⁽¹²⁾ under cl. v (b) of S. 7 of the Court Fees Act.⁽¹³⁾

Under cl. vi of S. 7 of the Court Fees Act ⁽¹⁴⁾ in suits to enforce a right of pre-emption, the fee is payable on the value computed in accordance with the provisions of cl. v of S. 7. The rule as payment of fee on five times the Government revenue is to be limited to cases where the suit relates to the entire mahal or part separately assessed, or a fractional share of it. Consequently, for a suit relating to several distinct plots of land not constituting any such definite fractional share, the fee is payable on the market value of the land.⁽¹⁵⁾

The plaintiff sued to pre-empt a sale of the equity of redemption in certain property in the possession of mortgagees with whom the property was usufructuarily mortgaged for Rs. 79,000. The plaintiff alleged that the consideration for the sale he sought to pre-empt was Rs. 5,000 and he paid *ad valorem* fee on such amount. The first Court asked the plaintiff to make good the deficiency of Rs. 975 in the Court-fees which was paid by the plaintiff, but the first Court dismissed the suit as there was not a properly stamped plaint within the period of limitation. The plaintiff appealed to the District Judge and again paid *ad valorem* Court-fee on Rs. 5,000. He was again asked to make good the deficiency, but as he did not, his appeal was dismissed. The plaintiff preferred a second appeal on the ground that, as the subject-matter of sale was only the equity of redemption, the plaintiff was right in paying *ad valorem* fee with reference to the value he put upon it. *Held* that the Court-fees should be paid upon the value of the land computed in accordance with S. 7, cl. v of the Court Fees Act.⁽¹⁶⁾

Where an appeal is preferred in a suit for pre-emption, on the ground that the right to pre-empt has or has not been established

(12) *Musst. Jian v. Nadir Nishan*, 6 P.R. 1883.

(13) Act VII of 1870.

(14) *Ibid.*

(15) Reference under the Court Fees Act VII of 1870, 16 A. 483=A.W.N. (1894) 124.

(16) *Daryao Singh v. Bharat Singh*, 6 A.L.J. 905 (F.B.)=6 M.L.T. 311=3 Ind. Cas. 562=32 A. 19.

as the case may be, no matter what other pleas may be taken, the value of the subject-matter in dispute for the purposes of the Court Fees Act must be determined as in terms provided in Art. vi of S. 7 of the Act.⁽¹⁷⁾ But when the question in appeal relates solely to the amount to be paid by the pre-emptor, then it should be calculated *ad valorem* on the difference between the amounts alleged as the sale price on the one side and the other.⁽¹⁸⁾

In a suit for pre-emption on a transfer of equity of redemption of a house, the Court-fee must be paid on the market value of the house which forms the subject-matter of the mortgage.⁽¹⁹⁾

The plaintiffs sued for pre-emption of shares in two villages out of a larger number sold in one and the same transaction. They paid Court-fees on their plaint calculated on five times the aggregate amount of the Government revenue payable by each of the two villages. *Held* that this was a proper mode of calculation. The two villages were not "distinct subjects" within the meaning of S. 17 of the Court Fees Act, 1870, and Court-fees were not therefore leviable in respect of each village separately.⁽²⁰⁾

Pleader's fees
in pre-emption suits—
Practice in
Punjab.

Pleader's fees in a suit for pre-emption should be calculated under cl. (4) and not under cl. (3) of rule 30 of the Chief Court "Rules and Orders," *i.e.*, with reference either to the amount decreed or according to the valuation of the suit, or according to such sum, not exceeding the valuation, as the Court thinks reasonable, and fixes with reference to the importance of the subject of dispute.⁽²¹⁾

Omission to
pay costs—
Effect.

A decree-holder who omits to pay the costs in time and thus violates the conditions of his decree loses the benefit of his decree even though he might have deposited the purchase-money in Court before time. ²

(17) *Hafiz Akmad v. Sobha Ram*, A.W.N. (1884), 179=6 A. 488.

(18) *Ibid.*

(19) *Ghasita Mal v. Kanshi Ram*, 123 P.L.R. 1903. See, also, *Jalal v. Muhammad Bakhsh*, 1 P.R. 1896 (F.B.).

(20) *Durga Prasad v. Purandar Singh*, A.W.N. (1904) 210=27 A. 186.

(21) *Baloo v. Madan Gopal*, 149 P.L.R. 1911.

(22) *Pehl Singh v. Ruldu*, 96 P.R. 1884. followed in *Udmi v. Kirpa Ram*, 106 P.R. 1900.

Sec. 35.—Receivership Proceedings.

Costs and expenses of receivership proceedings—When charged on the estate—
Priority.

Costs and expenses of receivership proceedings when charged against applicant.

Costs of appointing a new receiver.

Costs and expenses incurred for assistance to receiver.

Costs, items of, which will be allowed to receiver, rule as to.

Costs in case of reversal of order of appointment of receiver.

Costs incurred by receiver—Lien on estate.

Costs and expenses of defendant in suit instituted by receiver.

Costs of unsuccessful suit instituted by receiver—If allowed to receiver.

Costs of legal assistance and services—Right of receiver to charge for.

Receiver cannot employ for his legal advice and service any counsel engaged in
that suit—Even if suit has terminated.

Receiver not allowed Counsel fees paid to himself.

Costs of legal proceedings.

Costs, security for—Receiver when personally liable for costs.

Costs, when taxed, may be subject of receivership.

THE expenses attending the receivership are entitled to priority of payment out of the funds in the hands of the receiver. ⁽¹⁾

Costs and ex-
penses of
receivership
proceedings—
When
charged on
the estate
—Priority.

When a fund is brought into Court for administration and distribution, it must bear the expenses incurred in the receivership proceedings, and they must be paid in preference to all other claims against it.

In an American case the costs of a receivership were properly given preference over prior liens although the appointment of the receiver was made without prejudice to prior liens. ⁽³⁾

Next to the costs of receivership, the expense of taking care of the property is payable out of the funds in the hands of the receiver. ⁽⁴⁾

(1) *Bogardus v. Mosses*, 181 Ill. 554. On the subject-matter of this section, see Author's Law of Receivers, 1915, in the Lawyer's Companion Series, pp. 37, 154, 326—328, 486, 511, 649; High on Receivers, 4th Ed.; Alderson on Receivers, pp. 827-829, 841-843; Kerr on Receivers, 6th Ed., 1912, Chaps. VII, VIII; Woodroffe on Receivers, 2nd Ed., 1910, pp. 252, 263, 265, 276, 290, 293; Reviere on Receivers, 1912, pp. 17, 31, 32, 118-119, 180—188; Daniell's Chancery Practice, 7th Ed., 1901, Vol. II, 1436—1441; Seton's Judgments and Orders, 6th Ed., 1901, Vol. I, pp. 774-776; 803-809; Encyclopedia of the Laws of England, 2nd Ed., Vol. XII, Heading "Receivers;" Mew's Digest, Vol. XII, cols. 13, 82, 89; Halsbury's Laws of England, Vol. XXIV, Heading "Receivers," p. 402.

(2) *Petersburg Savings and Insurance Co. v. Della Torre*, 70 Fed. R. 643.

(3) *Gallagher v. Gingrich*, 105 Iowa. 237.

(4) *Ferguson v. Dent*, 46 Fed. 88.

A receiver is entitled to get out of the funds in his hands his costs, charges and expenses properly incurred in the discharge of his duties.⁽⁵⁾

Costs and expenses of receivership proceedings when charged against applicant.

As a general rule, "when plaintiff has sought and procured the appointment of a receiver in a case where the jurisdiction is properly exercised, persons dealing with the receiver must look for their reimbursement solely to the fund or property in the charge of the Court without any personal liability on the part of the applicant. The mere inadequacy of the property and its failure to realize at a sale a sufficient amount to cover the costs and expenses of the receivership will not render the plaintiff personally liable for such deficiency, where he has been guilty of no irregularity and has properly invoked the jurisdiction of the Court in the first instance."⁽⁶⁾

If, however, the appointment is improperly made in the first instance, without notice to the defendant and without sufficient averments in the plaint to warrant the relief, and the receiver is continued against the objections of the defendant, the costs and expenses of the receivership should not be charged against him, but against the plaintiff in the action, by whom they were caused.⁽⁷⁾

In another case, it has been laid down that "where the plaintiff procures the appointment of a receiver, he acts at his peril and is chargeable with knowledge of the fact that if the fund of which the receiver takes possession is not adequate to defray the costs and expenses of the receivership, he may be compelled to pay such expenses himself, and, in such case, it is not incumbent upon the persons who make such advances to notify the plaintiff that they look to him for payment."⁽⁸⁾

Costs of appointing a new receiver.

Where a receiver is discharged on account of his inability to procure new sureties, he will not be charged with the costs of appointing a new receiver.⁽⁹⁾

(5) *Balaji Narayan v. R. Govind*, 19 B. 660.

(6) *Atlantic Trust Co. v. Chapman*, 208 U.S. 360. See, also, *High on Receivers*, 4th Ed., S. 809-a, p. 963. See, also, on this point *Sevak Kalidas Dayaram v. Manohar Ganesh Tambekar*, Bom. P.J. 1893, p. 462.

(7) *Moyers v. Coiner*, 22 Fla. 422.

(8) *German National Bank v. Best*, 22 Colo. 192.

(9) *Lane v. Townshend*, 2 Ir. Ch. N.S. 120.

Amounts expended for assistance to the receiver when shown to have been reasonable and necessary, will be allowed to a reasonable amount.⁽¹⁰⁾

Costs and expenses incurred for assistance to the receiver.

"It may be stated generally that all the property which comes into the possession of the Court through its receiver, together with all the rents, issues and profits arising therefrom, must be applied to the satisfaction of the decree after deducting taxes, insurance and other allowable charges.⁽¹¹⁾

Costs, items of, which will be allowed to receiver, rule as to.

This being the rule, the question arises what expenditures a receiver may lawfully make out of the fund with which he may be credited upon accounting. The matter of expenditures is, in general, strictly regulated, and the first and most essential rule is that the receiver will not be credited with any payments which are not made by leave of the Court by which he was appointed.⁽¹²⁾

Various limitations have been engrafted upon this rule which operate to relieve it of some of its harshness, and which are the result of an effort to save the trust property the expenses of repeated applications to the Court for instructions. Accordingly a receiver may lawfully, under some conditions, make such use of the trust fund without leave of the Court, as is necessary to preserve it, or to secure an income from it according to customary good usage, subject, however, to the supervision of the Court."⁽¹³⁾

Thus the receiver is relieved of personal liability where he expends small sums, or acts in good faith and for the best interests of the property in emergency involving expense, in order to prevent loss or damage.⁽¹⁴⁾

"A receiver's charges in his account of expenditures must be reasonable, and what is reasonable under the circumstances is for the Court to determine.⁽¹⁵⁾ Thus a receiver has been permitted, without leave of the Court, to charge the funds with a reasonable

(10) *Davis v. Stover*, 16 App. Pr. (N.S.) 225.

(11) *Pepper v. Shepherd*, 4 Mackey (D.C.) 269, 279. On this point see Alderson on Receivers, pp. 827—829.

(12) *Hooper v. Winston*, 24 Ill. 353.

(13) *Atwood v. Knowlson*, 91 Ill. App. 265.

(14) *Blunt v. Olitherow*, 6 Ves. 799; *Hynes v. McDermott*, 3 N.Y. St. R. 582. As to what will be held reasonable expenses in carrying on a business, see *Flagg v. Metropolitan Ry. Co.*, 10 Fed. R. 413, per Blatchford, J., 4 Am. & Eng. Corp. Cas. 140.

(15) *Wells v. Wales*, 31 Eng. Law & Eq. 562; *Wastell v. Leslie*, 31 Eng. Law & Eq. 563 (n.).

premium of insurance paid for the protection of the property,⁽¹⁶⁾ and also with the amount of an award paid to recover books necessary for him in conducting suits connected with the receivership,⁽¹⁶⁾ and with amounts necessary to employ agents where the estate lay at a distance,⁽¹⁸⁾ and with a reasonable compensation for assistants, clerks and watchmen where necessary.⁽¹⁹⁾ And where the receiver was directed to apply the revenue from certain pieces of property to the repair and betterment of others, he was allowed sums laid out for what seemed to him necessary repairs.⁽²⁰⁾ But he cannot employ a deputy receiver whose remuneration shall be paid out of the fund."⁽²¹⁾

Accordingly, when the receiver has paid no money, but has made an arrangement with a deputy to receive such compensation as the Court may allow, the contract should be reported to the Court, and a blank left in the report for the sum that may be allowed.⁽²²⁾

A receiver is a trustee, bound as such to the exercise of prudence and good faith in all his dealings with the trust estate. Allowance for expenses is not a matter of course, and the receiver's accounts should be carefully scrutinized by the chancellor. If there are unnecessary or extravagant expenditures they should be reduced or entirely rejected.⁽²³⁾

A receiver who pays claims against his predecessors is in no better condition than his predecessor with regard to them, and, therefore, if the predecessor were in arrears, he cannot be allowed the credit.⁽²⁴⁾

A receiver is not entitled to reimbursement for the expenses of journeys to a foreign country, for the purpose of prosecuting proceedings before the tribunals of that country, for the recovery

(16) *Brown v. Hazelhurst*, 54 Md. 26 (Eng.).

(17) *Adams v. Woods*, 15 Cal. 206 (Amer.).

(18) *Blank v. Lindsey*, 15 Ves. 91.

(19) *Dickerson v. Van Tine*, 1 Sandf. Super. Ct. 724; *Taylor v. Sweet*, 40 Mich. 736; *Corey v. Long*, 12 Abb. Pr. (N.S.) 427; *Howes v. Davis*, 4 Abb. Pr. 71.

(20) *Hynes v. McDermott*, 3 N.Y. St. R. 582. This disbursement was subject, of course, to the allowance of the Court.

(21) *Corey v. Long*, 12 Abb. Pr. (N.S.) 427. The question of employing counsel will be considered hereafter in the course of this section.

(22) *Adams v. Woods*, 15 Cal. 206, Amer. If the allowance be unsatisfactory, the aggrieved party may, of course, object by motion in the cause.

(23) *Schwartz v. Keystone Oil Co.*, 153 Pa. St. 283; 25 Atl. R. 1018.

(24) *Battaile v. Fisher*, 86 Miss. 321.

of property belonging to the estate, unless he had express authority from the Court for such journey.⁽²⁵⁾

It has been said that when receivers carry on the business of a corporation and sell the property, they cannot diminish the fund due to the lien creditors by retaining an allowance for their fees and those of counsel.⁽²⁶⁾

Where a receiver continued the operation of a glass plant beyond the authority given him, and at a loss, it was held that the claims for labour should be first paid and that the deficit should be charged against the receiver.⁽²⁷⁾

When an order of appointment of receiver is reversed all expenses attending the receivership, and his duty as to the property must be paid regardless of who is the winning party, and should be paid by the plaintiff who applied for when the appointment is wrongly made.⁽²⁸⁾

Costs in case of reversal of order of appointment of receiver.

The subject received extended consideration by the supreme Court of New York in the case of *Weston v. Watts*,⁽²⁹⁾ in which a receiver was appointed who took possession of the property. On appeal the decree was reversed and the receiver ordered to return the property and render an account of his administration before a referee, who was authorized to fix the compensation of the receiver, which the plaintiff was ordered to pay. The receiver held the property and demanded payment of his compensation. As to this action the Court declared that it could not be sustained, and that the plaintiff, the unsuccessful party in the litigation, must pay the expenses of the receivership. "To take a person's property from him by an unauthorized proceeding," said the Court, "and place it in the hands of a receiver, and then subject him to the expenses of the proceeding, would be very transparently unjust, even if the Courts had the power to do so." In the same case in a concurring judgment Barnett, J., said: "It would be a pretty severe rule, even if constitutional, which would compel a litigant to pay the expense of having his own property illegally taken out of his custody for a while. There might be cases where

(25) *Malcolm v. O'Callaghan*, 3 Myl. & Cr. 52.

(26) *Moore v. Lincoln Park & Steamboat Consolidation Co.*, 196 Pa. St. 519; 46 Atl. R. 857, following *Lane v. Hotel Co.*, 190 Pa. St. 280; 42 Atl. R. 697.

(27) *Gillespie v. Blair Glass Co.*, 189 Pa. St. 50; 41 Atl. R. 1112.

(28) *Moyers v. Coiner*, 22 Fla. 422.

(29) 45 Hun, 219.

a receiver was erroneously appointed, but not under such circumstances as to make the appointment absolutely void, which would warrant an order that his disbursements be paid out of the fund, as, for example, where the property consisted of a herd of cattle for which the receiver had to buy fodder. In such a case it would be fair and just to charge the successful party with the cost of feeding, for he would have had to incur it if the animals had remained in his own custody." But commissions and disbursements, except such as would have been necessary if the custody of the property had remained unchanged, it was said, were on a different footing."⁽³⁰⁾

On appeal in an American case the appointment of the receiver was revoked and the receivership vacated. Pending the appeal the receiver gave bond and proceeded with the management of the property in compliance with the order of the Court. As to the contention that, as the appointment was wrong, the defendant should not be charged with the payment of the receiver's compensation, but that it should be taxed against the plaintiff, the Court said: "The authorities upon this question are badly in conflict, but we believe the better reason to be with those which hold that, inasmuch as the receiver is appointed to manage and preserve the property pending the litigation for the benefit of those ultimately adjudged to be entitled to it, the cost of doing this, including his commissions, should ordinarily be made a charge upon the property itself, and paid out of its proceeds regardless of who finally succeeds

(30) The following note to the decision in the above case given by Mr. Alderson in his book on Receivers may also be noted:—"We conceive no reason to question the correctness of this opinion of the New York Court, but appreciate that it is both logical and just. There is one feature of the question which the opinion does not cover, the payment of the expenses of the receivership when the plaintiff is insolvent. There cannot, of course, be any recourse on the Court, and if the expenses are not paid out of the fund or property held by the receiver they must go unpaid. To guard against such an emergency the Court could, and should, in proper cases, impose on the plaintiff the giving of a bond as a condition to the appointment of a receiver, so that, in the event the plaintiff ultimately fails to maintain the action, the payment of the expenses attending the receivership may be properly adjusted. As a rule receivers are appointed without requiring any bond from the party procuring their appointment, the receivers being ordered to give bond for the faithful performance of their duties." (*Briarfield Iron Works Co. v. Foster*, 54 Ala. 622, 633; *Moritz v. Miller*, 87 Ala. 331; 6 So. R. 269; *Dollins v. Lindsey*, 89 Ala. 217; 7 So. R. 234). In some cases the applicant is required to enter into bond before the appointment of a receiver. Such a provision would sometimes be mandatory and prohibitory, and in such a case without compliance with its requirement the appointment is void. *Dreyspring v. Loeb*, 113 Ala. 263; 21 So. R. 73. See Alderson on Receivers, 1905, S. 95, pp. 134, 135.

* * * To hold otherwise might greatly embarrass the Courts in obtaining suitable persons to fill these important positions, for we apprehend that few indeed could be found who would be willing to give the enormous bonds and incur the heavy responsibilities assumed by receivers of large properties, if they were required to await the result of the litigation for their compensation, and in case the defendant should be successful could then only look to the plaintiff for its payment.”⁽³¹⁾

If the order or decree appointing a receiver is reversed on appeal, he must, it has been adjudged, deliver back all the property received without deducting commissions.⁽³²⁾

In one of the recent American cases it was stated as follows: “We do not decide that in all cases where an order appointing a receiver * * * is reversed, no commission can be allowed to the receiver. There may be circumstances existing in any such case which would render it a matter of discretion whether or not to permit commissions, etc., to the receiver; and with its exercise we would have no right of review if not abused.”⁽³³⁾ The erroneous appointment of a receiver does not constitute him a usurer.⁽³⁴⁾

Even where an order appointing a receiver was reversed on appeal, it was held that he had the right and it was his duty to hold and protect the property in his possession until taken from him by order of the Court.⁽³⁵⁾ Where a decree appointing a receiver is reversed wholly without any reservation, his office ceases with such reversal.⁽³⁶⁾

The expenses of a receiver, reasonably incurred in the discharge of his duty, are a lien upon the property prior to that of the bond-holders, and “among the expenses which should be allowed him are reasonable fees for counsel employed by him in the proper discharge of his trust, the cost of litigation, and the expenses in taking care of, protecting and repairing the property in his charge.”⁽³⁷⁾

Costs incurred by receiver—Lien on estate.

(31) *Espuella Land & Cattle Co. v. Bindle*, 11 Tex. Civ. App. 262; 32 S.W.R. 582.

(32) *Weston v. Watts*, 45 Hun. 219; *Pittsfield National Bank v. Bayne*, 140 N.Y. 321.

(33) *Pittsfield National Bank v. Bayne*, 140 N.Y. 321.

(34) *How v. Jones*, 60 Iowa. 70.

(35) *In re Murray Hill Bank*, 43 N.Y.S. 836; 14 App. Div. 313.

(36) *Crumlish's Admr. v. Shenandoah Valley R. R. Co.*, 40 W. Va. 627; 22 S.E.R. 90.

(37) *McLane v. Placerville, etc., R.R. Co.*, 66 C. 606 (Amer). See this point discussed more fully, *infra*.

Costs and expenses of defendant in suit instituted by receiver.

In an action prosecuted by the receiver of a corporation for the collection of money due to the company when the action is carried on for the enhancement of the fund in the receiver's hands and for the benefit of those who shall be finally determined to be entitled thereto, if the receiver is unsuccessful in his suit, the defendant is entitled to costs. And such defendant will not be required to await the final distribution of the assets and to share *pro rata* with other creditors or parties interested, but he is entitled to an immediate order for payment of the costs out of any funds in the receiver's hands.⁽³⁸⁾

Costs of unsuccessful suit instituted by receiver—If allowed to receiver.

As a general rule receiver is allowed only costs of successful proceedings. But if the proceedings instituted by the receiver were done after obtaining the previous sanction of the Court, he will be allowed costs whether the proceedings are successful or not.⁽³⁹⁾

If a receiver improvidently and recklessly instituted proceedings in a certain form, which he has afterwards to abandon under the advice of counsel, and then brings his action in another form, in which he is successful, he cannot be allowed the costs of the former proceedings, but must bear it himself.⁽⁴⁰⁾

In ordinary cases, a receiver, if successful in a suit instituted by him and if the same be for the benefit of the estate, the costs and other expenses of such a suit would be allowed to the receiver although the previous sanction of the Court be not obtained.⁽⁴¹⁾ But in the case of a receiver of an infant's estate he will not be allowed his costs and expenses incurred in instituting or defending actions without the sanction of the Court.⁽⁴²⁾

Costs of legal assistance and services—Right of receiver to charge for.

On this subject of the right of receivers to charge for legal services, the judgment of Justice Mookerjee has made important and original contribution.⁽⁴³⁾ We shall proceed to see how his Lordship has laid down the law on this subject. "Receivers are entitled, in the settlement of their accounts, to payments made on account of legal services and counsel's fees; and such fees, when paid by the receiver in good faith the disbursement being proved to be

(38) *Columbian Insurance Co. v. Stevens*, 37 N.Y. 536. See, also, High on Receivers, 4th Ed., S. 810, p. 965.

(39) *Bristowe v. Needham*, 2 Ph. 190.

(40) *In re Montgomery*, 1 Mol. 419.

(41) *Bristowe v. Needham*, 2 Ph. 190.

(42) *Swaby v. Dickon*, 5 Sim. 629.

(43) *Mohini Mohan v. Baroda Kanta*, 12 Ind. Cas. 780=14 C.L.J. 445.

necessary and beneficial to the parties ultimately entitled to the fund, should be paid from such fund in the settlement of the receiver's accounts. It must be remembered, however, that the Court is reluctant to allow a receiver any payments made to Counsel for services when the employment has not been authorised by the Court, specially when the payment was either unnecessary or needlessly expensive. The principle applicable was thus concisely explained in *Henry v. Henry* ⁽⁴⁴⁾: "In no case, except when the *cestuis que trustent* are *sui juris* and waive it, should a Court suffer a credit to stand or be entered upon the accounts of any trustee for expenses incurred without a previous order, whether for attorney's fees or otherwise, until he satisfies the Court by proof, (1) that the expense was a reasonably necessary one and for a service not within and the ordinary duties which the trustee should himself perform; (2) that the amount claimed is the fair and reasonable value of the service; and (3) that the amount has been actually paid in good faith by the trustee. If the Courts would vigorously enforce this rule, trust estates would not suffer as many have suffered in the past. The loose practice of executors, administrators, guardians and other trustees, of employing counsel, generally, without regard to cost, without any effort to obtain the best terms practicable for the estate, with no thought of personal responsibility or expectation of payment until allowance is made, but too often upon the assumption expressly or impliedly indulged by both, that the attorney shall receive only what he may induce the Court to allow from the funds in hand, after the service has been rendered, is fraught with evil and should not be encouraged. Under its influence, estates have not infrequently been in large measure swallowed up in cost, and in some instances, Courts, created to protect the helpless, actually brought into public disfavour."⁽⁴⁵⁾

The Court must determine whether the expenses incurred are just and well founded, and the matter must be carefully investigated; for the estate cannot properly be made responsible for expenses needlessly, if not capriciously, incurred. To sum up the position: a receiver is entitled to legal assistance in proper cases, and will be allowed reasonable and proper fees in this behalf out of the funds, not only when the employment has been previously sanctioned by

(44) 108 Ala. 582.

(45) See the same cited in the judgment of Justice Mookerjee in *Mohini Mohan v. Baroda Kanta Sarkar*, 12 Ind. Cas. 780=14 C.L.J. 445.

the Court but also when it was not previously authorised, if the expense has been incurred in the exercise of a sound discretion. Such allowance will be made only for services requiring legal skill, but not for services which were not rendered to the receiver or for services which were not in behalf of the interests represented by the receiver, or which were rendered in matters with which the estate in the receiver's hands had no concern, or in which the interest only of the receiver personally may be involved, or for services, the necessity for which had been caused by the receiver. Such allowances, however, must be carefully scrutinised, and if they are unnecessary or extravagant, they should be reduced or disallowed altogether. Such allowances are in substance to be governed by the reasonable necessities in that regard, if the receiver has properly discharged the duties which belong to him to perform, by the time necessarily spent in the administration, the grade of service required, the efficiency of that rendered, the benefit to the trust, the fidelity displayed, and by all other circumstances throwing light on the question.⁽⁴⁶⁾

Receiver cannot employ for his legal advice and services any counsel engaged in that suit even if suit has terminated.

The rule is that the receiver should not employ the counsel of either of the parties to the litigation in which he was appointed ; since their duty is to protect the interests of their respective clients and to watch the receiver's proceedings, to the end that a favourable performance of his duties may be insured, they are not regarded as competent to act as counsel for the receiver, and their undertaking to act in such a capacity might frequently cast upon them inconsistent and conflicting duties which could not be properly discharged by one and the same person.⁽⁴⁷⁾

The rule that a receiver cannot employ for his legal advice and services any counsel engaged in the suit also applies even though the suit has terminated. The termination of the suit does not in

(46) *Per Mookerjee and Caspersz, JJ.*, in *Mohini Mohan Patra v. Baroda Kanta Sarkar*, 12 Ind. Cas. 780 at pp. 787, 788 = 14 C.L.J. 445. As illustrating a case, in which fees allowed were held not excessive, reference may be made to *Cake v. Mohan*, (1896), 164 U.S. 311, while as illustration of a case in which the fees were held excessive, reference may be made to *Drey v. Watson*, (1905) 188 Fed. 792; 71 C.C.A. 158.

(47) *Per Mookerjee and Caspersz, JJ.*, in *Mohini Mohan Patra v. Baroda Kanta Sarkar*, 12 Ind. Cas. 780 at p. 789 = 14 C.L.J. 445. See, also, *Dixon v. Wilkinson*, (1859) 4 Drew 614 at p. 619 ; 4 De. G. and J. 508 ; 5 Jur. (N.S.) 1063 ; 7 W.R. 624 (Eng.). See, also, *Moore v. O'Loughlin*, (1879) 3 L.R. Ir. 405, and see, also, *Eychman v. Parkins*, (1836) 5 Paige 543, and *Farwell v. G. W. Telegraph Company*, (1896) 161, Ill. 522 at p. 613 ; 44 N.E. 891.

any way affect the capacity or the incapacity of the counsel in this respect.⁽⁴⁸⁾

On this subject the following extract from the judgment of Mookerjee,⁽⁴⁹⁾ may well be noted:—"It has, indeed, been suggested that, as the consent decree had been made, the suit may be deemed to have terminated, and it was, in this view, right and proper for the vakil to appear for the receiver and against the plaintiffs. This contention, in our opinion, is entirely unsustainable. No doubt, the consent decree had been made, but the parties were still unable to have the subject-matter of the administration-suit released from the custody of the receiver as an officer of the Court; there was serious difference of opinion as to the relative rights of the parties, and the terms upon which they were to be allowed to resume possession of their property. The parties and the receiver were at controversy as to the propriety of transactions which, according to the receiver, had taken place under the advice, if not the approval, of the very vakil whose services the receiver was so anxious to employ against the plaintiffs. It is well settled that the authority of a solicitor to represent his client does not necessarily terminate with the judgment in the suit,⁽⁵⁰⁾ and, in the circumstances of the case before us, we cannot adopt as well founded the suggestion that the suit had terminated so as to entitle the vakil to appear against the party for whom he had previously acted. No doubt, as the learned Judges of the Sudder Court observed in *Ram Charan Mazumdar v. Raja Bishu Nath Singh*,⁽⁵¹⁾ much must be left in these matters to the honour and etiquette of the Bar, and the nice sense of their position which ordinarily distinguish members of the profession. But, in the circumstances of this case, we regret very much that we should have to express our disapproval of the course adopted, and we cannot but feel that it would have been better for all parties concerned, if a course so obviously inappropriate and inexpedient, had been, as it might easily have been, avoided."⁽⁵²⁾

(48) See *Mohini Mohan v. Baroda Kanta*, 12 Ind. Cas. 780=14 C.L.J. 445.

(49) *In the case of Mohini Mohan v. Baroda Kanta Sarkar*, 12 Ind. Cas. 780 at pp. 789, 790=14 C.L.J. 445.

(50) *De la Pole (Lady.) v. Dick*, 1885, 29 Ch. D. 351; 54 L.J. Ch. 940; 52 L.T. 457; 53 W.R. 585 (Eng); *Bagley v. Maple & Co.*, (1908) 27 T.L.R. 284.

(51) (1856) Beng. S.D.A. 399 at p. 404.

(52) *Per Mookerjee and Caspersz, JJ. in Mohini Mohan Patra v. Baroda Kanta Sarkar*, 12 Ind. Cas. 780 at pp. 789, 790=14 C.L.J. 445.

Receiver not
allowed
counsel-fees
paid to him-
self.

"A receiver will not be allowed to charge for counsel-fees paid to himself for services rendered, he being an attorney, in addition to the legal costs properly taxable in suits prosecuted or defended by him. And it is deemed as unsafe to permit a receiver to contract for, and to pay himself, such extra allowance, as it would be to permit him to become a purchaser of the trust property, which it is his duty to sell to the best advantage of the estate."⁽⁵³⁾

Cost of legal
proceedings.

Where a receiver commences proceedings at law and then, under advice of counsel, abandons them and proceeds in another form, and is successful in the second proceeding, it seems that he will not be allowed the costs of the first proceeding.⁽⁵⁴⁾

But a receiver will not be charged the costs of an accounting because some items of credit are not allowed, no fraud or bad faith being shown.⁽⁵⁵⁾

In England a receiver has been allowed to take out of the fund in his hands the costs adjudged to him against an unsuccessful plaintiff, the latter being irresponsible.⁽⁵⁶⁾

Where a receiver institutes proceedings without the permission of the Court, after a rule or order relating to the same subject-matter had been made, the Court has power to determine whether the costs shall be paid out of the funds in the hands of the receiver or by him personally; and in such a case the successful party is not required to make an affirmative motion to determine whether he should be personally charged with the costs.⁽⁵⁷⁾

Pending the litigation it is not the duty of a receiver to pay the costs and expenses incurred by the plaintiff in the suit, in which the receiver was appointed. It may be that the plaintiff's demand, from the beginning, has been wrongful, and, if so, whatever has been done at his instance, must be at his expense.^(57-a)

"He is entitled to the protection of the Court against loss for disbursements made by himself as receiver, which were such

(53) *In re Bank of Niagara*, 6 Paige, 213. See, also, *High on Receivers*, 4th Ed., S. 808, p. 961.

(54) *In re Montgomery*, 1 Mol. 419; *Alderson on Receivers*, 1905, pp. 343, 344, 549, 841--843.

(55) *Hynes v. McDermott*, (1886) 3 N. Y. St. R. 582, 586; *Radford v. Folsom*, 55 Iowa, 276.

(56) *Courand v. Hamner*, 9 Beav. 3.

(57) *Matter of Castle*, 2 N. Y. St. R. 362 (Sup. Ct. 1886).

(57-a) See *Alderson on Receivers*, 1905, S. 268, p. 343.

as a reasonable and prudent man would have been justified in expending.⁽⁵⁸⁾

Where a judgment was obtained against a receiver, in a suit originally brought against the corporation of the property of which he was appointed, but which was defended by him, it was adjudged that the costs attending the suit and an allowance should be paid by him out of the fund, since they were incurred for the benefit of the fund out of which all other claims entitled to preference had been paid, and that this was not giving preference to a debt as such, but only requiring the fund to pay an expense incurred for its own benefit.^(58-a)

When a receiver prosecutes an action for recovery of money for the enhancement of the fund for which he is receiver, and fails to recover, the defendant is entitled to costs, and is not bound to await the final administration of the fund, and, as a general creditor, share with other parties interested therein, *pro rata*, but is entitled to an immediate order for payment of the costs out of any funds in the hands of the receiver. This is true where the receiver continues the prosecution of an action begun by the insolvent company before his appointment.⁽⁵⁹⁾

Where in a suit by a receiver against several defendants, one of them successfully defended the suit, it was held the receiver was not personally liable for the costs of such defendant, unless ordered by the Court to pay them for mismanagement or bad faith in conducting the action.⁽⁶⁰⁾

"Where receivers of the property of a bank continued a suit commenced by the bank, and were nonsuited, it was held that the defendant was entitled to all his costs out of the fund in the receiver's hands, down to the time of the nonsuit, but not for making up the record, and issuing an execution against the bank."⁽⁶¹⁾

If upon the examination of the accounts of a receiver and the vouchers relating thereto, no misconduct of the receiver be shown, he is not chargeable with the expenses of the accounting.⁽⁶²⁾

(58) *Adams v. Haskell*, 6 Cal. 475 (Amer.).

(58-a) *Locke v. Covert*, 42 Hun, 484 (1886).

(59) *Columbia Ins. Co. v. Stevens*, 37 N.Y. 536.

(60) *Marsh v. Hussey*, 4 Bosw. 614.

(61) *Camp v. Niagara Bank*, 2 Paige, 288.

(62) *Hynes v. McDermott*, 3 N.Y. St. R. 582, 586 (N.Y. Com. Pl.).

As has already been seen, a successful defendant in an action brought by a receiver is entitled to an immediate order for payment of the costs out of any funds in the receiver's hands.⁽⁶³⁾

According to the English practice the receiver is not justified in defending an action brought against him unless he first obtain leave of Court; hence, if a defence be prosecuted without leave, and be unsuccessful, he is not entitled to be credited with the costs.⁽⁶⁴⁾

Where a motion is made to remove a receiver which is subsequently withdrawn, and the receiver then surrenders his trust, the Court will allow him the expenses of the defence if he has acted in good faith⁽⁶⁵⁾; but the rule would be otherwise if the motion were prosecuted successfully.⁽⁶⁶⁾

So, also, the receiver is not chargeable with costs where he is discharged because of his inability to secure new sureties⁽⁶⁷⁾; but when a receivership is extended over additional lands, the receiver must perfect additional security, or be removed. If, in such a case, he be removed and seek the costs incident to his original appointment, he must make a special case for them.⁽⁶⁸⁾

According to the English practice it seems to be the duty of the parties to the proceeding to see to the taxation and payment of costs due to a receiver, but if they neglect to do so the receiver may attend to it.⁽⁶⁹⁾

A special receiver appointed during vacation should be allowed, out of the moneys collected by him during such receivership, an amount sufficient to compensate him for all costs and other legitimate expenses which he may have incurred while acting as such special receiver.⁽⁷⁰⁾

Costs, security for—
Receiver
when personally liable
for costs.

Generally a receiver will not be required to give security for costs in a suit brought by him, but such may be and will be done when the receiver is without funds with which to pay the

(63) *Columbian Ins. Co. v. Stevens*, 37 N.Y. 536.

(64) *Bristowe v. Needham*, 2 Phil. Ch. 190; *Swaby v. Dickon*, 5 Sim. 629.

(65) *Cowdrey v. Railroad Co.*, 1 Woods 331. A contrary rule prevails in England, upon the ground that the receiver need not have appeared and is not a party interested. *Herman v. Dunbar*, 23 Beav. 312.

(66) *In re Colvin*, 4 Md. Ch. 126. *

(67) *Lane v. Townsend*, 2 Ir. Ch. (N.S.) 120.

(68) *Wise v. Ashe*, 1 Ir. Eq. 210.

(69) *Ireland v. Eade*, 7 Beav. 55.

(70) *Kerr v. Hill*, 27 W. Va. 577, 616.

costs and the action was brought in bad faith, or heedlessly, or without reasonable prospect of success.⁽⁷¹⁾

A receiver's liability for costs in actions instituted by him on behalf of the estate in his charge is similar to that of any other trustee—as, *e.g.*, an executor or administrator—who sues for the interest of an estate; but being an officer of the Court, and presumably acting by its authority, he usually receives special consideration.⁽⁷²⁾

So it has been held that where he has been prevented from going to trial, by good and sufficient reasons, after having noticed the case for trial, he should not be required to pay costs personally, especially as he had evidently acted in good faith.⁽⁷³⁾

Where a bill filed by a receiver on behalf of creditors, under the advice of counsel, was, without fault of the receiver, dismissed upon the ground that its allegations of fraud were not supported by the proof, the costs were allowed to the receiver out of any funds which had come or might come into his hands.⁽⁷⁴⁾

Where a receiver voluntarily intervened in litigation without funds to pay the costs, and it was shown that the claim which he wished enforced was not proper, *held* that he was personally liable for the costs.⁽⁷⁵⁾ And if a receiver institute a suit carelessly and without permission of the Court, he may be charged personally with the costs, and without an affirmative motion for that purpose.⁽⁷⁶⁾

Taxed costs may be the subject of receivership by way of equitable execution; ^{Costs, when taxed, may be subject of receivership.} (77) but the Court will refuse to appoint a receiver over untaxed costs in respect of which legal execution could not issue.^(77-a)

(71) *Ridgeway v. Seymour*, 85 N.Y.S. 197; 14 Misc. R. 78; 25 Civ. Proc. R. 23; *Cahn v. Sugenheimer*, 57 N.Y.S. 406.

(72) See *Alderson on Receivers*, 1905, S. 549, p. 747.

(73) *St. John v. Denison*, 9 How. Pr. 433, where he was unable to go to trial on account of the absence of a material witness. See also *Eubbell v. Dana*, 9 How. Pr. 424.

(74) *Tillinghast v. Champlin*, 4 R. I. 173.

(75) *Bourdon v. Martin*, 26 N.Y.S. 373.

(76) *In re Castle*, 2 N.Y. St. R. 362.

(77) *Kerr on Receivers*, 6th Ed., p. 122, Note.

(77-a) See *Willis v. Cooper*, 44 S.J. 698; *Kerr on Receivers*, 6th Ed., p. 122.

Sec. 36—Reference—Review—Revision,

I.—Reference.

Costs of reference to High Court, provisions of the Civil Procedure Code as to Practice.

Small Cause Court reference—Practice as to costs.

II.—Review.

Provisions of the Code of Civil Procedure.

Court-fees on application for review.

Miscellaneous.

III.—Revision, etc.

Revision.

Restoration of suit.

I.—Reference.

Costs of reference to High Court, provisions of the Civil Procedure Code as to Practice.

THE costs (if any) consequent on a reference for the decision of the High Court shall be costs in the case.⁽¹⁾

The costs of a reference to the High Court cannot be dealt with separately, but must be dealt with when awarding the costs of the suit. They are, however, in the discretion of the Court, and need not necessarily follow the event of the suit.⁽²⁾

(1) See Act V of 1908 (Code of Civil Procedure), O. XLVI, r. 4.

(2) *Nicol v. Mathoora Dass Dumani*, 15 C. 507=12 Ind. Jur. 458. The following observations of the Court in the course of the judgment may also be noted:—"When the reference is under S. 617, the costs are provided for under S. 620 of the Civil Procedure Code, which says: 'Costs, if any, consequent on a reference for the opinion of the High Court shall be costs in the case.' Now the sole question here is what is the meaning of the words 'costs in the case.' On the one hand it is suggested that 'the case' means 'the reference,' and that the costs of the reference may be dealt with as a thing apart. On the other hand a more extreme view is taken, namely, that the costs must follow the costs of the cause. Now I do not think that this can be the true meaning. The technical meaning of the words 'costs in the cause' is quite unknown in this country generally, costs of every separate application being dealt with in the discretion of the Judge when dealing it with the costs of the case. I think the meaning of the words is plain. S. 617 allows a reference in the hearing of a suit or appeal and under S. 620 the costs are to be costs in the case. I entertain no doubt that this means costs of the suit or appeal as in S. 617, S. 620 being the section under which the costs are dealt with, and the costs being made costs in the case. Turning to the sections dealing with the question of costs in suits, S. 220 provides 'that the Court shall have full power to give and apportion costs of every application and suit in any manner it thinks fit, and the fact that the Court has no jurisdiction to try the case is no bar to the exercise of the power.' And then comes the only proviso I think which makes costs *prima facie*, but not I think necessarily, abide

If a party asks the Judge of the Small Cause Court to refer a case and does not appear in the High Court, he must be taken to have abandoned his case, and must have judgment given against him in the Court. The defendants who appear would be entitled to an order that the plaintiffs at whose request the reference was made should pay the costs of the reference and other expenses connected therewith.⁽³⁾

Where a party to a suit requests the reservation of a question by the Small Cause Court for the opinion of the High Court and it is not reserved because the Judges entertain any doubts, and the party does not appear in the High Court, the decision must be against him, whether security has been given for the costs of the reference and the amount of the judgment or not, and he must pay the costs of the reference.⁽⁴⁾

In the case of a reference from the Presidency Small Cause Court to the High Court, the provisions of the Statute which governs the matter should be strictly complied with. Where a judgment is given contingent on the opinion of the High Court on a point to be referred to the latter, and the party, at whose instance the contingent judgment is given and the reference made, fails to deposit the security "at once," the reference will be liable to dismissal.⁽⁵⁾

II.—Review.

With regard to costs of an application for review the Provisions Code of Civil Procedure provides as follows:—"Where the application for review has been rejected in consequence of

the result of the suit; 'Provided that if the Court directs that the costs of any application or suit shall not follow the event, the Court shall state its reasons in writing.' Now these costs, therefore, under S. 620 are in the same position as costs of a suit under S. 220. The costs of an application may be dealt with separately or reserved, but the costs of a suit can only be dealt with once and for all, viz., at the termination of the suit. The result is that I think this order is wrong, and the costs of the reference must be decided when the case is decided; but I desire to say that when the learned Judge comes to deal with the costs of the reference he will not necessarily be bound to give them to the party who succeeds in the suit. He will be at perfect liberty to give them on their own merits. In the result this order directing the defendant to pay the costs of the reference must be set aside, and the applicant must have his costs of this rule." *Nicol v. Mathoor Dass Dumani*, 15 C. 507=12 Ind. Jur. 458.

(3) *F. Dissent v. Justices of the Peace for the Town of Calcutta*, 5 B.L.R. App. 24=20 W.R. 349 (Note).

(4) *Williamson Brothers v. Arab Ismail Khan*, 11 B.L.R. 415=20 W.R. 349.

(5) *Jugal Kishore v. Sewmuck Roy*, 28 C. 260 distinguishing, *Fornaro v. Rammarain Sockdeb* 14 B.L.R. 180.

the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and, where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same.”⁽⁶⁾

Court-fees on
application
for review.

The proper fee leviable on an application for review of judgment when it refers to a portion of the decree is the fee leviable on the plaint or memo. of appeal, in which the judgment, review of which is asked for, is passed.⁽⁷⁾

The stamp-fee on an application for review must be calculated on the amount that would be obtained if the review were granted, and not necessarily on the whole value of the suit.⁽⁸⁾

An application for review of an interlocutory order is properly stamped with a Court-fee of Rs. 2 and neither Art. 4 nor 5 of Sch. I of the Court Fees Act refers to an interlocutory order.⁽⁹⁾

An application for review of judgment, such as is alluded to in Arts. 4 and 5, Sch. I of the Court Fees Act⁽¹⁰⁾ does not include an application for a new trial in a Small Cause Court in the mofussil.⁽¹¹⁾

Miscellaneous.

The provisions of S. 17 of the Provincial Small Cause Courts Act as to the deposit of costs on an application for review are not mandatory, but merely directory.⁽¹²⁾

A decree of a Division Bench of the High Court, dismissing an appeal for default in depositing the estimated costs of preparation of the paper book under r. 17 of the High Court Rules, Part II, Chapter VIII, can only be set aside by an order under S. 626 of the Civ. Pro. Code (Act XIV of 1882).⁽¹³⁾

(6) See Act V of 1908 (Code of Civil Procedure), O. XLVII, r. 7 (2)

(7) *In re Sheikh Magbul*, 31 A. 294 (*In re Manohar G. Tambekar*, 4 B. 26, not followed; *Nobinchander v. Mahomed Uzir Ali*, 3 C.W.N. 292, followed).

(8) *In re Manohar G. Tambekar*, 4 B. 26; *Anonymous*, 7 M.H.C.Ap. 1. But see *Nobinchander v. Mahomed Uzir Ali*, 3 C.W.N. 292, in which a different view has been taken.

(9) *Jagannath v. Mulchand*, 31 A. 262.

(10) Act VII of 1870.

(11) *Gopeenath v. Ram Joy*, 14 W.R. 249.

(12) *Ramasami v. Kurisu*, 13 M. 178 (F.B.).

(13) *Fatimunnissa v. Deeki Pershad*, 24 C. 350 (F.B.) = 1 C.W.N. 21.

The plaint in this suit, which was instituted by the appellant, was rejected by the original Court on the ground that it was written up on paper insufficiently stamped, and the appellant, when required to supply the requisite stamped paper, within a fixed time, had failed to do so. On appeal by the appellant the High Court, being of opinion that the plaint was sufficiently stamped, allowed the appeal "with costs," and set aside the original Court's order, and directed it to restore the suit to its file and dispose of it on the merits. The respondents applied for a review of the High Court's judgment so far as it related to the costs of the appeal. The Court (Pearson and Oldfield, JJ.), being of opinion that neither party was responsible for the error which led to the dismissal of the suit, decided that the liability for the costs of the appeal and of the application for review of judgment should abide the result of the trial of the suit and be costs in the cause; and so ordered.⁽¹⁴⁾

III.—Revision, etc.

Ordinarily, costs should follow the event, and when the lower Court does not act on this rule it ought to give a sufficient reason. Where the reason given by the Subordinate Judge for disallowing the costs of a successful plaintiff is unsatisfactory, the High Court can interfere under S. 25 of Act IX of 1887. ^{Revision.}⁽¹⁵⁾

A criminal Court's order to an accused person to pay costs of adjournment under S. 344 of the Criminal Procedure Code, 1898, on an application made by the former under S. 526 of the said Code is obviously improper and unjustifiable and, though not appealable, is liable to be set aside on Revision by the High Court.⁽¹⁶⁾

A revision application, in which the case was once remanded for further enquiry, was rejected 'with costs throughout.' A miscellaneous application was then made to ascertain the costs of the suit. *Held* that it had been the practice of the Judicial Court of Kathiawar to award Rs. 10 only in revision cases, but that there could be found no ground for this practice; that the words of Appendix B to the Rules for the practice of pleaders⁽¹⁷⁾ were quite clear; and that, therefore, costs were to be calculated from

(14) *Lachmi Narain v. Thakur Das*, 1 A.W.N. 9.

(15) *Narayana Iyer v. Venkatarama Aiyar*, (1912) M.W.N. 366.

(16) *Fatta v. The Crown*, 8 P.W.R. 1911 (Cr.) following *Browne v. Chanda Singh*, 6 P.R. 1906 (Cr.).

(17) II K.B.D., p. 648.

the beginning to the end of all proceedings whether original, appellate, or revisional.⁽¹⁸⁾ It was further held that 'costs throughout' could only mean 'costs throughout all the proceedings in the suit' (and not costs in any particular proceedings only).⁽¹⁹⁾

Restoration
of suit.

A Judge, when restoring a suit to the file under S. 99 of the Civ. Pro. Code⁽²⁰⁾ has no jurisdiction to pass at that time any order as to the general costs of the suit.⁽²¹⁾

Sec. 37—Refund of Costs.

Refund of costs—Provisions of the Code of Civil Procedure as to.

Certain illustrative cases.

Interest on refund of costs.

Execution of decree.

Appeal.

Costs realized by assignee—Decree reversed in appeal—Suit to recover costs from assignee.

Refund of
costs—
Provisions of
the Code of
Civil Procedure
as to.

THE Code of Civil Procedure provides as follows :—"Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal. No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section(1)."⁽¹⁾

(18) *Shah Dharshi Bechar v. Shah Jatashankar Dharshi*, 10 K.L.R. 243.

(19) *Ibid.*

(20) Act XIV of 1882.

(21) *Krishna Vithal Poole v. Ganesh Bhaskar Tilak*, 26 B. 201=3 Bom. L.R. 734; when the evidence shows a larger payment than the sum actually pleaded—the plea cannot be amended by inserting the larger amount. But a new trial will be granted on terms. *B. Dabee v. T. Mookopadhiah*, (1848) G. Taylor 402=2 Ind. Dec. Old Series, p. 240.

(1) See Act V of 1908 (Code of Civil Procedure), S. 144.

Costs paid in compliance with a decree subsequently reversed may be ordered to be refunded by the Court which made the original decree.⁽²⁾ Certain illustrative cases.

Where a decree under which costs were recovered is reversed, no express order is needed for refund of the costs; the party who recovered having no right to retain the same. Interest is awardable on costs to be so refunded.⁽³⁾

A party to a suit whose case has been dismissed in both the lower Courts with costs is entitled, when the decrees of the lower Courts are reversed by the Privy Council and the case remanded for retrial, to apply for a refund of the costs already paid under the decrees of the lower Courts, but not for interest on such costs. Such an application need not be made to the Privy Council, but may be made to the Court in which the suit was instituted.⁽⁴⁾

On reversal by the Judicial Committee of the decree of the High Court, such costs as were allowed by the practice of the Courts in India to a successful plaintiff suing in *forma pauperis*, and paid, were ordered to be restored to the defendant.⁽⁵⁾

(2) *Dorab Ally Khan v. Abdool Azees*, 4 C. 229=3 C.L.R. 358. In a later case the facts were as follow :—"The suit was dismissed with costs by the original Court. These costs were taxed, and the attorney of one of the defendants pressing for payment, the plaintiff paid his costs. From the decision of the original Court, there was an appeal which resulted in a reversal, and remand of the case for retrial. The plaintiff's attorney thereupon asked the attorney of the said defendant to refund the costs, but the latter refused to pay without directions from Court. The plaintiff thereupon applied to the Judge, sitting on the Original Side, for a refund of the costs paid by him, with interest thereon from the date of refusal. The decree of the appellate Court went on to provide that the costs of the suit incurred in the Court below should be in the discretion of the Judge who tries the suit. The fact of the payment of costs under the decree of the lower Court had not been brought to the notice of the appellate Court. Held—It was not intended by the direction of the appellate Court to have the question of refund of costs determined by the Judge, who is to retry the suit, or, in other words, that the question of refund should stand over until retrial. From the case of *Dorab Ali Khan v. Abdul Azees*, 4 C. 229=3 C.L.R. 358, it is clear that the Court of First Instance has power to order refund of costs if the order of the appellate Court is silent on the point, and probably, under S. 583 of the Civ. Pro. Code, the lower Court has jurisdiction for this purpose. Interest at the rate of 6 per cent. per annum was ordered to be paid on the amount to be refunded from the date of refusal by the defendant to repay. His Lordship remarked that parties should bring to the notice of the appellate Court the fact that costs have been paid under the decree of the lower Court, and obtain from that Court the usual order for repayment." *Mary Macdonald Watkins v. Saheneada Mahomed Zohoorooddeen*, 1 C.W.N. cxviii.

(3) *Kedar Nath Pakrasee v. Doya Moyee Debia*, 20 W.R. 49.

(4) *Dorab Ally Khan v. Abdool Azees*, 4 C. 229=3 C.L.R. 358.

(5) *Rajendra Nath Haldar v. Jagendra Nath Haldar*, 7 B.L.R. 216 (P.C.)=15 W.R. 41=14 M.I.A. 67.

Where a claim by a person dispossessed by a decree-holder in execution of his decree is allowed with costs and the decree-holder subsequently files a suit to set aside the summary order and obtains a decree declaring that order to be imperative, the claimant cannot take out execution for costs granted by the order, even though the subsequent decree might not have specifically referred to such costs.⁽⁶⁾

In this case the order of the District Judge awarding costs to respondent which he had realized from the appellant having been reversed by the Chief Court, the latter was held to be entitled to get them back. It was contended that the Civ. Pro. Code does not provide for their recovery by summary process, Ss. 244 and 583 (7) not being applicable to the order in question which was not a decree. Declining to accept the contention, the Chief Court held that, assuming that S. 590, Civ. Pro. Code, does not make the procedure provided by S. 583 applicable by analogy, it was nevertheless competent to the Court on general principles to compel restitution.⁽⁸⁾

A decree was passed against two defendants and both of them preferred an appeal. The first defendant died during the pendency of the appeal, and without his legal representatives being brought on the record, the appeal was heard and decided on behalf of the surviving appellant and the suit dismissed with costs, and it was expressly stated in the decree that the appeal was prosecuted only on behalf of the surviving defendant; *Held* that it would be unreasonable to construe the decree as being intended to enure for the benefit of the first defendant also, and to consider that the decree appealed against was reversed in favour of his representative; and that, therefore, the decree of the lower Court must be regarded as still in force as against the first defendant, and so his heir was not entitled to restitution of the costs levied from his father under that decree until he successfully prosecutes the appeal.⁽⁹⁾

Appellants in the Privy Council who had, antecedently to filing their appeal to Her Majesty in Council, paid to the assignee of the decree appealed against, which was for costs only, the

(6) *D. Seshagiri Aiyar v. Marakathammal*, 5 M.L.J. 252 distinguishing *Raghunath Das v. Badri Prasad*, 6 A. 21.

(7) Of the Code of Civil Procedure (Act XIV of 1882).

(8) *Thakur Mahan Chand v. Lal Ganda Mal*, 49 P.R. 1896.

(9) *Natesa Ayyar v. Annasawmi Ayyar*, 25 M. 426.

amount then payable under that decree, could not on succeeding in their appeal obtain restitution, merely by virtue of and in execution of the order of Her Majesty in Council, of the amount so paid, from the assignee when that assignee had been no party to the appeal to Her Majesty in Council.⁽¹⁰⁾

Under S. 583 of the Code of Civil Procedure,⁽¹¹⁾ the decree of the appellate Court has to be executed and by the very scope of the section it can only apply to the parties to the appeal; it cannot be executed against a person who was no party to the decree of the appellate Court and who has not derived any interest subsequent to such decree.⁽¹²⁾

A successful appellant in an appeal to the High Court applied, in execution of his decree, for a refund of a sum of money which he had paid to the respondent, by way of costs with interest thereon, in execution of the lower Court's decree. He further applied for interest on the refund claimed, at the rate of 6 per cent. per annum. The respondent objected to paying interest on the refund. *Held* that the appellant was entitled to the interest claimed on the refund of costs.⁽¹³⁾

Where, in an appeal by the defendant in respect of the costs decreed against him by the Court of first instance, the order of the lower Court was upheld, but the amount of costs thus payable by him was not specified in the decree, such decree could be executed in respect of such costs which had become the substantive portion of the decree.⁽¹⁴⁾

An objection to the attachment of property in execution of a decree having been allowed with costs, the decree-holder filed a suit to contest such order, but without claiming any relief in respect of the costs he was ordered to pay to the objector. Having succeeded in the suit, he applied to the Court which had

(10) *Sadiq Husain v. Lalta Prasad*, 20 A. 139=17 A.W.N. 222 referring to *Bhagwati Prasad v. Jamna Prasad*, 19 A. 136.

(11) Act XIV of 1882.

(12) *B. L. Frizoni v. Raja Ram Narain Singh*, 5 C.W.N. 426 referring and following *Sadiq Husain v. Lalta Prasad*, 20 A. 139; *Bhagwati Prasad v. Jamna Prasad*, 19 A. 136.

(13) *Ram Sahai v. Bank of Bengal*, 8 A. 262=6 A.W.N. 87, referring *Forester v. The Secretary of State for India in Council*, 3 C. 161. See, also, *Kedar Nath v. Doye Moyee*, 20 W.R. 49.

(14) *Himayat Husain v. Jai Devi*, 5 A. 589=3 A.W.N. 128, distinguishing *Shohrat Singh v. Bridgman*, 4 A. 376.

allowed the objection, in the miscellaneous department, for refund of such costs. *Held*, that the application being with reference to a portion of an order made under S. 280 of the Civ. Pro. Code, ⁽¹⁵⁾ the Court was *functus officio* in the matter, and its order refusing such refund was not appealable, not being one passed under S. 244 of the Civ. Pro. Code ⁽¹⁶⁾ and if regarded as one passed under S. 280, that an appeal was prohibited by S. 283 of the Code.⁽¹⁷⁾

Costs realized
by assignee—
Decree reversed
in appeal
—Suit to re-
cover costs
from assign-
nee.

Certain appellants in the High Court obtained from that Court a decree dismissing the respondents' plaintiffs' suit with costs. That decree for costs was assigned by the decree-holders, and the assignee took out of Court in execution thereof the money which had been paid in satisfaction of it by the judgment-debtors. Subsequently that decree was reversed by the Privy Council, and the plaintiffs obtained a decree in their favour with costs in all Courts. After an infructuous attempt to get a portion of those costs from the assignee by way of execution of the order of the Privy Council, the decree-holders filed a separate suit against him for their recovery.

Held, that the decree-holders had no cause of action for a suit to recover from the assignee the costs realized by him in the manner above described.⁽¹⁸⁾

Sec. 38.—Specific Performance—Vendor and Purchaser.

Costs in suits for specific performance—Provisions of the Specific Relief Act as to. Costs, as a general rule, are borne by unsuccessful litigant.

Subject classified under four heads.

- (i) Cases where general rule is enforced with more than ordinary stringency.
- (ii) Cases where general rule is allowed to operate.
- (iii) Cases where general rule is modified so as to deprive successful litigant of costs, wholly or in part.
 - (a) Where vendor obtains decree.
 - (b) Where vendor's action is dismissed.
 - (c) Where purchaser obtains decree.
 - (d) Costs of action caused by vendor's death.
 - (e) Purchaser electing to have action dismissed.

(15) Act XIV of 1882.

(16) *Ibid*.

17) *Ragunath Das v. Badri Prasad*, 6 A. 21=3 A.W.N. 177 (distinguished in *D. Seshagiri Aiyar v. Marakathammal*, 5 M.L.J. 252).

(18) *Lalta Prasad v. Sadiq Husain*, 24 A. 288=22 A.W.N. 47.

(iv) Cases where, in contravention of general rule, successful litigant is made to pay costs.

Vendor liable for costs till good title shown.

Where compensation is the only question.

Unfounded allegations as to character.

Costs of preventing reference as to title.

Costs of action include costs of all inquiries properly made under the order.

Costs, when defendant submits to plaintiff's demand.

When defendant disclaiming is entitled to costs.

Vendor obtaining title pending suit.

Possession, how far important in determining question of costs.

Deposit, not set off against costs.

Mortgagee refused costs of unsuccessful suit.

Solicitor's lien on purchase-money.

Vendor's lien.

Extent of lien.

Purchaser's costs of successful action may be deducted from purchase-money.

S. 49 of the Specific Relief Act⁽¹⁾ enacts that "the costs of all applications and orders in this chapter shall be in the discretion of the High Court."⁽²⁾

Costs in suits for specific performance—Provisions of the Specific Relief Act as to.

It will be seen that in this class of suits, just as in other classes of suits, the general rule holds good that "the party who fails is, *prima facie*, liable to costs."⁽³⁾ Although the question of costs rests

Costs, as a general rule, are borne by unsuccessful litigant.

(1) Act I of 1877: On the subject-matter of this section, see the Indian Specific Relief Act (I of 1877), S. 49; Dart's Vendors and Purchasers, 6th Ed., Vol. II, pp. 1256—1272; 1336, 1337; Fry on Specific Performance, 3rd Ed., 1892, pp. 414, 504, 532, 613, 650; Daniell's Chancery Practice, 1901, 7th Ed., Vol. I, p. 980; Seton on Judgments and Orders, 6th Ed. Vol. I, pp. 250 and 2237-2258, etc.; Beames on Costs, 37, etc.; Mews' Digest, Vol. XIII, Cols. 1868 to 1879; Encyclopædia of the Laws of England, 2nd Ed., Vol. XIII, Heading "Specific Performance", pp. 591-592, 584; Supreme Court of Judicature Act (1890), S. 5 and O. LXV; Morgan and Wurtzburg on Costs in Chancery Division, pp. 250 to 264; *Dyas v. Stafford*, (1882) 9 I.R. Tr. at p. 529; Halsbury Laws of England, Vol. XXVII, p. 95, etc.; Marshall on Costs. The following works dealing on the subject may also be usefully consulted—Story's Equity Jurisprudence; White and Tudor's Leading Cases in Equity, Vol. II, Title "Specific Performances"; Sugden's Vendors and Purchasers, 14th Ed., 1862; Banerjee's Law of Specific Performance in British India; Articles on the "Defence of Lack of Mutuality" published in the American Law Register (University of Pennsylvania) for May, July, August, Sept. Oct., 1901 and for May 1902.

(2) This occurs in Chap. VII of the Specific Relief Act, dealing with the "enforcement of public duties."

(3) *Vancouver v. Bliss*, 11 Ves. 463.

entirely in the discretion of Court,⁽⁴⁾ yet it is for the unsuccessful litigant to show (if he can) the existence of circumstances sufficient to negative his *prima facie* liability.⁽⁵⁾ It has been stated by a learned writer⁽⁶⁾ speaking with special reference to suits for the specific performance of contracts that "the present disposition of the Courts appears to be, to adhere, with considerable strictness, to the general rule." It has been pointedly observed by Lord Cottenham, "Parties may have more or less reason for coming here; but the question is, whether those who are right, or those who are wrong, are to pay the costs of their so doing. The rule I always act upon is, to order costs to be paid by those who are wrong."⁽⁷⁾

Subject
classified
under four
heads.

Dart in his work on Vendors and Purchasers⁽⁸⁾ dealing with this subject says that it may be conveniently classified as follows, *viz.*—

1st. Cases where the general rule, fixing the unsuccessful litigant with costs, is enforced with more than ordinary stringency :

2ndly. Cases where it is merely allowed to operate :

3rdly. Cases where it is modified, so as to deprive the successful litigant of his costs, wholly or in part :

And 4thly. Cases where the successful litigant is wholly or in part fixed with payment of costs.

We shall also adopt the same classification in dealing with the subject-matter of this section.

(i) Cases
where general
rule is
enforced with
more than
ordinary
stringency.

Under the first class the following cases may be noted :—

(i) A vendor, obtaining a decree for specific performance, has been held entitled to costs on the special ground of the purchaser having persisted in an objection to the title which he knew had been decided against another purchaser in a former suit.⁽⁹⁾ Similarly in the following cases the plaintiff's action was dismissed with costs, (ii) where an action was dismissed on the ground of misrepresentation,⁽¹⁰⁾ (iii) where it was dismissed on the ground of fraud ; (iv) or

(4) Sug. 646 ; *Gorahly v. Malone*, 1 H.L.C. 81.

(5) *Vancouver v. Bliss*, 11 Ves. 463.

(6) Dart in his work on Vendors and Purchasers, 6th Ed., p. 1256.

(7) *Hunter v. Nockolds*, 2 Ph. 545 ; and see *Green v. Briggs*, 6 Ha. 633 ; and *Earl Nelson v. Lord Bridport*, 10 Beav. 305 ; *Patteson v. Graham*, 2 S. & G. 211.

(8) Dart's Vendors and Purchasers, 6th Ed., p. 1257.

(9) *Biscoe v. Wilks*, 3 Mer. 456.

(10) *Burton v. Lister*, 2 Atk. 387 ; *Vancouver v. Bliss*, 11 Ves. 463.

on the ground that the plaint contained groundless imputations of moral⁽¹¹⁾ fraud against the defendant⁽¹²⁾, or (v) where the Court found that the claim was dishonourable and contrary to moral equity⁽¹³⁾, or (vi) where the plaintiff's claim was found to be against a clear stipulation in the contract.⁽¹⁴⁾ In all the above cases the plaintiff's claim was dismissed with costs. (vii) So also it has been held that where the unsuccessful litigant has acted fraudulently in the subject-matter of the suit or has acted vexatiously, and refused fair offers of accommodation, the decree against him will generally be with costs.⁽¹⁵⁾

As to the second class of cases. (i) A purchaser resisting specific performance, on grounds which the Court considers clearly untenable, will not be relieved from costs because he acted under counsel's opinion.⁽¹⁶⁾ (ii) So, also, where the purchaser omitted to take a valid objection to the title which was not removed until after the suit was filed, and insisted on objections which the Court considered untenable, he was ordered to pay all the costs of the suit.⁽¹⁷⁾ (iii) Similarly where the purchaser is held by his conduct to have waived the usual reference as to the title⁽¹⁸⁾ or (iv) any particular objection arising on the title⁽¹⁹⁾ and he has rested his defence on the question of title, the

(ii) Cases where general rule is allowed to operate.

(11) See the conclusion of V.C. Wigram's judgment in *Marshall v. Sladden*, 7 Ha. 444.

(12) *Morgan & W.* 106; *Scott v. Dunbar*, 1 Moll. 442, 460; *Langley v. Fisher*, 9 Beav. 90; see *Glascott v. Lang*, 2 Ph. 310, 322; *Knight v. Majoribanks*, 2 M. & G. 16; *Price v. Berrington*, 15 Jur. 999.

(13) *Davis v. Symonds*, 1 Cox. 402, 408, and other cases cited in Beames on Costs, 37.

(14) *Williams v. Edwards*, 2 Si. 78, 83.

(15) *Morgan & W.* 113, 114; *Clowes v. Beck*, 2 D. M. & G., 731; *Sherwin v. Shakespeare*, 17 Beav. 267; 5 D.M. & G. 517; and see *Jones v. Farrell*, 1 D. & J. 208. See Dart's Vendors and Purchasers, 6th Ed., Vol. II, pp. 1256, 1257.

(16) *Maling v. Hill*, 1 Cox, 186; and see *Firmin v. Pulham*, 12 Jur. 410, where it would appear that a trustee acting under advice was nevertheless fixed with costs; and *Peers v. Ceeley*, 15 Beav. 209; *Boulton v. Beard*, 3 D. M. & G. 608, where the fact of the trustees having acted on counsel's advice, though stated at the bar, does not appear to have been proved, and is not noticed in the judgments; see *Lewin*, 347. See, also, *Osborne to Rowlett*, 13 Ch. D. 790 where the difficulty having arisen entirely from conflicting decisions, no order was made as to costs; or even if the party acted upon the recommendation of the Master under the old practice, he will not be relieved from liability for costs. *Earl Nelson v. Lord Bridport*, 10 Beav. 805.

(17) *Bridges v. Longman*, 24 Beav. 27.

(18) *Fleetwood v. Green*, 15 Ves. 595; *Margravine of Auspach v. Noel*, 1 Madd. (Eng.) 317.

(19) *Burnwell v. Brown*, 1 J. & W. 175.

decree against him will be with costs : (v) on similar grounds, it has been held that where the vendor's action is dismissed merely for want of title and the title is clearly bad, the decree against him should be with costs⁽²⁰⁾ although he be merely a trustee for sale, (21 & 22) or although the title have become defective through the accidental destruction of the deeds subsequently to the contract,⁽²³⁾ (vi) "so, where a purchaser had objected that a good title could not be shown unless certain accounts were taken, and, this being resisted, each party filed a bill for specific performance, the Court, holding the purchaser to be right, made a decree, in the second suit, and gave him the costs of both suits."⁽²⁴⁾ And even, where the title is such that a purchaser could not be advised to accept it without taking the opinion of the Court, and it is held to be good, the purchaser will generally have to pay the costs, "to make his title sure," by showing that the Court entertains no doubt about it⁽²⁵⁾ although the rule may be relaxed where the doubt arises from conflicting decisions, even though the Court is confident of its own view."⁽²⁶⁾ But in one case where there was a substantial objection to the title, which the vendor ought to have known, but which the purchaser did not discover until after the institution of the suit, the Court, although it overruled all the purchaser's objections to the title which were the immediate cause of the litigation, refused the vendor his costs.⁽²⁷⁾

(iii) Cases where general rule is modified so as to deprive successful litigant of costs, wholly or in part.

(a) Where vendor obtains decree.

As to the third class of cases the following cases may be noted : (27-a) (i) "A vendor obtaining a decree, has been refused costs on the ground of his having unsuccessfully contended that the purchaser had waived his right to investigate the title."⁽²⁸⁾ (ii) So, a vendor has been refused costs where the purchaser's objection to the title, although overruled, has been considered a fair

(20) *Walters v. Pyman*, 19 Ves. 351 ; *Playford v. Hoare*, 3 Y. & J., 175 ; *Blosse v. Lord Clammorris*, 3 Bl. 62.

(21 & 22) *Dart's Vendors and Purchasers*, 6th Ed., Vol. I, p. 94.

(23) *Bryant v. Bush*, 4 Rus. 1, 5.

(24) *Burton v. Todd* ; and *Todd v. Gee*, 1 Sw. 255, 262.

(25) *Hall v. May*, 3 K. and J. 590 ; *M'Queen v. Farquhar*, 11 Ves. 492 ; *Osborne to Rowlett*, 13 Ch. D. 798.

(26) (*Ibid.*)

(27) *Phillipson v. Gibbon*, 6 Ch. 428.

(27-a) On this point see *Beames on Costs*, 39.

(28) *M'Queen v. Farquhar*, 11 Ves. 492 ; *Sidbotham v. Barrington*, 5 Beav. 261.

objection ⁽²⁹⁾ or (iii) has been overruled merely on the authority of an unreported decision ⁽³⁰⁾ or (iv) has been occasioned by the vendor or his solicitor ⁽³¹⁾ or (v) has arisen from a mutual misunderstanding, ⁽³²⁾ So, (vi) where the title was not clear on the abstract as delivered before bill filed ⁽³³⁾ or (vii) the vendor has refused to furnish necessary evidence in support of the title (although the purchaser's requisitions embraced unnecessary evidence) ⁽³⁴⁾ or where he has obtained a decree on the ground of the purchaser's acquiescence in a voidable contract, ⁽³⁵⁾ in all these cases costs were refused to the vendor. ⁽³⁶⁾

Similarly in cases where the dismissal of the vendor's action for (b) Where specific performance was merely on the ground of his own *laches* in vendor's action is applying to the Court, the order was without awarding costs on either dismissed. side. ⁽³⁷⁾ Acting on the same principle costs were not awarded when the vendor's suit was dismissed on any of the following grounds: (i) where the dismissal was on the ground that the title was merely doubtful, ⁽³⁸⁾ (ii) where the dismissal was on the ground of agency being denied, ⁽³⁹⁾ (iii) where the dismissal was on the ground of the general inaccuracy of the transactions relied on as constituting the contract, ⁽⁴⁰⁾ (iv) where the dismissal was upon a ground of defence which the purchaser did not resort to until after the institution of the suit; ⁽⁴¹⁾ (v) so, where a purchaser had, in the first instance, by his acts, waived the time for completion, and had gone on for some time inducing the vendor to incur expenses

(29) *Cox v. Chamberlain*, 4 Ves. 631; *Powell v. Martyr*, 8 Ves. 149; *Staines v. Morris*, 1 V. and B. 8; *Aislabie v. Rice*, 3 Madd. 261; *Thorpe v. Freer*, 4 Madd. 466 (Eng.); *M'Queen v. Farquhar*, 11 Ves. 482.

(30) *Corder v. Morgan*, 18 Ves. 344.

(31) See *Fenton v. Browne*, 14 Ves. 144, 150; *Dokin v. Cope*, 2 Rus. 175.

(32) *Calverley v. Williams*, 1 Ves. 210, 213.

(33) *Anon v. Collinge*, 3 V. & B. 143-N.; *Wilson v. Clapham*, 1 J. and W. 36.

(34) *Newall v. Smith*, 1 J. and W. 263.

(35) *Dickenson v. Heron*, cited Sug. 630-N, 649.

(36) See *Dart's Vendors and Purchasers*, 6th Ed., Vol. II, pp. 1260, 1261.

(37) *Guest v. Homfray*, 5 Ves. 824.

(38) *Rose v. Galland*, 5 Ves. 199; *White v. Foljambe*, 11 Ves. 337, 352; *Willcox v. Bellaers*, T. and R. 491; *Mullings v. Trinder*, 10 Eq. 449; but see *Pyrke v. Waddingham*, 10 Ha. 11.

(39) *Howard v. Braithwaite*, 1 V. and B. 202, 374; *Blore v. Sutton*, 3 Mer. 237; *Thornbury v. Beville*, 1 Y. and C. O. C. 554.

(40) *Marquis Townshend v. Stangroom*, 6 Ves. 341.

(41) *Winch v. Winchester*, 1 V. and B. 380; and see 3 Y. and C. 517.

to perfect his title, and suddenly, upon discovering that vacant possession could not be given according to stipulation, declined to complete, costs were not awarded to the successful party.⁽⁴²⁾ So, according to Lord St. Leonards, "if, after a bill filed for specific performance, the plaintiff, in pursuance of a power in the instrument, determines the contract, the bill will be dismissed without costs."⁽⁴³⁾ So, the Court has, by way of compromise, refused to fix the vendor with costs, he on his part consenting to give up his legal right of action under the agreement.⁽⁴⁴⁾

(c) Where purchaser obtains decree.

So, a purchaser obtaining a decree for specific performance, has been refused his costs: (i) on the ground of the inadequacy of the consideration: ⁽⁴⁵⁾ (ii) so, where a purchaser's bill for the performance of a contract alleged to arise out of correspondence, was dismissed on the ground of the language being equivocal and not clearly amounting to an agreement, costs were refused.⁽⁴⁶⁾ (iii) So, where it was dismissed on the ground of delay and the vendor had not objected to the delay.⁽⁴⁷⁾ (iv) So, also, on the ground of the defendant having in his answer alleged fraud and circumvention, which he failed to prove, ⁽⁴⁸⁾ or (v) having set up a false defence which the plaintiff has been obliged to disprove.⁽⁴⁹⁾ (vi) So, also, on the ground of the hardship of the case, and the novelty of the point raised.⁽⁵⁰⁾

(d) Costs of action caused by vendor's death.

So, where the vendor has by a will subsequent to the contract devised the property to an infant, or in such a manner as to render a suit necessary, his estate must bear the costs; ⁽⁵¹⁾ but if the will be prior to the contract it seems that no costs will be given.⁽⁵²⁾

(42) *Nokes v. Lord Kilmorey*, 1 De. G. and S. 444; and see *Deverell v. Lord Bolton*, 18 Ves. 505, 514.

(43) Sug. 654, referring to *Western v. Pim*, 3 V. and B. 197.

(44) *Buxton v. Lister*, 3 Atk. 387; and see 2 De. G. and S. 346. See, also, *Dart's Vendors and Purchasers*, 6th Ed., Vol. II, p. 1260.

(45) *Burrowes v. Lock*, 10 Ves. 470.

(46) *Stratford v. Bosworth*, 2 Ves. and B. 348; and see 6 Ves. 341.

(47) *Firth v. Greenwood*, 1 Jur. N.S. 866.

(48) *Thomas v. Phillpps*, 11 Jur. 80.

(49) *Field v. Churchill*, 4 Jur. 739.

(50) *Job v. Bannister*, 2 K. and J. 382; aff. 5 W.R. 177 (Eng.). See *Morgan and Wurtzberg*, 109, 110.

(51) *Purser v. Darby*, 4 K. & J. 41; *Sanderson v. Chadwick*, 2 N.R. 414; Cf. *White v. Beck*, 6 I.R. Eq. 63 (71).

(52) *Murdin v. Patey*, 1 N.R. 566; *L. & S. W. R. Co. v. Bridger*, 4 N.R. 261. This distinction, which is now well established, does not seem to have been taken in

If the purchaser elect to have his action dismissed, upon its appearing that the vendor cannot make a title, the present practice seems to be to dismiss it without costs.⁽⁵³⁾ So costs have been refused on the ground of delay in the commencement and prosecution of the suit.⁽⁵⁴⁾

Where a bill was correctly filed on the authority of a reported decision, there being no authorities in conflict with it, and such decision was reversed during the progress of the suit, it was held that the plaintiff might thereupon, on motion, have his suit dismissed without costs.⁽⁵⁵⁾ So, where the plaintiff has been misled by an oversight of the Court, as, *e.g.*, in not having seen what were the provisions of an Act of Parliament applicable to the case, he has been allowed, on motion, to have his suit dismissed without costs, and without prejudice to his right to file a fresh suit.⁽⁵⁶⁾ Similar

some of the earlier cases, which were decided without reference to the date of the will (See *Wortham v. Lord Dacre*, 2 K. & J. 437, where the vendor's estate paid the costs, but the date of the will is not given; *Hinder v. Streeten*, 10 Ha. 18; *Bannerman v. Clarke*, 3 Dr. 632; and see *Morgan & Wurtzburg* 262.). In a modern case, where a suit was rendered necessary by the vendor having, subsequently to the contract, devised the estate to infants who were also his co-heirs, and the purchaser, while desirous of completing the purchase, claimed exemption from payment of interest under the contract on the ground of delay on the vendor's part in making out his title, and the suit was instituted by the vendor's representatives Lord Romilly decreed specific performance, and held the purchaser liable for the whole costs of the suit (*Williams v. Glenton*, 34 Beav. 528): but, on appeal, the purchaser was held to be wrongly charged with the costs, so far as the suit related to getting in the legal estate from the infants, and an apportionment was directed; Knight Bruce, L.J., being of opinion that they ought to fall entirely on the vendor, and Turner, L.J., that, under the special circumstances, no costs should be given (S. C. 1 Ch. 200). Where the vendor dies before the completion of the contract intestate, and leaving an infant heir, it is now well settled that no costs are given of the necessary suit for specific performance (*Morgan & Wurtzburg* 261; *Hanson v. Lake*, 2 Y. & C.C.C. 328; *Scott v. Scott*, 11 W.R. 766 (Eng.); *Longinotto v. Morss*, 26 L.T. 828; *Hedson v. Carter*, 1 N.R. 179). The costs of the infant heir will come out of the purchase-money. (*Barker v. Venables*, 13 W.R. 803 (Eng.). Such an action will now rarely be necessary. (See Conv. Act, ss. 4, 30.) And where, after the contract, one of several vendors became of unsound mind, no costs of a suit to obtain a vesting order were given. (*Cresswell v. Haines*, 8 Jur. N.S. 208.)

(53) *Malden v. Fyson*, 9 Beav. 347; *Lewis v. Loxham*, 3 Mer. 429; see *Morgan & Wurtzburg* 253; unless, perhaps (see Sug. 646, n. (e); 3 M. & C. 710), the statement of claim alleges that the vendor cannot make a title. *Nicolson v. Wordsworth*, 2 Sw. 365.

(54) *Thornhill v. Glover*, 3 D. & War. 195, 229; *Nunn v. Fabian*, 1 Ch. 35, 41.

(55) *Robinson v. Rosher*, 1 Y. & C. C. C. 7; and see *Lancashire R. Co. v. Evans*, 14 Beav. 529; *Sutton Harbour Commrs. v. Hitchins*, 1 D. M. & G. 170; *Dyke v. Rendall*, 2 D. M. & G. 220; but see, contra, *Biscoe v. Wilks*, 3 Mer. 456; *Russel v. Dickson*, 4 H.L.C. 293; and in Ireland, *Cronin v. Murphy*, 1 Ir. Ch. R. 233; and see *Morgan & Wurtzburg* 110.

(56) *Lister v. Leather*, 1 D. & J. 361, 368.

principles will apply where the defendant put an end to the subject-matter of the suit:—as by surrendering a lease on a suit being filed for its assignment, and absconding.⁽⁵⁷⁾

(iv) Cases where, in contravention of general rule, successful litigant is made to pay costs.

As to the fourth class of cases.—It not unfrequently happens that the party obtaining a decree has been clearly in the wrong, during all or a part only of the litigation; and if so, he must, as a general rule, pay all or a proportionate part⁽⁵⁸⁾ of the costs of the suit; e.g., in an exceptional case, where the plaintiff obtained a decree not in accordance with the prayer in his plaint,⁽⁵⁹⁾ he was made to pay the costs of the suit: so, it has been said that, “if a purchaser file a bill insisting that the vendor cannot make a title, he must pay the costs, whether he accept or refuse the title.”⁽⁶⁰⁾ “So, if a purchaser, being a plaintiff and aware of objections to the title, require a reference and, on the chief clerk certifying the title, agree to waive the objections, he must pay the costs of the unnecessary investigation.”⁽⁶¹⁾”

Vendor liable for costs till good title shown.

If prior to the filing of the vendor's suit for specific performance the contract was resisted merely on the ground of want of title, and no title was shown before the suit was filed, the plaintiff, although he may obtain a decree, will have to pay the costs up to the time when he showed a good title⁽⁶²⁾ unless the purchaser has resisted specific performance solely on other grounds which are held to be untenable.⁽⁶³⁾

The vendor is in all cases liable to pay the costs until a good title is shown; and this, although the purchaser, by his answer, unsuccessfully insist on the alleged illegality or abandonment of the contract.⁽⁶⁴⁾

(57) *Know v. Brown*, 2 Br. C.C. 186 and see *Goodday v. Sleigh*, 1 Jur. N.S. 201.

(58) See *Farrow v. Rees*, 4 Beav. 25; *Freer v. Hesse*, 4 D.M. and G. 505.

(59) *Mortimer v. Orchard*, 2 Ves. 243.

(60) Sug. 646, citing *Nicloson v. Wordsworth*, 2 Sw. 365, but with a query; a case before the Master under the old practice, see *Morgan and Wurtzburg* 110.

(61) *Bennett v. Fowler*, 2 Beav. 302. But *secus* where no abstract is produced until the parties are in Chambers, though the only defect is one previously known to the purchaser, *Wilson v. Williams*, 3 Jur. N.S. 810; *Dart's Vendors and Purchasers*, 6th Ed., Vol. II, p. 1264.

(62) *Wilson v. Allen*, 1 J. and W. 623; *Lewin v. Guest*, 1 Rus. 320; Sug. 650; *Wilkinson v. Hartley*, 15 Beav. 183, 188; *Flood v. Pritchard*, 40 L.T. 873; *Morgan & Wurtzburg* 254; 24 Beav. 254 *et seq.*

(63) *Bridges v. Longman*, 24 Beav. 27, in which case the purchaser was wrongly resisting specific performance and had to pay the costs.

(64) *Smith v. Leigh*, Sug. 648; but the purchaser will not be allowed the extra costs occasioned by this unsuccessful defence, or even the general costs of the suit

Where a vendor, when before the Master, abandoned the ground on which he had previously relied but established his title on another ground, and the Master reported generally in favour of

(*Knight v. Harden*, Beames on Costs, 38; *Townsend v. Champernowne*, 3 Y. & C. 528) except such costs as have been occasioned by improper contentions or objections made or taken by the defendant in the course of the suit (*S.C. Weddall v. Nixon*, 17 Beav. 160). As an ordinary rule, costs are given not to, but against, a vendor up to the time at which he has first shown a good title (*Phillipson v. Gibbon*, L.R. 6 Ch. at p. 434). But there is also another general rule, that if a purchaser has taken certain objections to the title of the vendor, and those objections which have been the cause of the litigation are overruled, the vendor will be entitled to his costs, and the purchaser will not escape paying them by reason of some evidence, the want of which was never the subject-matter of dispute between them, not having been supplied until the title was investigated in Chambers (S.C. p. 434, Cf. *Bridges v. Longman*, 24 Beav. 27). Sometimes in suits for specific performance where the plaintiff is successful the costs of the action up to a certain period will be ordered to be borne by one party, and for remainder of the action by another. For Forms of Order, see Seton 250. Thus, in actions for specific performance, where a vendor does not deliver a complete abstract, or make out his title, until after the institution of the action, he will be liable to pay the costs of the action up to the time when he showed a good title, *Townsend v. Champernowne*, 3 Y. & C. Ex. 505, 527; *Harford v. Purrier*, 1 Madd. (Eng.) 532, 538; *Wilson v. Allen*, 1 J. & W. 611, 624; *Wynn v. Morgan*, 7 Ves. 202, 206; — *v. Collinge*, 3 V. & B. 143, n; *Lewin v. Guest*, 1 Russ. 325, 328; *Wilkinson v. Hartley*, 15 Beav. 183, 189; *Wilson v. Williams*, 3 Jur. N.S. 810; *Grove v. Bastard*, 1 De G.M. & G. 69, 79; *Offen v. Harman*, 8 W.R. 129, (Eng.) And so, where the vendor established his title after a contest, upon a ground different from that shown in the abstract delivered, the costs of the inquiries as to the title were ordered to be paid by the vendor. *Fielder v. Higginson*, 3 V. & B. 142; see, however, *Carrodus v. Sharp*, 20 Beav. 56. But if new objections are taken after the institution of the action, the vendor is not necessarily ordered to pay the costs of the action, up to the time of the removal. *Scoones v. Morrell*, 1 Beav. 251, 258; *Sidebotham v. Barrington*, 5 Beav. 261; *Freer v. Hesse*, 4 De G. M. & G. 495, 505; *Bridges v. Longman*, 24 Beav. 27. Where a suit for specific performance had been instituted in a County Court, an inferior Court, but had been transferred to the High Court because the subject-matter of the suit exceeded the limits of the pecuniary jurisdiction of the inferior Court the plaintiff was ordered to pay the costs in the County Court, though he was given the other costs of the suit. *Ward v. Wyld*, 5 C.D. 779. Ordinarily in actions for specific performance where the title is in dispute the vendor pays the costs up to the date when the title was shown (*Halkett v. Earl of Dudley*, (1907) 1 Ch. 590 at p. 607), but where questions are raised of contract only, and not of title, the purchaser if unsuccessful will be ordered to pay the costs of the action and inquiry upon title being shown. *Banfield v. Picard*, (1911) 55 Sol. J. 649. Where judgment is given with an inquiry as to title, and the certificate is against the title, the defendant is entitled to a lien for his deposit with interest and costs, and also the costs of investigating the title. *Kitton v. Hewett*, (1904) W.N. 21. As to grounds for depriving a successful vendor of costs, see *Greenhalgh v. Brindle*, (1901) 2 Ch. 324, and cases there cited; also *Re Spindler and Mear's Contract*, (1901) 1 Ch. 908; *In re Nichol's and Van Joel's Contract*, (1910) 1 Ch. 43, C.A., a successful vendor was deprived of costs owing to having endeavoured to get a title, which depended upon a question of construction involving real difficulty approved by the Court on a summons under the English Vendor and Purchaser Act instead of by means of an originating summons.

the title, the purchaser was allowed the costs of the reference and the several applications to the Court;⁽⁶⁵⁾ and this is in accordance with the general rule that if a party having committed an unintentional error offers to the aggrieved party all that he is entitled to, and this is refused, such refusal, and not the original error, must, for the purpose of determining the liability to costs, be considered to be the cause of any subsequent litigation.⁽⁶⁶⁾

Where compensation is the only question.

So, if a purchaser bring an action for specific performance with an abatement of purchase-money, the question of abatement being the only one in dispute, if he fails upon this point the judgment for specific performance will give costs against him;⁽⁶⁷⁾ so, also, where the question of compensation is the only material one in dispute, and the vendor's non-compliance with a requisition made before issue of the writ is attributable to the unfounded claim for compensation, the purchaser must pay the costs of the suit, so far as it relates to that claim;⁽⁶⁸⁾ but, as a general rule, where a purchaser

(65) *Fielder v. Higginson*, 3 V. & B. 142; *Harrison v. Coppard*, 2 Cox. 318.

(66) (See and consider *Cordingley v. Cheeseborough*, 4 D.F. & J. 379, 383, and judgment). "But the rule will not prevail where the purchaser, by resisting the contract on grounds other than of title (*Croome v. Lediard*, 2 M. & K. 293; *Scoones v. Morrel*, 1 Beav. 351; *Taylor v. Brown*, 2 Beav. 180; *Abbott v. Sworder*, 4 De G. & S. 448; *Abbott v. Calton*, 22 L.J. Ch. 936; *Peers v. Sneyd*, 17 Beav. 151; *Carrodus v. Sharp*, 20 Beav. 56; but see Sug. 651, 652), or by his improper conduct (*Oxenden v. Lord Falmouth*, cited, Sug. 650), or claim (*Wyvill v. Bishop of Exeter*, 1 Pr. 292; *Fife v. Clayton*, 13 V. 546; 1 Coop. temp. Cott. 351 (costs of cross bill filed unnecessarily); and see *M'Nicoll v. Kay*, 4 W.R. (Eng) 801), has occasioned the litigation; or where insisting on other objections he has not accepted the vendor's offer to procure evidence which, if produced, would have perfected the title (*Long v. Collier*, 4 Rus. 269; *Holwood v. Bailey*, ib. 271; *Townsend v. Champagnowne*, 3 Y. & C. 520; *Monro v. Taylor*, 8 Ha. 70; aff. 3 M. & G. 713); and where a good title was not shown until after the institution of the suit, and then only by the production of evidence which had not been previously required, and was not the cause of dispute, the purchaser who had insisted on untenable objections, was ordered to pay all the costs of the vendor's suit (*Bridges v. Longman*, 24 B. 27; and see V.-C. Wood's statement of the rule, *Lyle v. The Earl of Yarborough*, Johns. 70, 77; *Murrell v. Goodyear*, 6 Jur. N.S. 356); so, too, where a vendor offered and showed a good title by possession for twelve years, although he did not strictly prove his title until the reference, he was held entitled to his costs (*Games v. Bonnor*, 33 W.R. (Eng.) 64). In one case, where the plaintiff had agreed to grant a lease as if he were owner in fee simple, being, in fact, as to part of the property, only entitled as lessee, and his title was not disclosed until after the institution of the suit, his bill for specific performance was dismissed with costs, notwithstanding that the intending lessee had primarily rested his defence on other grounds which were not discussed at the hearing (*Baskcomb v. Pillipps*, 6 Jur. N.S. 363).

(67) *Fewster v. Turner*, 6 Jur. 144; *White v. Cuddon*, 8 Cl. & F. 766.

(68) *Lyle v. Earl of Yarborough*, Johns. 70; see, too, *Williams v. Edwards*, 2 Si. 78; *Re Tarry and White*, 32 Ch. D. 14.

obtains a decree for specific performance with compensation, it will be with costs.⁽⁶⁹⁾

So, if the successful litigant introduce upon the pleadings unfounded allegations affecting the character⁽⁷⁰⁾ of his opponent, he will have to pay the costs thereby occasioned.⁽⁷¹⁾ But where the Court, merely on the ground of the personal hardship of the case as against the defendant, refuses to enforce specific performance, it may not make him pay the plaintiff's costs.⁽⁷²⁾

Where a purchaser sets up a defence which prevents the plaintiff from obtaining the usual reference of title on motion, and fails to establish it, he may be at once directed to pay costs up to and inclusive of the hearing without regard to the result of the reference.⁽⁷³⁾

(69) *Leyland v. Illingworth*, 2 D. F. & J. 248; *Gedye v. Duke of Montrose*, 26 Beav. 45.

(70) See 7 Ha. 444.

(71) *Wright v. Howard*, 1 S. & S. 205; *Bower v. Cooper*, 2 Ha. 408; see *Thomas v. Phillipps*, 11 Jur. 80.

(72) *Wedgwood v. Adams*, 8 Beav. 103.

(73) *Hyde v. Dallaway*, 4 Beav. 606. "It is stated by Lord St. Leonards (Sug. 107 citing *Camden v. Benson*, 1 Ke. 671), that, in every case, the purchaser is entitled to the costs of the application for a reference of title; and to the costs of that reference: it appears, however, from a later case (*Flower v. Hartopp*, 8 Beav. 200; and see *Holland v. King*, 20 L.T.O.S. 123), that the decision, upon which the above proposition was founded, is misreported: and that the Court only held that the purchaser was not liable to pay costs, on the certificate being in favour of the title: if, however, the title were made out, in chambers, on grounds not appearing on the abstract, he would be entitled to receive costs (*Fielder v. Higginson*, 3 V. & B. 142, where the purchase seems to have been made under a decree; see 2 S. & S. 117): and if the title is found to be good upon grounds appearing on the abstract, he may be ordered to pay costs, if his objections are frivolous and vexatious (*Thorpe v. Freer*, 4 Madd. 466 (Eng.); *Wyman v. Carter*, 12 Eq. 315; Dan. C.P. 1088; *Morgan and Wurtzburg* 378). If the title prove the purchaser, unless precluded by the conditions, is entitled to receive his costs (see *Leland v. Griffith*, 2 Mol. 150; *Pleasants v. Roberts*, ib. 507; *Barton v. Lord Downes*, Fl. & K. 638; *Weir v. Chamley*, 2 Ir. Ch. R. 566), charges and expenses (see *Form of Order*, *Perkins v. Ede*, 16 Beav. 268; and *Powell v. Powell*, 19 Eq. 422, 425), out of the fund in Court (if any) (*Reynolds v. Blake*, 2 S. & S. 117; *A.-G. v. Corp. of Newark*, 8 Si. 71; *Calvert v. Godfrey*, 6 Beav. 97; *Ward v. Trathen*, 14 Si. 82; *Lachlan v. Reynolds*, Kay, 52); or, if there be none, from the party having the conduct of the sale, who may recover them in the action (*Berry v. Johnson*, 2 Y. & O. 564, 565; *Smith v. Nelson*, 2 S. & S. 557), but a defendant, to whom the conduct of the sale has been given, will not, it seems, be ordered to pay the purchaser's costs, where there are funds in Court which may be made primarily answerable: in such a case leave will be given to the purchaser to apply for payment (*Mullins v. Hussey*, 1 Eq. 488). It is said to have been held by Sir J. Leach that where exceptions were allowed to the Master's report in favour of the title, the Court would not thereupon direct that the purchaser be discharged

Costs of action include costs of all inquiries properly made under the order.

The costs of an action include not only the costs up to the hearing, but also the costs of all accounts and inquiries requisite for carrying out the decree; nor are these latter costs for subsequent consideration: but at the same time the Court will not allow its order to be abused so as to be the cause of oppression to the adverse litigant. Thus, where the plaintiff obtained a decree for specific performance with costs, and an inquiry as to damages caused by the defendant's acts of waste, and the chief clerk's certificate giving damages was varied by allowing none, the Court of Appeal held that nevertheless the plaintiff was entitled to the costs of the inquiry, so far as it related to damages within the scope of the order, but that he must pay the costs of all the other inquiries which were not intended by the order, and had been wrongfully gone into the Chambers.⁽⁷⁴⁾

Costs, when defendant submits to plaintiff's demand.

Where the defendant submits to the whole demand of the plaintiff, and to pay costs, he may at once stop all further proceedings; ⁽⁷⁵⁾ and, if the question of liability to costs be the only one remaining in dispute, it has been held that the proper course is, to apply to the Court by motion or petition; ⁽⁷⁶⁾ and where a plaintiff omitted so to do, but brought the cause to a hearing, the Court refused him any costs subsequent to the time at which his original demand had been submitted to.⁽⁷⁷⁾

and his costs be paid, but that some specific application must be made for the purpose (*Hide v. Hide*, 1 Coop. t. Cott. 379; and see *Howell v. Kightley*, 3 D. & M. G. 325.: It appears that on a sale by the Crown under the 25 Geo. III. c. 35, authorizing the sale of the lands of Crown debtors or their sureties, the purchaser gets no costs if the title prove bad; *Re v. Cracroft*, 1 M. C. & Y. 460): notice of which must have been given to all parties interested in the purchase-money (*Sherwood v. Beveridge*, 3 De G. & S. 425). It appears that, where the title is decided to be bad, the purchaser must be actually discharged by order, before there can be a re-sale. (*Williams v. Wace*, C.P. Coop. 42)."

(74) *Krehl v. Park*, 10 Ch. 334.

(75) *Damer v. Earl of Postarlington*, 2 Ph. 30; Dart's Vendors and Purchasers, 6th Ed., p. 1267.

(76) *Sivell v. Abraham*, 8 Beav. 598; *Price v. Corporation of Penzance*, 4 Ha. 506; *Tapp v. Tanner*, 20 L.J. Ch. 559.

(77) *Sivell v. Abraham*, 8 Beav. 598; and see *Hennet v. Luard*, 12 Beav. 479; *Sentence v. Porter*, 13 Jur. 980; and see *Woodward v. Miller*, 16 L.J. Ch. 16; *North v. G. N.R. Co.*, 2 Gif. 64; *Nicholls v. Elford*, 5 Jur. N.S. 264; *Thompson v. Knight*, 7 Ib. 704; *Wilde v. Wilde*, 10 W.R. 368 (Eng. Rev. Ib. 503). "It was, however, unwillingly held by Knight Bruce, V.C., that this course could not, without the defendant's consent be adopted before answer; inasmuch as he had a right to put in his answer, and to read it on the question of costs at the hearing (*Langham v. G. N. R. Co.*, 1 De. G. & S. 505); and in a later case (*M'Naughten v. Hasker*, 12 Jur. 956; see, too, *Burgess v.*

It was laid down⁽⁷⁸⁾ by Wigram, V. C., as a general rule, When that where a defendant so disclaims as to show that he had no interest in the property *when the bill was filed*, he is entitled to his costs; ^{defendant disclaiming is entitled to costs.} ⁽⁷⁹⁾ but where he is properly brought before the Court in respect of an interest at the *time the bill was filed*, and then says, "I now abandon my interest," it is a question of discretion with the Court either to order the plaintiff to pay the defendant's costs or not; with reference to the circumstances which may have rendered the suit necessary or proper. ⁽⁸⁰⁾

In a later case⁽⁸¹⁾ the rule was thus stated by Lord Romilly: "First, where a defendant disclaims in such a manner as to show that he never had, and never claimed, an interest, at or after the filing of the bill; then he is entitled to his costs: secondly, if a defendant having an interest, shows that he disclaimed, or offered to disclaim, before the institution of the suit, there also he is entitled to his costs; ⁽⁸²⁾ and thirdly, that where a defendant, having

Hill, 26 B. 244; *Wallis v. Wallis*, 4 Dr. 458) the same judge refused a similar application by a plaintiff after answer; but merely on the ground of the novelty of the proceeding; and where the defendant by an agreement for compromising the suit had admitted his liability to costs, and failed to fulfil the agreement, but subsequently satisfied the plaintiff's demand except in respect of costs, Lord Langdale, upon motion before answer, ordered their payment (*Tapp v. Tanner*, 20 L. J. Ch. 559). The rule, however, has been settled by a decision of the Court of Appeal, in which it was laid down that the Court will not, on motion by the plaintiff to stay proceedings, order the defendant to pay the costs of the suit, unless by consent (*Wilde v. Wilde*, 4 D. F. & J. 348; and see *Morgan v. G. E. R. Co.*, 1 H. & M. 78, where this decision was reluctantly followed. See, too, *Dan. C. P.* 1173); *Turner. L. J.*, remarking that the case of *Sivell v. Abraham* had been misunderstood, and that all that was there decided was, that a plaintiff might apply to the Court to stay proceedings, and order the defendant to pay the costs of the suit; and that, if the defendant made no objection, the suit might be disposed of in that way. In one case, *Stuart, V. O.*, while refusing the motion as irregular, made the costs of it costs in the cause, as "being a well meant endeavour on the part of the plaintiffs to put an end to a useless litigation." (*Ventilation Co. v. Edelsten*, 2 N. R. 53).

(78) *Gabriel v. Sturgis*, 5 Ha. 101; and see *Appleby v. Duke*, 1 Ha. 303; *Grig. v. Sturgis*, 5 Ha. 93.

(79) *Glover v. Rogers*, 11 Jur. 1000.

(80) See *Ohrlly v. Jenkins*, 1 De G. & S. 543; *Staffurth v. Pott*, 2 Ib. 571; *Benbow v. Davies*, 11 Beav. 369; *Fewster v. Turner*, 6 Jur. 144; *Gurney v. Jackson*, 1 S. & G. 97; *Ford v. White*, 16 Beav. 120; *Ford v. Lord Chesterfield*, 16 Beav. 516; *Lock v. Lomas*, 15 Jur. 162; *Williams v. Lomas*, 16 Jur. pt. 2. p. 94; *Hiorns v. Holton*, 16 Jur. 1077; *Hurst v. Hurst*, 22 L. J. Ch. 546).

(81) *Ford v. Chesterfield*, 16 Beav. 516; see *Ballamy v. Brickenden*, 4 K. & J. 670; where Lord Romilly's statement of the rule is approved.

(82) *Ward v. Shakeshaft*, 1 D. & S. 269.

an interest, allows himself to be made a party to the suit, and does not disclaim, or offer to disclaim, till he puts in his defence or disclaimer, in that case he is not entitled to his costs."

Where a defendant has never claimed any interest, it is not necessary, in order to entitle him to his costs, that he should have given notice of his intention to disclaim before issue of the writ;⁽⁸³⁾ but if he omit to say that he never claimed, the dismissal will be without costs;⁽⁸⁴⁾ so, also, where he simply alleges that he was applied to before action, and did not "refuse" to disclaim;⁽⁸⁵⁾ or that if he had been applied to he would have released his interest.⁽⁸⁶⁾ A person who is properly made a defendant ought to offer to be dismissed without costs; and if the action is persevered in against him, he will, in such case, be entitled to his subsequent costs.⁽⁸⁷⁾ Where a party improperly refuses either to claim or disclaim, and simply remains passive, he may, it seems, be ordered to pay costs.⁽⁸⁸⁾

Vendor
obtaining
title pending
suit.

Where a vendor, having a bad title, brings an action for specific performance, and his title is perfected pending the suit, it is his duty to offer to the purchaser his costs up to that time, and to give him a conveyance.⁽⁸⁹⁾

Possession,
how far im-
portant in
determining
question
of costs.

In general, a purchaser is less favoured on the question of costs when he has taken possession of the estate before the title is made out; but this does not apply to cases where, according to the contract, possession is to be taken before a title is shown; or where it is taken at the instance of the vendor.⁽⁹⁰⁾ A purchaser who, for many years, retained possession without payment, and refused either to vacate the contract or accept the title, was fixed with the costs of a suit by the vendor, although the title was ascertained to be defective.⁽⁹¹⁾

(83) *Bellamy v. Brickenden*, 4 K. & J. 670.

(84) *Ohrlly v. Jenkins*, 1 De G. & S. 543.

(85) *Harrison v. Pennell*, 4 Jur. N.S. 682.

(86) *Collins v. Shirley*, 1 R. & M. 638; but see *Gurney v. Jackson*, 1 S. & G. 97.

(87) See *Talbot v. Kemshead*, 4 K. & J. 93; *Davies v. Whitmore*, 29 Beav. 617.

(88) *Re Primrose*, 23 Beav. 590, (See Judgment in this case).

(89) *Freer v. Hesse*, 4 D. M. & G. 505. As to the duty of an auctioneer in this respect, see *Heatley v. Newton*, 19 Ch. D. 326.

(90) *Vancouver v. Bliss*, 11 Ves. 458, 464.

(91) *King v. King*, 1 M. & K. 442.

Where the Court actually dismissed a purchaser's suit for specific performance with costs, it refused, on a subsequent application, to allow him to set off against them the deposit paid to the vendor, but left him to his legal right;⁽⁹²⁾ but the Court would refuse to give costs unless the vendor would return the deposit.⁽⁹³⁾

A mortgagee has been refused, as against the mortgaged estate, his costs of an unsuccessful suit against a purchaser for specific performance, although instituted under the best advice.⁽⁹⁴⁾

"In one case an order is stated to have been made on the petition of the vendor's solicitor, restraining the vendor from receiving, and the purchaser from paying, the purchase-money, until the solicitor's lien for costs was satisfied".⁽⁹⁵⁾

A vendor has in many cases another form of relief open to him after a judgment for specific performance, in the enforcement of his lien for unpaid purchase money, with interest, and his costs of the action.⁽⁹⁶⁾

This lien in the case of a purchaser extends to (1) all instalments of purchase money, ⁽⁹⁷⁾ (ii) interest thereon, ⁽⁹⁸⁾ (iii) sums paid under the contract as interest on unpaid purchase money ⁽⁹⁹⁾ (iv) interest thereon ⁽¹⁰⁰⁾ and (v) the costs of an unsuccessful action by the vendor as against the purchaser.⁽¹⁰¹⁾

"A purchaser obtaining a decree for specific performance on a counter-claim against a vendor, who had brought an action for a declaration that the contract for sale had been determined, was allowed to deduct his costs of the claim and the counter-claim

(92) *Williams v. Edwards*, 2 Si. 84.

(93) *Gee v. Pearse*, 2 De. G. & S. 346.

(94) *Peers v. Geeley*, 15 Beav. 209.

(95) *Birch v. Padmore*, cited 1 Jur. N. S. 123, and see *Bovil v. Padmore*, 7 D.M. & G. 27.

(96) See Fry on Specific Performance of Contracts, 3rd Ed., 1892, p. 532.

(97) *Bryant v. Bush*, 4 Russ. 5; *Hick v. Phillips*. Prec. in Ch. 575. See *Graves v. Wright*, 2 Dr. & War. at p. 79 and cf. *Mycok v. Beatson*, 13 Ch. D. at p. 386.

(98) *Lord Anson v. Hodges*, 5 Sim. 227; *Webb v. Kirby*, 7 De. G. M. & G. 376; *Wythes v. Lee*, 3 Drew 396.

(99) *Rose v. Watson*, 10 H.L.C. 672.

(100) *Ibid.*

(101) *Middleton v. Magnay*, 2 H. & M. 233; *Turner v. Marriott*, L.R. 3 Eq. 744.

from the purchase-money in priority to a mortgagee of the vendor whose mortgage had been created after the date of the contract, but before the commencement of the action.⁽¹⁰²⁾

Sec. 39.—Stay of Proceedings—Costs.

Stay of proceedings—Rule as to.

Stay of proceedings—Practice and procedure as to.

Stay of proceedings where writ improperly issued.

Stay of proceedings in respect of second action with respect to same cause of action.

Stay of proceedings pending payment of costs—English law and practice.

Stay of proceedings on account of non-payment of costs incurred in a foreign Court.

Stay of proceedings for not giving security for costs as ordered.

Stay of proceedings pending appeal.

Stay of proceedings in lunacy.

Stay of proceedings, effect of.

Stay of proceedings—
Rule as to.

EVERY Court has inherent power to temporarily suspend the proceedings in any action where the plaintiff is in default, or has disobeyed any lawful order of the Court. In addition, large powers of staying proceedings are given to the Court by various statutes, rules and orders⁽¹⁾ both in England and in this country.

Stay of proceedings—
Practice and
procedure
as to.

“As a general rule the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable probability of getting them back if the appeal succeeds.”⁽²⁾

But the matter is entirely one of discretion⁽³⁾ and where there are special circumstances the Court may make such order as will do justice in the case.⁽⁴⁾ So, where there is a fund out of which a large sum has been ordered to be paid to the successful parties the Court will see that an appeal shall not be nugatory, and may, therefore, where it will be difficult to get back the payments out of the fund if

(102) *Green v. Sevin*, 13 Ch. D. 589; for form of order in such a case, see Seton 1304.

(1) Ency. of the Laws of England, Vol. XIII, p. 620.

(2) *Atkins v. G.W. Ry. Co.*, (1886) 2 T.L.R. 400, following *Barker v. Lavery*, (1885) 14 Q.B.D. 769, C.A. This rule applies to Admiralty cases in which bail has been given, the former practice of the Privy Council being no longer applicable. (*The Annot Lyle*, (1886) 11 P.D. 116.)

(3) *Becker v. Earl's Court, Limited*, (1911) 56 Sol. J. 206, C.A.

(4) *The Ratala*, (1897) P. 132; *Att. Gen. v. Emerson*, (1889) 24 Q.B.D. pp. 58, 59.

made, grant an injunction restraining dealings with the fund till the appeal is disposed of. (5)

The application for a stay may be granted subject to terms such as payment of the money to the respondent on security or an undertaking being given by him to repay it if the applicant succeeds on the appeal, or payment into Court. (6)

The usual course is for the respondent's solicitor to give an undertaking to refund, if necessary. (7) In *Grant v. Banque Franco-Egyptienne* (8) it was laid down that where such an undertaking is given stay of execution for the costs will not as a rule be granted. On the other hand, there is no invariable practice that, where the undertaking will not be given, the Court will order a stay. (9)

"If a writ of summons has been issued by an uncertificated solicitor, or by a solicitor without the consent of the plaintiff named thereon, the action will be stayed, and the solicitor who issued the writ will be ordered to pay all costs occasioned to either the plaintiff or the defendant. (10)

Stay of proceedings where writ improperly issued.

If the present action is between the same parties, and raises the same issues as a former action, it may be dismissed altogether as frivolous and vexatious, whether the plea of *res judicata* can strictly be pleaded or not. (11)

Stay of proceedings in respect of second action with respect to same cause of action.

(5) *Wilson v. Church* (No. 1), (1879) 11 Ch. D. 576, C. A.; *Wilson v. Church* (No. 2), (1879) 12 Ch. D., at pp. 458, 459 (James, L.J., diss., on the special circumstances of the case); *Polini v. Gray*, (1879) 12 Ch. D. at p. 443. See, also, *Bradford v. Young*, (1884) 28 Ch. D., at p. 22, where the applicant for a stay was put upon terms. But there must be special circumstances in order that the payment out may be restrained, and the fact that the respondents are a Scotch company is not such a special circumstance (*Re Queensland Mercantile Agency Co.*, (1891) 61 L.J. Ch. 48, correcting decision in *Re The Howe Machine Co.*, (1889) 41 Ch. D. 118.)

(6) *Merry v. Nickalls*, (1873) L.R. 8 Ch. App. 206; *Cooper v. Cooper*, (1876) 2 Ch. D. 493; *Morgan v. Elford*, (1876) 4 Ch. D. 388.

(7) *Wilson v. Church* (No. 2), (1879) 12 Ch. D., p. 458; *Hood-Barrs v. Crossman and Prichard*, (1897) A.C. 172.

(8) (1878) 3 C.P.D. 202.

(9) *Att.-Gen. v. Emerson*, (1889) 24 Q.B.D. 56; *Becker v. Earl's Court, Limited*, (1911) 56 Sol. J. 206, C.A.

(10) *Fricker v. Van Grutten*, (1896) 2 Ch. 649; *Gold Reefs, Ltd. v. Dawson*, (1897) 1 Ch. 115; *Geilinger v. Gibbs*, (1897) 1 Ch. 479.

(11) *Mac Dougall v. Knight*, (1890) 25 Q.B.D. 1; *Horrocks v. Stubbs*, (1896) 74 L.T. 58.

If, however, the plaintiff is now suing in a different character, though substantially by virtue of the same alleged title, the second action will be stayed till the costs of the first action are paid.⁽¹²⁾

Stay of
proceedings
pending
payments
of costs—
English law
and practice.

Where the defendant has obtained the rule for a new trial, and the Court of Appeal has ordered the plaintiff to pay the costs of the application, the defendant is not entitled as of right to an order to stay proceedings until such costs are paid.⁽¹³⁾

But although the non-payment of costs *per se* is not ground for staying proceedings, nevertheless the Court has jurisdiction to stay the proceedings whenever it can be shown that a person is proceeding vexatiously in not paying costs which he has been ordered to pay.⁽¹⁴⁾

The mere fact that a plaintiff who has been ordered to pay costs has not done so, is not enough to justify the Court in staying the action.⁽¹⁵⁾ But if the Court sees that the plaintiff is guilty of vexatious conduct, and that it is oppressive for him to proceed in such circumstances, the Court will stay the action till he complies with the order for payment of costs.⁽¹⁶⁾ Then if they be not paid within a reasonable time, the Court may make a peremptory order that they be paid by a day specified; and if they be not paid by that day, the Court may dismiss the action altogether.⁽¹⁷⁾

There is no difference between the K. B. D. and Ch. D. as to the grounds on which an action ought to be stayed for non-payment of costs. Nor can a distinction now be made between cases where the loss from non-payment of the costs falls on a person or on a fund.⁽¹⁸⁾

Where one of two defendants is allowed to withdraw his defence upon the terms that he "pay to the plaintiffs their costs of the action so far as they were occasioned by the said defence," the Taxing Master will only allow costs specifically caused by such

(12) R.S.C. O. XXVI, r. 4; *Martin v. Earl Beauchamp*, (1888) 25 Ch. D. 12; *M'Cabe v. Bank of Ireland*, (1889) 14 App. Cas. 413.

(13) *Morton v. Palmer*, (1882) 9 Q.B.D. 89.

(14) *Re Wickham*, (1887) 35 Ch. D. 272, C.A.

(15) *Morton v. Palmer*, (1882) 9 Q.B.D. 89; *In re Wickham*, (1887) 35 Ch. D. 272.

(16) *Graham v. Sutton, Carden & Co.*, (1897) 2 Ch. 367.

(17) Seton, 6th Ed., Ch. xi, §. 2, p. 130.

(18) *Graham v. Sutton, Carden & Co.*, (1897) 2 Ch. 367. C.A., and see notes to jud. Act, 1873, S. 24 (5).

defence, the effect of the order being to relieve such defendant from the general costs of the action.⁽¹⁹⁾

The Courts in India have no power to stay proceedings in a suit instituted therein, because the costs of a previous suit between the same parties brought in the High Court of Justice in England have not been paid.⁽²⁰⁾

Stay of proceedings on account of non-payment of costs incurred in a foreign Court.

If a plaintiff make default in obeying any order of the Court, his action may be stayed till he obey it. Thus if a plaintiff be ordered to give security for costs ⁽²¹⁾ within a time specified, and fails to do so, his action will be stayed till he complies with the order, and may subsequently be dismissed.⁽²²⁾

Stay of proceedings for not giving security for costs as ordered.

An appeal does not in itself operate as a stay of execution or other proceedings; but either the Court, or the Judge who heard the case, ⁽²³⁾ or the Court of Appeal can direct that proceedings should be stayed.

Stay of proceedings pending appeal.

"It is usual, to apply, in the first instance, to the Judge who tries the case, immediately after judgment. If he thinks the point is one of some difficulty, and worthy of reconsideration in the Court of Appeal, he will probably grant a stay of execution unconditionally. If, however, he has little or no doubt in his mind as to the correctness of his judgment, he will probably order a stay of execution, for, say, a fortnight, on condition that the appellant brings so much money into Court within a week; if notice of appeal be given within that fortnight, the stay to continue till after the hearing of the appeal; the taxation of costs to continue in the meantime, and the amount of the allocatur to be paid to the solicitor of the successful party on his giving his personal undertaking, to refund it, should the judgment be reversed on appeal."⁽²⁴⁾

"If the Judge who heard the case thinks that any appeal would be frivolous and vexatious, he will decline to make any order

(19) *Real and Personal Advance Co. v. McCarthy*, (1881) 13 Ch. D. 362, C.A. and see *Re Sutcliffe*, (1881) 44 L.T. 547 (further answers to interrogatories in administration action); *Mansel v. Clanricarde*, (1885) 54 L.J. Ch. 982 (expenses of producing a witness for examination and cross-examination before the trial). See, also, *Dan. Ch. Pract.* 956—958; *Morgan and Wurtzburg*, 46—73.

(20) *Arthur Bowles v. Mary J. Bowles*, 8 B. 571.

(21) See *Security for Costs*, *Ency. of the Laws of England*, Vol. XIII, p. 204.

(22) *Le Grange v. McAndrew*, (1879) 4 Q.B.D. 210.

(23) *Oppert v. Beaumont*, (1887) 18 Q.B.D. 435. See, also, *Code of Civil Procedure*, (Act V of 1908), O. XLI, r. 5, sub-S.(1).

(24) *Ency. of the Laws of England*, Vol. XIII, p. 625.

at all, leaving the defeated party to apply for a stay to the Court of Appeal—an application which is not often successful.”⁽²⁵⁾

The Court of Appeal has power also to order the successful party not to part with the property in dispute until the hearing of the appeal.⁽²⁶⁾

A party making an application to the Court for a stay of proceedings pending an appeal must pay the costs of such application.⁽²⁷⁾

Stay of
proceedings
in lunacy.

“If any action is brought against any person for signing, or carrying out any reception order, report, or certificate, or presenting any petition, or doing anything in pursuance of the Lunacy Act, 1890, such action may, upon summary application to the High Court or a Judge thereof, be stayed upon such terms as to costs and otherwise as the Court or a Judge may think fit, if the Court or Judge is satisfied that there is no reasonable ground for alleging want of good faith or reasonable care.”⁽²⁸⁾ Such proceedings are in fact absolutely privileged.”⁽²⁹⁾

Stay of
proceedings,
effect of.

A stay does not operate as a judgment on the merits. It is not, apparently, ground for a plea of *res judicata*,⁽³⁰⁾ yet it is practically a bar to any further proceeding.

Sec. 40.—Transfer of Civil Cases.

Heavy and exemplary costs awarded as against party making application for transfer on false and frivolous grounds.

Heavy and
exemplary
costs awarded
as against
party making
application
for transfer
on false and
frivolous
grounds.

A RULE for the transfer of a civil case on the ground that the Judge had an interest in the subject-matter of the case was applied for and improperly obtained upon an affidavit containing an astute and intelligent perversion of facts. In discharging the above rule the High Court awarded very heavy and exemplary costs.⁽¹⁾ Their Lordships Pigot and Gordon, JJ., after examining the grounds raised by the petitioner and having found them to be false and

(25) See *Bradford v. Young*, (1884) 51 L.T. 550.

(26) *Wilson v. Church*, (1879) 11 Ch. D. 576; *The Ratata*, (1897) P. 118.

(27) *Cooper v. Cooper*, (1876) 2 Ch. D. 492, C.A.; following *Merry v. Nickalls*, (1873) L.R. 3 Ch. 205. See notes to O. LVIII, r. 16, p. 971.

(28) St. 53 & 54 Vict., c. 5, s. 330, sub-S. 2.

(29) *Hodson v. Pare*, (1899) 1 Q.B. 455.

(30) *Bean v. Flower*, (1895) 73 L.T. 371.

(1) *Kunja Lal Banerji v. Dinabandhu Jha*, 15 O.L.J. 162.

frivolous, said in the course of the judgment :—"On neither ground, therefore, is there any case made out to justify the appellant in insisting or pressing to have this case transferred to this Court. Had an offer to pay all costs in any event made by the petitioner's pleader been accepted by the other side, it would perhaps have removed one of many strong reasons against making the Rule absolute which is the heavy increase of costs that would necessarily result to the respondent on a transfer of the case. Ample reasons suggest themselves to one's mind why that proposal should not be accepted, and one of them perhaps is that unless a proposal of this nature be put down in black and white, difficulties might occur in enforcing and carrying it out, but we should have been reluctant to make the Rule absolute in any case. A Rule applied for, as this has been, upon an astute and intelligent perversion of facts ought not to be made absolute unless some strong grounds exist for doing so. One strong ground does exist in the desire expressed by the District Judge himself for a transfer of the case, but it is a desire which we feel bound in this case to disregard. He would, as we understand, prefer that the case should be transferred, and the wish is a perfectly natural one, but one which in the interests of justice, we ought not to accede to in this case. It would be a bad example that a Rule applied for and supported, as this has been, should be successful. We shall not finally dispose of this Rule to-day. We have directed a search to be made for precedents as to costs in Rules improperly obtained, and although we now intimate that we shall discharge the Rule, we defer passing a final order to-day, and the matter will be mentioned again some day next week and a final order will be made." When the matter was again brought before the Court some day in the subsequent week, their Lordships said :—"Since giving judgment in this case last Thursday, we have caused enquiry to be made with regard to cases in which costs of a special amount have been ordered by this Court. We said the other day that if necessary, we should make a precedent in this case, but we preferred to search for and find one. Such a precedent exists in *Harendra v. Hara Sundari*,⁽²⁾ before Justices Mitter and Grant,

(2) 15 C.L.J. 166, Note. The facts of this case were as follows :—The appeal arose out of proceedings for revocation of probate of a will alleged to have been executed in Aghrahan, 1289. The will was registered and the testator died in Falgoon, 1289. Probate was granted on the 14th January, 1885. Application was then made by the appellant for revocation on the ground that the will was a forgery, and that the testator

and there the Court ordered costs such as we are now about to order. It is not necessary for us to state our reasons further than we have done in our judgment of Thursday last, the shorthand-note of which we have perused this morning, and which contains a sufficient statement of our reasons for imposing costs at a rate which shall completely exonerate the successful party. All that we shall do now is to order the petitioner in this case to pay Rs. 500 as costs of the Rule which has been discharged."⁽³⁾

Sec. 41.—Trusts.

General costs incident to administration.

Duty of trustee to furnish accounts.

Inaccurate accounts.

Duty of trustee to supply information—What kind of information to be supplied—Costs.

Expensive information—Costs of.

Costs in case of retirement of trustee by order of the Court.

Costs of administration suit, together with "costs, charges, and expenses."

Depriving trustees of costs of litigation.

Costs of trustees who have committed a breach of trust.

One set of costs only allowed where trustees unreasonably sever.

Expenses incurred in unsuccessfully defending an action.

Costs of premature sale.

Unreasonable expenses disallowed.

Unnecessary law costs.

Costs paid by defaulting trustee to his solicitor.

Taxation, practice as to.

General costs
incident to
administra-
tion.

LEGAL expenses incident to the administration of a trust almost exclusively fall on capital, unless the settlor has expressly provided for them ; for they are for the benefit of all persons interested.⁽¹⁾

was insane. At the trial, the allegation of forgery was abandoned, as made without any grounds whatever and merely at random. Upon the question of insanity, the Court found that the petitioner had falsified his own case by production of a long correspondence between himself and his brother, the testator. The District Judge, therefore, refused the application. Upon appeal to the High Court, the only ground taken was that the testator was insane. The appeal was obviously frivolous. The following order was made by the Court:—"The appeal is dismissed with costs, the hearing fee being fixed at Rs. 500."

(3) *Kunja Lal Banerji v. Dinabandhu Jha*, 15 G.L.J. 162 at pp. 165, 166.

(1) *Re Fellow's Settlement*, 2 Jur. (N.S.) 62; *Re Fulham*, 15 ib. 69; *Ex parte Davies*, 16 ib. 882. On the subject-matter of this section see S. 4—"Administration Action," pp. 307-355, *supra*. Encyclopædia of the Laws of England, 2nd Ed., Vol. XIV, Heading Trusts, Trustees, p. 319; Halsbury's Laws of England, Vol. XXVIII,

All costs incident to the administration and protection of the trust property, including legal proceedings, are borne by corpus,⁽²⁾ unless they relate exclusively to the tenant for life.⁽³⁾

In dismissing a suit for the administration of trusts on the ground of want of jurisdiction, the Court has power to direct the plaintiff's costs to be paid out of the estate.⁽⁴⁾

A beneficiary is always entitled to inspect the trust accounts and documents relating to the trust property. But a trustee is not bound to supply copies of accounts or trust documents,⁽⁵⁾ or to supply information which necessitates expenditure,⁽⁶⁾ except at the cost of the beneficiary requiring the same. Duty of trustee to furnish accounts.

Where a trustee by his gross and indefensible neglect to furnish accounts renders an originating summons necessary, he may be ordered to pay all the costs including the costs of taking and vouching the account.⁽⁷⁾

If the plaintiff has been over hasty in seeking the assistance of the Court, he may have to pay the costs, or even his solicitor may be ordered to bear them personally.⁽⁸⁾

pp. 159—162; 193—195; Vol. IV, pp. 340—354; Mew's Digest, Vol. III, Cols. 430—436; Morgan and Wurtzburg, pp. 209—212; 311—328; 409—412; Marshall on Costs; Seton on Judgments and Orders, 6th Ed., Vol. II, pp. 1169—1177; see, also, Lewin on Trusts; Godefroi on Trusts; Watson's Compendium of Equity; Ellis on the Trustee Act, (1893); Underhill on Trusts, 6th Ed., 1904, pp. 197—208, 347—357; Rudall's Law of Trusts and Trustees, 3rd Ed., 1904, pp. 71, 105—107, 151. The following cases may also be usefully referred to:—*Baroda Prosad v. Gogendra Nath*, Cal. Case Law, Vol. I, p. 803; *Suseemookhee Dossee, etc. v. Sreekissen Paul, etc.*, (1850) 1 Taylor & Bell 251=2 Ind. Dec. (Old Series), p. 479; *Louisa Jones v. Mary Anne*, (1858) 1 Boulnois 359=3 Ind. Dec. (Old Series), p. 220; *In the goods of Vancitters*, (1800) Morley's Digest, Vol. I, p. 111; *In the goods of Collins* (Ecclesiastical side), (1777) Morton 260=1 Ind. Dec. (Old Series), p. 1041=Morley's Digest, Vol. I, p. 111=Hyde's Notes, 28th March 1877; *Janordhun Ramchunder v. Executors of Dhakjee Dadajee*, (1847) Perry's Oriental Cases 467=4 Ind. Dec. (Old Series), p. 428.

(2) *Lord Brougham v. Poulett*, 19 Beav. 135; *Sanders v. Miller*, 25 Beav. 154; *Re Earl De la Warris Estates*, 16 Ch. D. 587; *Stott v. Milne*, 25 Ch. D. 710; explained by *Re Weal. Andrews v. Weal*, 42 Ch. D. 674.

(3) See *Re Marner's Trusts*, 3 Eq. 432; *Re Evans*, 7 Ch. App. 609; *Re Smith's Trusts*, 9 Eq. 374; Underhill on Trusts, 6th Ed., 1904, p. 198.

(4) *Venkatalutchmi Ammal v. Srirungapatnam Srinivasamurthy*, 11 M.L.J. 91 (92).

(5) *Ottley v. Gilby*, 8 Beav. 602.

(6) *Re Bosworth. Martin v. Lamb*, 58 L.J. Ch. 432.

(7) *Re Skinner. Cooper v. Skinner*, (1904) 1 Ch. 289.

(8) *Re Dartnall. Sawyer v. Goddard*, (1895) 1 Ch. 474.

Inaccurate
accounts.

Although the Court will generally saddle with costs a trustee whose only fault is that he has failed to do so, yet where a trustee has kept and furnished accounts, which, by an honest mistake, turn out to be inaccurate, he will be allowed his costs. (9)

Duty of
trustee to
supply in-
formation—
What kind of
information
to be supplied
—Costs.

"A trustee is bound to give his *cestui que trust* proper information as to the investment of the trust estate; and where the trust estate is invested on mortgage, it is not sufficient for the trustee merely to say, 'I have invested the trust money on mortgage; but he must produce the mortgage deeds, so that the *cestui que trust* may thereby ascertain that the trustee's statement is correct, and that trust estate is so invested. . . . Where a portion of the trust estate is invested in consols, it is not sufficient for the trustee to say that it is so invested, but his *cestui que trust* is entitled to an authority from the trustee to enable him to make proper application to the bank in order that he may verify the trustee's own statement; there may be stock standing in the name of a person who admits he is a trustee of it, which at the same time is incumbered; some other person having a paramount title may have obtained a charging order on the stock, or placed a *distringas* upon it.'" (10)

Expensive
information
—Costs of.

As above stated a beneficiary is entitled, either personally or by his solicitor, to inspect the trust accounts and documents. If, however, he requires a copy of an account or document, he must pay the necessary expense himself; for it is not fair that it should be saddled on the trust estate, nor of course can the trustee be expected to incur the expense personally. (11)

Where a beneficiary demands information as to his rights under the settlement which cannot be furnished by the trustee without the assistance of a solicitor, the trustee is not bound to incur that expense (if he be himself a solicitor with power to discharge, he is not bound to incur the loss of time), unless the beneficiary is willing to pay the costs of complying with his requisition. (12)

Costs in case
of retirement
of trustee by
order of the
Court.

Retirement by order of the Court is now a comparatively rare method of retirement from a trust. It might arise where the trustee wishes to retire and either cannot procure a person to take his place, or, being himself the appointing party, has a dispute

(9) *Smith v. Crimer*, 24 W.R. 51 (Eng.).

(10) *Per Chitty, J., In re Tillott, Lee v. Wilson*, (1892) 1 Ch. at p. 88.

(11) *Otley v. Gilby*, 8 Beav. 602.

(12) *Re Bosworth, Martin v. Lamb*, 58 L.J. Ch. 432.

with his beneficiaries in relation to the person to be appointed, or where the persons to appoint are out of the country or cannot be found.⁽¹³⁾ In such cases he would be justified in issuing an originating summons for the appointment of a new trustee in his place. No doubt it was formerly considered that a trustee could not retire from his trust without some good reason, and that "if the circumstances preventing his continuing to perform his duties arose from any act of his own, or anything relating to himself, he ought to pay the costs of the appointment of a new trustee."⁽¹⁴⁾ But this was long before the statutory power, which enables a trustee to retire if desirous of being discharged; and it is conceived that now a trustee would not only be exempt from bearing the costs of an application to appoint a new trustee on his retirement (where it is difficult or impossible to appoint such a person under an express or the statutory power), but would also be entitled to his own costs;⁽¹⁵⁾ anyhow, it is the common practice."⁽¹⁶⁾

Unless trustees have been guilty of misconduct they are entitled to their costs of an action for the administration of the trust as between solicitor and client, and not merely as between party and party;⁽¹⁷⁾ in addition thereto any other costs, charges and expenses properly incurred by them in the execution of the trust.

Costs of administration suit, together with "costs, charges, and expenses."

A trustee or executor will be allowed the amount of a solicitor's bill of costs which he has paid for services rendered in the matter of the trust;⁽¹⁸⁾ even, it would seem, where the necessity for the services arose through want of caution on the part of the trustee, *e. g.*, where proceedings had to be taken by an administrator against an agent to whom he had entrusted money to make payments.⁽¹⁹⁾

Where the Court, on the hearing of a summons for administration, "does not think fit to make any order as to costs," that is merely a euphemistic way of depriving the trustees of their costs

Depriving trustees of costs of litigation.

(13) See *Re Humphry*, 1 Jur. (N.S.) 921, and *Re Somerset* W.N. (1887), 122.

(14) *Forshaw v. Higginson*, 20 Beav. 485.

(15) See *Coventry v. Coventry*, 1 Keen, 758; *Greenwood v. Wakeford*, 1 Beav. 576; *Re Stokes*, 13 Eg., 333; and *Barker v. Peile*, 2 Dr. & S. 340.

(16) See *Re Chetwynd*, *Carisbrick v. Nevins*, (1902) 1 Ch. 692. See Underhill on Trusts.

(17) *Re Love, Hill v. Spurgeon*, 29 Ch. D. 348.

(18) *Macnamara v. Jones*, Dick. 587.

(19) *Re Davis*, *Muckalt v. Davis*, W.N. (1887), p. 186, *sed quære*.

of the summons, and they cannot afterwards claim them as "costs, charges, and expenses" incurred in the execution of the trust.⁽²⁰⁾

To deprive a trustee of his costs has, however, been called "a violent exercise" of the Court's discretion.⁽²¹⁾

Such a practice would be contrary to the usual rule of the Court, and depriving a trustee of costs, or limiting him to a particular fund, is appealable by him on that ground.⁽²²⁾ On the other hand, it has been held by the English Courts, that if the trustee be allowed costs, the beneficiaries cannot appeal against such allowance.⁽²³⁾

Nevertheless a trustee who acts unreasonably may not only be deprived of costs, but be ordered to pay those of the plaintiff. For instance, in one case a trustee whose trust had become a simple trust, and who neglected for twenty-eight days after demand to transfer the trust property to the beneficiary, was not only deprived of costs, but ordered to pay those of the plaintiff.⁽²⁴⁾

Costs of trustees who have committed a breach of trust.

Where the sole object of a suit is to make trustees answerable for breach of trust, and a judgment to that effect is obtained, the trustees will not only not get their costs allowed, but will almost invariably have to pay the costs of the plaintiffs up to the judgment.⁽²⁵⁾

The costs subsequent to the judgment will be in the discretion of the Judge, who may disallow the trustee his costs if he considers that, but for the trustee's misconduct, there would have been no need for the action at all.⁽²⁶⁾ And the same result will follow where the conduct of a trustee is vexatious or oppressive;⁽²⁷⁾ or unreasonably cautious.⁽²⁸⁾

(20) *Re Hodgkinson, Hodgkinson v. Hodgkinson*, (1895) 2 Ch. 190.

(21) *Birks v. Micklethwait*, 34 L.J. Ch. 364.

(22) See *Re Chennel, Jones v. Chennel*, 8 Ch. D. 492; *Re Love, Hill v. Spurgeon*, 29 Ch. D. 348; *Re Knight's Will*, 26 Ch. D. 82.

(23) *Charles v. Jones*, 33 Ch. D. 80.

(24) *Re Knox*, (1895) 2 Ch. 488.

(25) Per Lord Langdale, *Byrne v. Norcott*, 13 Beav. 336; *Gough v. Eitty*, 20 L.T. 358; *Easton v. Landor*, 67 L.T. 833.

(26) *Easton v. Landor*, 67 L.T. 833.

(27) See *Marshall v. Sladden*, 4 De G. & Sm. 468; *Patterson v. Wooler*, 2 Ch. D. 586; *Attorney General v. Murdoch*, 2 K. & J. 571; *Palairret v. Carew*, 32 Beav. 564; *Griffen v. Brady*, 39 L.J. Ch. 136.

(28) *Smith v. Bolden*, 33 Beav. 262; *Re Cull*, 20 Eq. 561; *Firmin v. Pulham*, 2 D. & E. 99; *Cockcroft v. Sutcliffe*, 25 L.J. Ch. 313; and see, also, cases collected in Morgan and Wurtzburg on Costs, 2nd Ed., pp. 412 et seq.

But where an administration suit is necessary *apart from the breach of trust*, and the latter only forms an incidental feature of the suit, the trustee will, as a rule, be allowed his general costs of the suit as between solicitor and client, although he may have to pay the special costs caused by the breach.⁽²⁹⁾

If trustees are co-plaintiffs, they ought, except under special circumstances, to sue or defend jointly.⁽³⁰⁾ One set of costs only allowed

They generally will only be allowed one set of costs between them,⁽³¹⁾ to be apportioned by the taxing master.⁽³²⁾ If a trustee improperly refuses to join his co-trustee as plaintiff, and consequently has to be made a defendant, he may be deprived of costs altogether.⁽³³⁾ where trustees unreasonably sever.

But, on the other hand, where, owing to one trustee being also a beneficiary, it is necessary that one should be plaintiff, and the other defendant, they will each be allowed separate sets of costs as between solicitor and client.⁽³⁴⁾

It has been held that a trustee is entitled to be reimbursed costs of former trustees, paid by him to their personal representatives previously to the latter transferring the trust estate.⁽³⁵⁾ He is also entitled to be reimbursed costs incurred by him previously to his appointment, in obtaining a statement of the trust property, and ascertaining that the power of appointing new trustees was being properly exercised; ⁽³⁶⁾ and also costs incurred by the donee of the power of appointment in relation to the trustee's appointment.⁽³⁷⁾

Where a trustee take upon himself the responsibility of unsuccessfully defending an action in relation to the trust estate without procuring the sanction of the Court, the *onus* lies upon him of proving that he had reasonable grounds for defending it. If he cannot prove such grounds, he is not entitled to retain out of the Expenses incurred in unsuccessfully defending an action.

(29) *Pride v. Fooks*, 2 Beav. 430; *Campbell v. Bainbridge*, 6 Eq. 269; *Bell v. Turner*, 47 L.J. Ch. 75.

(30) *Morgan and Wurtzburg on Costs*, 2nd Ed., pp. 124—126 and 403.

(31) *Hughes v. Key*, 20 Beav. 395; *Gompertz v. Kensuit*, 13 Eq. 369.

(32) *Re Isaac, Cronbach v. Isaac*, (1897) 1 Ch. 251.

(33) *Hughes v. Key*, 20 Beav. 395; *Gompertz v. Kensuit*, 13 Eq., 369.

(34) *Re Love, Hill v. Spurgeon*, 29 Ch. D. 348; 54 L.J. Ch. 816; 52 L.T. 398; 83 W.R. 449 (Eng.).

(35) *Harvey v. Olliver*, W.N. (1887) 149.

(36) *Re Humphrey, Worcester, etc., Banking Co. v. Blick*, 22 Ch. D. 255.

(37) *Harvey v. Olliver*, W.N. (1887), 149.

trust property the costs of the action beyond the amount which he would have incurred if he had applied for leave to defend.⁽³⁸⁾

Costs of pre-
mature sale.

So also "where trustees attempted, at the solicitation of their beneficiaries, *some of whom were married without power of anticipation*, to sell the trust property before the date named in the settlement, it was held that they were not entitled to be indemnified against the costs of an action brought against them by the purchaser."⁽³⁹⁾

Unreasonable
expenses
disallowed.

Trustees will not be allowed to reimburse themselves "every out-of-pocket expense, but only such as are reasonable and proper under the circumstances." Thus, the expenses of a trustee's journeys to a foreign place in order that he might be present at the hearing of a suit brought in the foreign Courts (the sole question being one of foreign law, and not of fact), were disallowed.⁽⁴⁰⁾

An instance of departure from the rule that the successful party is to pay no costs, may be found in the case of a *cestui que trust* making his trustee a defendant to an action instituted by him against a third party; in that case the *cestui que trust*, although he obtains a judgment against his trustee, must pay his costs, unless the trustee has been applied to join in the action as co-plaintiff, and has refused.⁽⁴¹⁾ The proper course to be pursued by a *cestui que trust* who intends to institute an action against a stranger relative to the trust property, is to apply to the trustee to become a co-plaintiff, indemnifying him against costs; and then, if he refuses, he must bear his own costs as a defendant.⁽⁴²⁾

Unnecessary
law costs.

A trustee, although entitled to obtain legal advice in relation to the execution of the trust, is not entitled, out of an excess of caution, to charge the estate with unnecessary legal proceedings.⁽⁴³⁾

Costs paid by
defaulting
trustee to his
solicitor.

It has been held that the solicitor of a trustee is not debarred from accepting payments out of the estate in respect of costs properly incurred, unless notice be brought home to him that, at the time when he accepted them the trustee had been guilty of a breach of trust, such as would preclude him from resorting to the

(38) *Re Beddoe, Downes v. Collam*, (1893) 1 Ch. 547.

(39) *Leedham v. Chawner*, 4 K. & J. 458.

(40) *Malcolm v. O'Callaghan*, 3 My. & Cr. 52.

(41) *Reade v. Sparkes*, 1 Moll. 8.

(42) *Reade v. Sparkes*, 1 Moll. 8; and see *Pekinton v. Benbow*, 5 W.R. 670 (Eng.);

Hughes v. Key, 20 Beav. 395; *Lewin*, 1039, 1040.

(43) *Warter v. Anderson*, 11 Hare. 301.

trust estate for payment of costs.⁽⁴⁴⁾ But where a solicitor receives money with knowledge of a breach of trust, a summary order may be made upon him to pay it into Court, without the necessity of an action.⁽⁴⁵⁾

Where a person, being a trustee, chooses to employ a solicitor for the purpose of conducting the affairs of the trust, which, of course, the solicitor is well aware of, there is a distinction between his employing that same solicitor for exactly similar purposes with regard to which he is not a trustee. Where certain acts are asked to be done by the solicitor which are not strictly required for the purposes of the administration of the trust, the charges therefor are not to be put into the bill of costs which will have to be paid out of the trust estate; but the trustee will have to bear them personally. It is for the Taxing Master to determine, in each case, whether it is proper or necessary or fit for the administration of the trust that certain things should be done. And the question of *quantum and quoties* is one in which the opinion of the Taxing Master as to how much of the trustee's bill ought to be charged against the *cestui que trustent* ought to be accepted.⁽⁴⁶⁾

The present suit was brought by the Advocate-General at the instance of certain persons, to remove the defendants from the position of directors of a Mahomedan Mosque in Bombay and for administration of the property belonging to the Mosque. The decree ordered that the defendants should have their costs out of the estate taxed as between *attorney and client*. Their attorneys sent in their bill of costs to the Taxing Master, who refused to allow out of the estate certain items which he allowed as between the defendants and their attorneys. It was contended that according to the decree, the attorneys ought to be allowed out of the Mosque funds all the sums which the Taxing Master certified they ought to pay their attorneys. *Held*, that it did not follow that, because a charge is proper to be allowed between an attorney and a client, that the client, if a trustee, should be allowed that charge out of the trust funds; and that, where the Taxing Master decided that certain items allowed against the defendants should not come out of the Mosque funds, his decision could not be disturbed.⁽⁴⁷⁾

(44) *Re Blundell, Blundell v. Blundell*, 40 Ch. D. 370.

(45) *Re Carroll, Brice v. Carroll*, (1902) 2 Ch. 175.

(46) *Advocate General of Bombay v. Moulvi Abdul Kadur Jitakar*, 20 B. 301, referring to *In re Brown*, L R. 4 Eq. 464.

(47) *Advocate-General of Bombay v. Moulvi Abdul Kadur Jitakar*, 20 B. 301.

Sec. 42.—Unsoundness of mind—Suits by and against persons suffering from.

Costs under the Indian Lunacy Acts.
 Provisions of the Indian Lunacy Act regarding costs incurred in lunacy proceedings and costs of maintenance of lunatic.
 Provisions of English Law.
 Costs of petitioner when lunacy found.
 Costs of petitioner when lunacy not found or being found successfully traversed.
 Costs where petition vexatious or unnecessary.
 Costs of alleged lunatic.
 Solicitor's costs.
 Costs of other parties opposing the commission.
 Costs in case of vexatious opposition.
 Costs when a mortgagee becomes insane.
 Costs allowed to the unsuccessful party—Special case.
 Costs in case of death.
 Costs of traverse.
 Costs of subsequent proceedings.
 Jurisdiction to order costs in lunacy proceedings.
 Enforcing orders as to costs.

Costs under
the Indian
Lunacy Acts.

UNDER S. 11 of Act XXXIV of 1858 and S. 7 of Act XXXV of the same year, the Court can make such order as to costs as it may think fit respecting an enquiry under the Lunacy Acts, and may include therein such remuneration to physicians and surgeons as the Court, having regard to the nature of the enquiry, shall deem reasonable.⁽¹⁾

(1) See Act XXXIV of 1858, S. 11; Act XXXV of 1858, S. 7; these two Acts have now been repealed and re-enacted as Act IV of 1912. Doss's Law of Lunacy, 1906, p. 106. On the subject-matter of this section, see Notes under Sec. "Infants," *supra*. In fact the principles applicable in the matter of awarding costs in proceedings in Lunacy, are similar to those that apply to proceedings by or against minors. See the Code of Civil Procedure (Act V of 1908), O. XXXII, rr. 1 to 15. See, also, Archbold's Lunacy, 4th Ed., 1895, pp. 152-155, 226, 302, 417, 426, 508, 696-697. Pope on Lunacy, 2nd Ed., pp. 216 to 223; Elmer's Practice in Lunacy, 7th Ed., 1892, pp. 158-164 and 386-412; Encyclopædia of the Laws of England, Vol. VIII, Heading "Lunacy," pp. 455-457. Doss on Lunacy, 1903, pp. 11, 13, 106, 107. Halsbury's Laws of England, Vol. XIX, pp. 459-461. Wood Renton on Lunacy, 1896, pp. 284, 285, 379, 385, 874-877. Heywood and Massey on Lunacy Practice, 3rd Ed., 1907, pp. 533-536; Morgan and Wurtzburg, pp. 87, 239, 240, 326, 343, 344; Marshall on Costs. The following older text books relating to the subject may also be usefully referred to:—Bridal on Lunacy (1700); Collins on Lunacy, 1812 (a work of great value); Shelford on Lunacy (1847); Phillips on Lunacy (1858); Fry on Lunacy, 3rd Ed. (1890).

The following are the important provisions of the Indian Lunacy Act ^{Provisions of the Indian Lunacy Act regarding costs incurred in lunacy proceedings and costs of maintenance of lunatic.} (2) regarding costs of lunacy proceedings and costs of the maintenance of the lunatic :—" At the time appointed for the consideration of the petition (for a reception order in the case of an alleged lunatic), the Magistrate may either make a reception order or dismiss the petition, or may adjourn the same for further evidence or inquiry, and may make such order as to the payment of the costs of the inquiry by the person upon whose application it was made, or out of the estate of the alleged lunatic if found to be of unsound mind, or otherwise as he thinks fit." (3)

" When any lunatic has been admitted into an asylum in accordance with the provisions of S. 25, the High Court or the District Court, as the case may be, shall, on the application of the person in charge of the asylum, make an order for the payment of the cost of maintenance of the lunatic in the asylum, and may from time to time direct that any sum of money payable under such order shall be recovered from the estate of the lunatic or of any person legally bound to maintain him : Provided that if at any time it shall appear to the satisfaction of the Court that the lunatic has not sufficient property, and that no person legally bound to maintain such lunatic has sufficient means for the payment of such cost, the Court shall certify the same instead of making such order for the payment of the cost as aforesaid. An order under sub-S. (1) shall be enforced in the same manner and shall be of the same force and effect and subject to the same appeal as a decree made by the Court in a suit in respect of the property or person therein mentioned." (4)

" When any lunatic is admitted to a licensed asylum under a reception order or an order under S. 25, and no engagement has been taken from the friends or relatives of the lunatic or order made by the Court for the payment of expenses under the provisions of this Act, the cost of maintenance of such lunatic shall, subject to the provision of any law for the time being in force, be paid by the Government to the person in charge of such asylum. The paymaster of the military circle within which any asylum is situated shall pay to the officer in charge of such asylum the

(2) Act IV of 1912 (Lunacy).

(3) See Act IV of 1912 (Lunacy), S. 10.

(4) See Act IV of 1912 (Lunacy), S. 26.

cost of maintenance of every lunatic received and detained therein under an order made under S. 12."⁽⁵⁾

"Any money in the possession of a lunatic found wandering at large may be applied by the Magistrate towards the payment of the cost of maintenance of the lunatic or of any other expenses incurred on his behalf, and any moveable property found on the person of the lunatic may be sold by the Magistrate, and the proceeds thereof similarly applied."⁽⁶⁾

"If a lunatic detained in an asylum on a reception order made under S. 14, S. 15 or S. 17 has an estate applicable to his maintenance, or if any person legally bound to maintain such lunatic has the means to maintain him, the authority which made the reception order or any local authority liable for the cost of maintenance of such lunatic under any law for the time being in force may apply to the High Court or District Court within the local limits of the original jurisdiction of which the estate of the lunatic is situate or the person legally bound to maintain him resides, for an order for the payment of the cost of maintenance of the lunatic."⁽⁷⁾

"The Court shall inquire into the matter in a summary way, and on being satisfied that such lunatic has an estate applicable to his maintenance, or that any person is legally bound to maintain and has the means of maintaining such lunatic, may make an order for the recovery of the cost of maintenance of such lunatic, together with the costs of the application out of such estate or from such person. Such order shall be enforced in the same manner, and shall be of the same force and effect and subject to the same appeal as a decree made by the said Court in a suit in respect of the property or person therein mentioned."⁽⁸⁾

"The liability of any relative or person to maintain any lunatic shall not be taken away or affected by any provision contained in this Act."⁽⁹⁾

S. 109 of the English Lunacy Act, 1890, enacts as follows :—

"The costs of all proceedings for the purpose of ascertaining whether a person is a lunatic, and of all proceedings in the matter

Provisions
of English
Law.

(5) Act IV of 1912 (Lunacy), S. 86.

(6) Act IV of 1912 (Lunacy), S. 87.

(7) Act IV of 1912 (Lunacy), S. 88.

(8) Act IV of 1912 (Lunacy), S. 89.

(9) Act IV of 1912 (Lunacy), S. 90.

of a lunatic shall be in the discretion of the Judge in lunacy who may order all or any of such costs to be paid by the lunatic or alleged lunatic, or to be charged upon and paid out of his estate, or such part thereof as the Judge thinks fit, or by any other party to the proceedings; and in the case of the death of the lunatic or alleged lunatic, an order for payment of costs out of his estate may be made within six years next after the right to recover the costs has accrued, and every such order shall have the effect of an order of the High Court.”⁽¹⁰⁾

“The cases as to the costs of the inquiry show that the Court has regard to whether the inquiry was instituted *bona fide* and on reasonable grounds, and, if so, will order the costs to be paid out of the estate, even where the result was to establish the sanity of the alleged lunatic.”⁽¹¹⁾

“A wife living separate from her husband presented a petition for inquiry into his state of mind, grounded on the fact that he had had previously attacks of mental aberration (from which, however, he had always recovered), and was, at the time of presenting the petition, placed under personal restraint by his brother and sister, who refused to allow medical men set by the wife to see him, or to allow the wife to have any communication with him. The Court sent a medical officer to see the alleged lunatic; and the medical officer reported that he was completely recovered:—*Held*, that the costs of the petitioner ought to be paid out of the alleged lunatic’s estate.”⁽¹²⁾

Where an inquiry, based upon a report of the commissioners in Lunacy, had resulted in establishing the sanity of the alleged lunatic, the Court ordered the costs to be paid out of his estate.⁽¹³⁾

“On a petition for inquiry the medical visitor, by direction of the Court, saw the alleged lunatic, and made such a report as,

(10) The Lunacy Act, 1890, 53 and 54 Vict., C. 5, S. 109. This section which says that costs of proceedings in lunacy shall be in the discretion of the Judge in lunacy, is permissive not imperative, and, though it may give a concurrent remedy, it does not destroy a right of action which would otherwise have existed. *Brockwell v. Bullock*, 22 Q.B.D. 567; *In re Rhodes*, 44 Ch. D. 94. Consequently, the right of a medical witness engaged on behalf of an alleged lunatic at the inquiry remains unaffected. *Brockwell v. Bullock*, 22 Q.B.D. 567.

(11) See Pope on Lunacy, pp. 217, 218. See also *per* Lindley, L.J., in *Re Cathcart*, (1892) 1 Ch. on pp. 558-561, and *per* Lord Halsbury in *C.A.*, (1893) 1 Ch. on p. 472.

(12) *Re F.*, (1868) 2 De. G. J. & S. 89; 33 L.J. Ch. 338; 9 L.T. (N.S.) 698.

(13) *Re C.*, (1874) L.R. 10 Ch. 75; 28 W.R. 377 (Eng.).

in the opinion of the Court, to make an inquiry proper, and an inquiry accordingly took place, resulting in a verdict that the alleged lunatic was of sound mind. The Court being of opinion that the proceedings had been originated by the petitioner's solicitor for his own profit made no order as to costs."⁽¹⁴⁾

"An inquiry instituted on the petition of a husband as to the state of his wife's mind resulting in a finding that she was of sound mind, and capable of managing herself and her affairs, the Court ordered that two-thirds of his costs of the inquiry, and also his costs of the application, should be paid by the wife out of her separate estate."⁽¹⁵⁾

Costs of
petitioner
when lunacy
found.

Ordinarily, if lunacy is found, their costs, charges and expenses will be allowed to the petitioners out of the estate.⁽¹⁶⁾

Costs of
petitioner
when lunacy
not found
or being
found
successfully
traversed.

Even when the alleged lunatic is on inquisition returned sane, or is subsequently found sane on a traverse, the same rule will usually hold if the petition was *bona fide*, and there was reason to believe, at the time of presenting it, that the alleged lunatic would be benefited by a commission issuing.⁽¹⁷⁾ At all events, in such a case the petitioners will not be required to pay the costs of a party opposing the petition, even though it be the alleged lunatic himself.⁽¹⁸⁾

Costs where
petition vexa-
tious or
unnecessary.

On the other hand, the petitioners will not be allowed their own costs in the following cases:—

- (i) if their application is vexatious;⁽¹⁹⁾
- (ii) if it be solely for their own benefit;⁽²⁰⁾ or

(14) *Re S—*, (1876) 4 Ch. D. 301; 46 L.J. Ch. 233; 35 L.T. (N.S.) 828; 25 W.R. 133 (Eng.).

(15) *Re Cathcart*, (1893) 1 Ch. 466; 62 L.J. Ch. 320; 68 L.T. 358; 41 W.R. 277 (Eng.).

(16) *Ex parte Price*, 2 Ves. Sen. 407; *Re Hart*, 21 L.J.N.S. Ch. 810. They have even been treated on the same footing as the costs of opposing the inquisition, as for necessities supplied. See *Chester v. Rolfe*, 4 De. G. M. and G. 798; *Stedman v. Hart*, Kay 607.

(17) *Re F.*, 2 De. G. J. & S. 89; *Re C.*, L.R. 10 Ch. 75; conf. *Re Clogg*, 1 Ir. Jur. N.S. 87; *In re Popham*, 29 W.R. 403 (Eng.); *In re Meares*, 10 Ch. D. 552; *In re an alleged lunatic*, 5 T.L.R. 227; S.C., 33 S.J. 216.

(18) *Re Windham*, 31 L.J. N.S. Ch. 720.

(19) *Re Clare*, 3 Jon. & Lat. 571; *Re Smith*, 1 Russ. 348. Though Knight Bruce and Turner, L.J., seem to have thought there was no jurisdiction. *Re Windham*, 31 L.J. N.S. Ch. 720.

(20) *Ex parte Tulin*, 3 V. & B. 149.

(iii) if it be accompanied by misconduct on their part.⁽²¹⁾

Where the party is not found lunatic, even though the case to some extent justifies inquiry, the petitioner will get no costs.⁽²²⁾

Especially when an improper petitioner presents the petition at the instigation of a solicitor, no costs would be allowed to the petitioner.⁽²³⁾

The alleged lunatic is entitled to be represented in opposing the petition for inquiry and the commission.⁽²⁴⁾ Costs of alleged lunatic.

The services of a solicitor for these purposes have been accounted a necessity and created a valid debt against the lunatic's estate on an implied contract.⁽²⁵⁾ Solicitor's costs.

A solicitor acting for the lunatic in any proceeding in any lunacy may be deprived of his costs as between solicitor and client, if he be guilty of very reckless and improper conduct indeed.⁽²⁶⁾

Where an inquiry is pending, the Court has jurisdiction to sanction the payment of a sum of money to the alleged lunatic's solicitor on account of the expenses of the inquiry.⁽²⁷⁾

"A solicitor employed on behalf of a lunatic can have no action against him for his bill of costs. The heir-at-law of a lunatic appearing on a petition relating solely to the life estate of a lunatic, is not entitled to costs. A report made by the master after the death of a lunatic cannot be acted upon, but the costs incurred after the death may be ordered to be taxed."⁽²⁸⁾

The costs of other parties opposing the petition or commission have occasionally been allowed, even when the lunatic was separately represented.⁽²⁹⁾ Costs of other parties opposing the commission.

But in order to be allowed costs of attending the inquiry, the party must first have obtained the leave of the Court.⁽³⁰⁾ And that leave may be granted conditionally, on the party undertaking

(21) *Anon*, 2 Atk. 52; *Re Matthews*, cit. ap. Shelf. on Lun., pp. 135, 136; *Re Smith*, 1 Russ. 349, per Eldon, C.

(22) *Re S.*, 4 Ch. D. 301.

(23) Pope on Lunacy, 2nd Ed., 1890, p. 218.

(24) *Re Frank*, cit. ap. Shelf. on Lun., p. 134; *Wentworth v. Tubb*, 7 Jur. 738.

(25) *Williams v. Wentworth*, 5 Beav. 325.

(26) *Field v. Turner*, 43 W.R. 469 (Eng.).

(27) *In re Bullock*, 35 W.R. 109 (Eng.).

(28) *Barnesley v. Powell*, Amb. 102; *In re Way*, 30 L.J.Ch. 815.

(29) *Re Portsmouth*, cit. ap. Shelf. on Lun., p. 134.

(30) *Underhill on Trusts*, pp. 62, 63.

to be answerable for any increase of costs occasioned by his attendance.⁽³¹⁾

Costs in case
of vexatious
opposition.

Moreover, the costs of all parties on a vexatious opposition to the commission by persons, other than the alleged lunatic may be ordered to be paid by those persons.⁽³²⁾

Costs when a
mortgagee
becomes in-
sane.

When a mortgagee becomes of unsound mind, and the mortgagor desires to pay off the mortgage debt, and present a petition to obtain a vesting order, he must pay the whole of the mortgage debt and interest into Court; but he will not be allowed the costs of his petition, nor will he have to pay the mortgagee's costs.⁽³³⁾

Costs allowed
to the unsuc-
cessful party
—Special
case.

In the *East India Co. v. Dyce Sombre*,⁽³⁴⁾ the circumstances of the case being deemed to be such as to make it essential for the purposes of justice that the validity of the testamentary instruments should be submitted to judicial decision, the appellants (the executor and the parties interested under the will) were allowed one set of costs out of the estate, including the costs of the appeal, although the will itself was held to be invalid.

In *Ditchburn v. Fearn*,⁽³⁵⁾ under the special circumstances of the case, the appellant, though unsuccessful was allowed his costs of the suit in the Court below, though not the costs of the appeal.

Costs in case
of death.

A lunatic so found by inquisition died before a committee of the estate could be appointed. On the petition of one of the next-of-kin it was declared that the costs of the proceedings in lunacy were properly incurred, and that such costs, and also the costs of the application, ought to be paid out of the estate of the deceased lunatic in a due course of administration.⁽³⁶⁾

The taxed costs of the commission of lunacy are a debt against the assets of a lunatic, although at his death a traverse applied for by himself, be pending.⁽³⁷⁾

(31) *Re Richards*, 1 De. G. M. & G. 715.

(32) *Re Smith*, 1 Russ. 348.

(33) *In re Sparkes*, 6 Ch. D. 361.

(34) 4 W.R. 714 (Eng.).

(35) 6 Jur. 210.

(36) *Re Meares*, (1879) 10 Ch. D. 552; 48 L.J. Ch. 190; 40 L.T. (N.S.) 111; 27 W.R. 369 (Eng.).

(37) *Re Cumming*, (1852) 5 De. G. M. & G. 30; 23 L.J. Ch. 361; 18 Jur. 181.

The costs of an unsuccessful traverse would be allowed out of the estate.⁽³⁸⁾ Costs of traverse.

The costs, charges and expenses of parties having liberty to attend the master on appointment of committees, passing accounts, considering proposals, entertaining applications, conducting inquiries and the like, are allowed out of the estate unless there is a special direction that the parties are to attend at their own expense.⁽³⁹⁾ Costs of subsequent proceedings.

The jurisdiction to order costs is not limited to the lifetime of the lunatic.⁽⁴⁰⁾ Jurisdiction to order costs in lunacy proceedings.

The Court of lunacy will restrain proceedings against the lunatic in other Courts for payment of costs; ⁽⁴¹⁾ and this is a rule that other Courts take judicial notice of.⁽⁴²⁾

Besides liability to costs, scandal introduced into any of the various proceedings in the lunacy, may give the Court cause, as it has jurisdiction, to direct that it be expunged.⁽⁴³⁾

"Payment of costs may be enforced against the State by orders for sale, charge, mortgage, or other disposition of the property of the lunatic."⁽⁴⁴⁾ Enforcing orders as to costs.

Sec. 43.—Vexatious proceedings, abuse of process of Court and contempt.

Costs in case of abuse of process of Court and vexatious litigation.

Provisions of English Law safe-guarding abuse of process of Court.

Certain illustrative cases.

Costs of contempt proceedings—Illustrative cases.

Practice and Procedure.

Appeal.

Costs on discharge.

Payment and recovery of costs of contempt proceedings—Practice as to.

Liability of solicitor for committal for contempt and costs.

Liability of sheriff.

(38) *Wentworth v. Tubb*, (1842) 2 Y. & Coll. C.C. 537; 12 L.J. Ch. 61; 7 Jur. 788.

(39) See Underhill on Trusts, p. 86.

(40) 53 Vict. c. 5, S. 109. *In re Popham*, 29 W.R. (Eng.) 408 (Unheard petition).

(41) *Jones v. Bywater*, 2 Tyrw. 402; *Re Weaver*, 2 Myl. & Cr. 441.

(42) *Stedman v. Hart*, Kay 607. See *Brockwell v. Bullock*, 22 Q.B.D. 567.

(43) *Ex parte Le Heup*, 18 Ves. 221.

(44) *Re Cathcart*, (1893) 1 Ch. 466; 62 L.J. Ch. 320; 68 L.T. 358; 41 W.R. 277 (Eng.).

Costs in case of abuse of process of Court and vexatious litigation.

ONE of the methods which the Courts constantly adopt in the matter of preventing abuse of process of Court is to visit the party so abusing its process with the costs of the proceeding.⁽¹⁾

Provisions of English Law safe-guarding abuse of process of Court.

There may however be cases where the payment of costs would not adequately prevent the mischief.⁽²⁾

The jurisdiction of English Courts to prevent the abuse of the process of a Court extends to prohibiting individuals who are shown to have persistently abused the process of the Court by frivolous and vexatious applications from making any applications whatever without having first obtained the sanction of the Judge or master. The first case in which this was done appears to have been *Suir v. Newton*, in 1866, in which the Court of appeal prohibited the defendants from giving any notice of motion in the action, without special leave of the Court, until the costs of a previous order against them had been paid, and directing that, if any such notice were given without leave, the respondent should not be required to appear, and that such motion should be dismissed without being heard. In *Grepe v. Loam*,⁽³⁾ certain parties interested were shown to have made several unfounded applications after judgment, directed

(1) It is an abuse of the process of the Court for a litigant, either by action or pleading in an action, to set up a case which has been previously decided by a Court of competent jurisdiction, unless the first decision was obtained in a foreign Court [*Reichel v. Magrath*, (1889) 14 App. Cas. 665; *Montgomery v. Russell*, (1894) 11 T.L.R. 112, C.A.; *Stephenson v. Garnett*, (1898) 1 Q.B. 677]. But it must be clear that the point decided in the first action was in fact identical with that raised by the second action [*Lea v. Thurstby*, (1904) 89 L.T. 744; 90 L.T. 265, C.A.] Where an action was commenced in England, and the indorsement included a claim which was substantially the same as one decided in a Scotch action, and was the subject of a pending appeal to the House of Lords, the Court of appeal struck out the English writ with costs, as an abuse of process. [*Huntley, Marchioness of v. Gaskell*, (1905) 2 Oh. 656, C.A.]. The costs incurred by a party in suing out processes of contempt are not within the terms of Act XXV of 1841, but only the costs attendant upon the motion made for enforcing the former order of the Court. *Alexander v. Moran*, 14th November 1842, 1 Fulton 94 = Morley's Digest of Indian Cases, Vol. I, p. 111 = 1 Ind. Dec., Old Series, p. 701. On the subject-matter of this Chapter, see Encyclopædia of the Laws of England, Vol. I, pp. 79—81; Vol. XIII, pp. 620, 621; Vol. XIV, pp. 500—503; Annual Practice, 1909, Vol. II, p. 478; Vexatious Action Act (1896), 59 and 60 Vict., c. 51; Oswald on Contempt, pp. 134, 135, 215, 216, 261; Morgan and Wurtzburg, pp. 58—60; Amir Ali's Civil Procedure Code, 2nd Ed., 1916, p. 208; Madras Jurist, Vol. IV, p. 223; Mew's Digest, Vol. III, Cols. 1994—2003. The case of *Legal Remembrancer v. Moti Lal Ghose*, 41 C. 173, is a recent case in which the Calcutta High Court went very fully into the subject. The judgment is well worth reading in detail.

(2) Encyclopædia of the Laws of England, 2nd Ed., Vol. I, p. 79.

(3) (1887) Unreported, but referred to in 87 Oh. D. 169, Note.

to impede or nullify the effect of the judgment, and the Court prohibited these parties from making any applications without the leave of the Court being first obtained. This case has been followed with regard to interlocutory applications.⁽⁴⁾ The form of order in the last-named case was as follows:—"This Court doth order that the defendant is not to be allowed without leave of the Judge in chambers to make any application under the summons for directions, or to issue any summons on matters of procedure, or to serve any notice of motion to discharge any order in chambers made on any such application as aforesaid, without such leave; and in case he shall without such leave serve notice of any such application or summons or notice of motion as aforesaid on the plaintiffs, they are not to attend unless the Judge on the return thereof shall so direct; and unless the Judge shall think fit to give such directions, the application shall be dismissed without being heard. And it is ordered that the plaintiff's costs of this application be borne by the defendant in any event."⁽⁵⁾

A further safeguard has been provided in England for preventing persons so disposed from abusing the process of the Court by commencing groundless actions and other proceedings. The Vexatious Actions Act, 1896, provides that it shall be lawful for the Attorney-General to apply to the High Court for an order under the Act, and if he satisfies the High Court that "any person has habitually and persistently instituted vexatious legal proceedings, without any reasonable ground for instituting such proceedings, whether in the High Court or in any inferior Court, and whether against the same person or against different persons, the Court may, after hearing such person or giving him the opportunity of being heard, and after assigning counsel in case such person is unable on account of poverty to retain counsel, prohibit such person from taking proceedings in any Court without leave of the Court, or some Judge thereof." Leave can only be granted on evidence that the proposed proceeding is not an abuse of the process of the Court, and that there is *prima facie* ground for such proceeding. The party against whom the order is made may also be made liable for the costs of such proceeding.⁽⁶⁾

(4) 37 Ch. D. 168, C.A.

(5) *Kinnaird (Lord) v. Field*, (1905) 2 Ch. 306, C.A.

(6) St. 59 and 60 Vic., c. 51.

The Court has also inherent jurisdiction to stay on terms as to costs or dismiss an action or proceeding with or without costs when it holds the said action or proceeding to be vexatious.⁽⁷⁾ It can also dismiss an action shown by the pleadings to be vexatious.

The Court has an inherent power to stay or dismiss an action shown by the pleadings to be frivolous or vexatious; or, in the case of a defence, to order the defence to be struck out and judgment entered accordingly.⁽⁸⁾ The Court, on an application of this nature, must use a judicial discretion, and not prevent a suitor from exercising his rights on any vague or indefinite principle.⁽⁹⁾

The Court departed from the general rule that a successful party is entitled to his costs, in a case where the appellant had manifestly acted vexatiously towards the respondent, and, as a protest against frivolous litigation, ordered the appellant to pay the respondent's costs.⁽¹⁰⁾

Certain
illustrative
cases.

The Court has jurisdiction to make an order with regard to the costs of the insolvency proceedings, when it was satisfied upon the facts of the case that the proceedings were an abuse of the process of the Court.⁽¹¹⁾

"A, B, C, D and E were members of a certain firm. On the application of F, wife of S—A, B, C and D were adjudicated insolvents. The order of adjudication was made on the basis that certain shares in the business had been assigned to H. S and E were joint in business. It was found that assignment to H was an assignment to him as a *benamidar* for E and S. It was also found that F was not a real creditor of the firm at all but that she was put forward merely as a blind for E and S. An appeal was preferred by persons who were adjudicated insolvents at the instance of F. An application for the cancellation of the adjudication was made on the ground that there was no debt due to F and this application was dismissed by the Judge sitting on the original side. An appeal was preferred and was heard by a Bench consisting of

(7) See Annual Practice, 1909, Vol. II, 478.

(8) *Reichel v. Magraith*, (1889) 14 App. Cas. 665, see, also, R. S. C. O. XXV, r. 1.

(9) *Higgins v. Woodhall*, (1889) 6 T.L.R. 1, C.A.

(10) *Gyane Ram v. Palee Ram*, 2 N.W.P. 73.

(11) *Ketokey v. Sarat Kumari Debi*, 26 C.L.J. 44.

three Judges. The appeal was allowed. Subsequently an application was made by the petitioner (the appellant in the appeal) before a Bench differently constituted, praying for an order that the real people behind F should be made to pay the costs of the proceeding connected with the claim of F as a creditor in the insolvency: *Held* (i) that the Bench so constituted had jurisdiction to deal with the matter; (ii) that E and S should pay the costs of the insolvency proceedings, inasmuch as there were no means of getting them paid by F, she having no property; (iii) that though E lived outside the jurisdiction of the original side of the High Court and did not carry on business within that jurisdiction, the Court had jurisdiction to make an order with regard to the costs of the insolvency proceedings, as it was found that he was in reality one of two persons who came to Court for the purpose of making use of the process of the Court.”(11-a)

As an ordinary rule, only the parties to a litigation can be made liable for costs, but in exceptional cases a Court may make a stranger to a suit liable for costs.(11-b)

The costs of a successful motion to commit any person for contempt are payable by such person.(12)

Costs of
contempt
proceedings
—Illustrative
cases.

The costs of an application for committal or attachment are in the discretion of the Court, and should be asked for on the hearing of the application.(13)

The respondent can only be ordered to pay costs if he has been guilty of contempt.(14)

If the application fails, it will be refused with costs; but it is not usual to give costs where it fails on a technical objection and not on the merits. Otherwise, it is both usual and proper to give costs, for the extreme course of applying to commit or attach should not be resorted to unless the circumstances of the case justify that course.(15)

(11-a) *Ketokey Charan Banerjee v. Srimati Sarat Kumari Debi*, 26 C.L.J. 44.

(11-b) *Balabhadra Singh v. Radhashyam Singh*, 16 Ind. Cas. 381, relying on *Jawes Bevis v. Turner*, 7 B. 484, and *Jointee Chander Sein v. Anundo Lall Deo*, 14 W. R. O.C. 1.

(12) *Pennell v. Roy*, 1 W.R. 271 (Eng.); *Fripp v. Bridgewater and Taunton Canal Co.*, 3 W.R. 356 (Eng.); *Lane v. Sterne*, 3 Giff. 629; *Daw v. Eley*, 7 Eq. 49.

(13) *Abud v. Riches*, (1876) 2 Ch. D. 528.

(14) *In re Emmerson, Rawlings v. Emmerson*, (1887) 57 L.J.P. 1 O.A.

(15) See Oswald on Contempt, pp. 215, 216.

The usual rule, when a motion for contempt is dismissed, is that the respondent's costs should be paid.⁽¹⁶⁾

It is a matter of vital importance for the party against whom an order for contempt of Court is sought, to know the person or persons at whose instance the application is made; if the application is refused he is entitled to know who is responsible for his costs; if, on the other hand, the application is successful, he is entitled to know who the respondent is in a possible appeal by him.⁽¹⁷⁾

On the Crown side of the King's Bench Division, if a respondent is found not to be in contempt, the Court may award him costs, if it thinks the prosecutor's complaint was groundless and the attachment vexatious.⁽¹⁸⁾

Thus a motion to commit the publisher of a newspaper for contempt in publishing certain letters was refused, but without costs, he having been in some degree to blame.⁽¹⁹⁾

Where the defendant, against whom an *interim* injunction had been obtained, had not received clear notice of the continuance of the injunction, but the Vice-Chancellor held that under the circumstances his solicitor ought to have known and in fact did know of it, the motion was refused, but without costs.⁽²⁰⁾

(16) *Legal Remembrancer v. Matilal Ghose*, 41 C. 173 (175)=14 Cr. L.J. 321=20 Ind. Cas. 81=17 C.W.N. 1253. The Court said in the course of the judgment:—"This motion against T. K. Biswas has wholly failed and in my opinion it must be dismissed. This respondent has been brought before the Court at considerable costs to himself, and the usual rule, when a motion for contempt is dismissed, is that the respondent's costs should be paid. In this case I think it would be but right that the respondent should receive his costs and that, to ascertain them, they should (if necessary) be taxed as between party and party as though in a hearing on the Original Side. The order for costs will, as a matter of form, be against the Legal Remembrancer, the sole applicant on the record until the close of the case,—no costs were incurred after the amendment of the record by the addition of the Government. But doubtless the Government will defray the costs that thus fall on their officer." *Legal Remembrancer v. Matilal Ghose*, 41 C. 173 at pp. 224, 225=14 Cr.L.J. 321=20 Ind. Cas. 81=17 C.W.N. 1253.

(17) *Legal Remembrancer v. Matilal Ghose*, 41 C. 173 (176)=14 Cr. L.J. 321=20 Ind. Cas. 81=17 C.W.N. 1253.

(18) Crown Office Rules, 1906, r. 242 (12).

(19) See *Tiechborne v. Mostyn*, 7 Eq. 55 n. (1); *In re Cheltenham Wagon Co.*, 8 Eq. 580; *In re Bryant*, 4 Ch. D. 98; *In re Fells, Ex parte Andrews*, 4 Ch. D. 509; *Ex parte Langley, Ex parte Smith*, *In re Bishop*, 13 Ch. D. 110; *Jackson v. Mawby*, 1 Ch. D. 87; 45 L.J. Ch. 58; 24 W.R. 92 (Eng.); *Baker v. Baker*, W.N. (1876) 256 (Eng.); *Steele v. Hutchings*, W.N. (1879) 18. (Eng.).

(20) *Carrow v. Ferrior, Dunn v. Ferrior*, 17 L.T. 536.

The Court will sometimes give to the party moving, by way of indemnity, costs as between solicitor and client, instead of or in addition to committing the respondent; ^{Practice and Procedure.} (21) but costs as between solicitor and client cannot, if the motion fails, be given to the respondent. (22)

The order is, strictly, for committal for the contempt, but it has been usual to ask only for the costs of the motion by way of penalty. (23)

If the party cannot be treated as liable to commitment, he cannot generally be made to pay the costs as the price of the contempt. (24) An order of this kind merely directing the defendant to pay the costs may of course be appealed from. (25) But there is no rule that a motion to commit if refused must be refused with costs; and an appeal as to costs in such a case will not be entertained. (25-a)

The Court of Appeal has expressed a strong opinion against the practice of moving to commit for contempt when it is not intended to ask for a committal but only for an apology and payment of costs; a party making such a motion in future instead of getting any costs will in all probability have to pay them. (26)

An appeal lies from an order that the respondent do pay the costs of the application, in cases where an appeal would have laid had an order for attachment or committal been made, as it amounts to an adjudication of contempt and misconduct. (27)

The order of discharge usually directs the prisoner to pay the costs occasioned by the contempt, but, except in cases of criminal contempt, the discharge will not be made conditional upon the payment of costs. (28) ^{Costs on discharge.}

(21) *Plating Co. v. Farquharson*, (1881) 17 Ch. D. 49, C.A.; and see *Steele v. Hutchings*, W.N. (1879) 18 (Eng.).

(22) *Plating Co. v. Farquharson*, (1881) 17 Ch. D. 49, C.A.

(23) *Bullen v. Ovey*, 16 Ves. 144; *Leonard v. Attwell*, 17 Ves. 386.

(24) *Morgan and Wurtzburg on Costs*, p. 58.

(25) *Witt v. Corcoran*, 2 Ch. D. 69; 45 L.J. Ch. 603; 54 L.T. 550; 24 W.R. 501 (Eng.).

(25-a) *Hope v. Carnegie*, 4 Ch. 264; *Ashworth v. Outram*, 5 Ch. D. 943; and see *Morgan and Wurtzburg on Costs*, 2nd Ed., p. 158.

(26) *Plating Co. v. Farquharson*, 17 Ch. D. 49.

(27) *Witt v. Corcoran*, (1876) 2 Ch. D. 69, C.A.; *Stevens v. Metropolitan District Railway Co.*, (1885) 29 Ch. D. 60, C.A.

(28) *Jackson v. Mawby*, (1875) 1 Ch. D. 86; *In re Jarvis, Ward v. Jarvis*, (1886) W.N. 118; and see *Ayres v. Ayres*, (1901) 71 L.J.P. 18. But see *Clarke v. Dyson*, (1882)

In cases of criminal contempt the order of discharge may be conditional on the payment of costs,⁽²⁹⁾ such costs being equivalent to a fine for the contempt as well as an indemnity to the opposite party, and the Debtors Acts having no application.⁽³⁰⁾

Where a contemnor is without means, the Court may, upon his contempt being purged, order his discharge without directing him to pay costs.⁽³¹⁾

Payment and
recovery of
costs of
contempt
proceedings—
Practice as to.

A contempt cannot be cleared till after the costs incurred thereby have been paid by the party in contempt. The costs of the contempt need not be tendered till after the motion for clearing it has been made, and a conditional order granted.⁽³²⁾

A person attached for contempt in procedure, who has cleared his contempt, cannot be detained in prison because he has not paid the costs occasioned by his contempt; ⁽³³⁾ but where a person committed for communicating with a ward was ordered to be discharged on payment of certain costs, and the costs were not paid, discharge was refused.⁽³⁴⁾

The costs of an application to commit must be recovered together with the other costs of the contempt; otherwise, it seems, they cannot be obtained as costs in the cause, and will be lost.⁽³⁵⁾

Liability of
solicitor for
committal for
contempt
and costs.

Where a solicitor was, as such, ordered to deliver up certain documents and to pay £10 and the costs of an application, and he had delivered up the documents and paid the £10 but not the costs, he was held, by the Court of Appeal, liable to remain in prison under an attachment for default in payment of the costs.⁽³⁶⁾

26 Sol. Jo. 731. See, also, p. 216, *ante*. For forms, see Seton, Judgments and Orders, 6th Ed., p. 471 *et seq.*

(29) See Oswald on Contempt, p. 261.

(30) *Ibid.*

(31) *West Ham Corporation v. Cunningham*, (1906) Times, October 12.

(32) *Chattoo Sing v. Rajhissen Sing*, 28th June 1842. 1 Fulton, 27 and 30, Morley's Digest of Indian Cases, Vol. I, p. 110=1 Ind. Dec., Old Series, p. 660.

(33) *Jackson v. Mawby*, (1875) 1 Ch. D. 86; *Micklethwaite v. Fletcher*, (1879) 24 W.R. 793 (Eng.); *Ayres v. Ayres*, (1901) 71 L.J.P. 18. But see *Steele v. Hutchings*, (1879) W.N. 18, where a motion to commit was ordered to stand over with liberty to renew it if the costs between solicitor and client were not paid.

(34) *In re M*, (1876) 46 L. J. Ch. 24, C.A.

(35) *Const v. Ebers*, 1 Madd. 530 (Eng.); *Attorney-General v. Lord Carrington*, 6 Beav. 454; *Landars v. Allen*, 6 Sim. 619; notwithstanding *Anon*, 15 Ves. 174. As to the costs of contempt incurred by paupers, see Morgan and Wurtzburg, Chap. VI, S. 9.

(36) *In re Preston*, (1883) 11 Q.B.D. 545, C.A.

The order for the taxation of a solicitor's bill, the amount of which he had retained out of money belonging to his client, directed that, in case it should appear that the bill was overpaid, the solicitor should, within four days after service of the order and of the taxing master's certificate, repay to the client the amount certified to be overpaid. The costs of the taxation were reserved. The taxing master found that the bill had been overpaid, and by a subsequent order it was directed that the solicitor shall pay the taxed costs of the taxation of the bill. It was held that the costs of the taxation, as well as the amount due from the solicitor upon the taxation, were within the exception in S. 4⁽⁴⁾ of the English Debtors Act, 1869, as being due from him "in his character of an officer of the Court," and that he could be attached in respect of both for his default in payment.⁽³⁷⁾

Where a solicitor in certain bankruptcy proceedings had been ordered to refund a small sum paid to him in excess for certain costs and to pay the costs of the application, and had paid the amount of excess of costs as ordered, but not the costs of the application, the Court declined to make an order to attach him for not paying the costs of the application.⁽³⁸⁾

If the Sheriff having a person in his custody under an attachment for non-payment of a sum of money lets him go at large, he may be ordered on motion to indemnify the party to whom the sum was payable, and to pay the costs of the application.⁽³⁹⁾ Liability of Sheriff.

But the measure of the Sheriff's liability is not the whole sum due, but the amount which would probably have been recovered from the prisoner.⁽⁴⁰⁾

Where a Sheriff's officer took a solicitor into custody on a writ of attachment, while the latter was on his way to conduct a case for a client, notwithstanding that the officer had been warned of the fact, the parties served with the notice of motion to discharge (both the plaintiff and the officer), were made personally liable for the costs of the motion.⁽⁴¹⁾

(37) *In re a Solicitor*, (1895) 2 Ch. 66.

(38) *In re Apelt, Ex parte Byrne*, (1889) 6 Morr. 102.

(39) *Levett v. Lettaney*, Beames, App. 5; *Solly v. Greathead*, Beames, App. 6; *S.O. Anon.*, 11 Ves. 170; *Moore v. Moore*, 25 Beav. 8.

(40) *Moore v. Moore*, 25 Beav. 8.

(41) *Dodd v. Holbrook*, 14 W.R. (Eng.) 125; 18 L.T. 426; 11 Jur. N.S. 969; 12 Jur. N.S. 19; 35 L.J. Ch. 175, following the decision of Lord Eldon in *List's case*, 2 V. & B. 378.

Sec. 44.—Withdrawal of Suit—Costs.

Provisions of the Civil Procedure Code as to costs in case of withdrawal of suit.

Costs in case of withdrawal of suit—General principles regarding the same.

Costs in case of withdrawal of suit before date of hearing—*Ex parte* order.

Costs, Practice as to—Right of plaintiff to withdraw suit with liberty to bring fresh suit.

Costs, where Court is not willing to give permission to bring fresh suit.

Costs, where appellate Court allows withdrawal of suit or appeal.

Costs on memorandum of objections in case of withdrawal of appeal.

Costs not paid in time, effect of.

Costs, power of Court to extend time for payment of.

Scale of costs when suit withdrawn.

Scale of costs in case of withdrawal of land acquisition cases.

Court-fee.

Pleader's fees.

Costs in case of withdrawal of Small Cause suit.

Costs, Practice and procedure as to

(i) Form of order.

(ii) What is proper compliance with order as to payment of costs.

(iii) Interference by appellate Court.

(iv) Revision.

Provisions of
the Civil
Procedure
Code as to
costs in
case of with-
drawal of
suit.

THE Code of Civil Procedure provides as follows:—"At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim. Where the Court is satisfied—(a) that a suit must fail by reason of some formal defect, or (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim. Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-r. (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others."⁽¹⁾

(1) See Act V of 1908 (Code of Civil Procedure), O. XXIII, r.1.

When a suit is allowed to be withdrawn with liberty to bring a fresh suit, the order that the plaintiff should pay the defendant's costs is almost, if not quite, a matter of course, and an appellate Court will not interfere with such an order.⁽²⁾

Costs in case of withdrawal of suit—General principles regarding the same.

Similarly, it has been held in a more recent Bombay case that the plaintiff had to pay the costs incurred by the defendant where he caused the defendant's arrest before judgment and then applied for withdrawal of suit with liberty to bring a fresh suit.⁽³⁾

In another case an appeal to the Queen in Council was allowed by the High Court, in a suit instituted by a Hindoo widow as guardian of her husband's adopted son, a minor. After the allowance of the appeal and transmission of the record to England, the adopted son having become of age, petitioned the High Court for the withdrawal of the appeal. The High Court referred the application to the Judicial Committee. On a petition by the respondents, founded on these proceedings, to dismiss the appeal, the appellant resisted the application on grounds, first, that as a Hindoo widow she had preferable title to the estate to the adopted son; and, secondly, with respect to the costs incurred by her as guardian in bringing the suit. *Held*, dismissing the appeal *simpliciter*, (1) that as the adopted son was of age and *dominus litis* and had directed the withdrawal of the appeal, the appellant had no *locus standi*; (2) that any claim she had as widow must be the subject of an independent suit; and (3) that any costs incurred by her were to be recouped from the adopted son's estate.⁽⁴⁾

On plaintiffs' petition for withdrawal of their suit, before the date of hearing, the Court passed an *ex parte* order to that effect. Before the order was drawn up, the defendant's pleaders applied for costs, which were allowed by the Court. *Held* that as the

Costs in case of withdrawal of suit before date of hearing—*Ex parte* order.

(2) *Doucett v. Wise*, 1 W.R. 322.

(3) *Syed Ali v. Adib*, 15 B. 160. This was a suit for damages for breach of contract, in which the defendant was arrested before judgment under S. 477 of the Civ. Pro. Code (1882) although no summons had been served on him previously and he was discharged by the Court. At the hearing of the case, plaintiff applied to withdraw the suit with liberty to sue afresh. The defendant objected. On behalf of the plaintiff it was argued that the defendant had no right to appear at the hearing of the case, by reason of the non-service of summons on him. The Court held (1) that the defendant had the right to appear in spite of the non-service of summons on him because the plaintiff had brought him before the Court by a legal process and (2) that, under S. 373 of the Civ. Pro. Code (1882), the plaintiff might withdraw the suit with liberty to sue afresh. *H. E. Syed Ali v. Adib*, 15 B. 160.

(4) *Ranee Bistoopria Putmadaye v. Nund Dhul*, 13 M.I.A. 602.

defendants had been summoned, the Court should neither have passed an order, allowing the suit to be withdrawn without notice to the defendants, nor should it without notice to the plaintiffs, have passed an order charging them with costs. ⁽⁵⁾

Costs,
Practice as to
—Right of
plaintiff to
withdraw
suit with
liberty to
bring fresh
suit.

A plaintiff is free at any moment from the time of instituting his suit until that of the decree being made which judicially determines the merits of his claim, to withdraw that claim and to say that he no longer desires a decision, and his doing so deprives the Court of authority to entertain the claim. It should then confine itself to the question of costs. ⁽⁶⁾

(5) *Misser Debee Pershad v. Baldeo Pershad*, 5 N.W.P. 116. This was an application in Chambers for withdrawal of a suit. This suit was instituted on the 22nd of December 1904. On the same day the plaintiff's attorney wrote to the 2nd defendant's attorney giving his notice of the institution of the suit and asking him if he would accept service of summons in behalf of his client. The defendant No. 2's attorney replied on the 23rd saying that he had instructions to receive service of summons and asking for a copy of the plaint on the usual terms, a copy of the plaint was accordingly sent on the same date and paid for. On the 30th of January 1905 the 2nd defendant's attorney filed his written statement and informed the plaintiff's attorney. On the same date he took out a Registrar's summons for an order on the plaintiff to file his affidavit of documents and informed the plaintiff's attorney. Thereupon the attorney for plaintiff appeared before the Registrar and informed him that he had instructions to withdraw the suit against the 2nd defendant and the Registrar referred the matter to the Court. It was contended on behalf of the 2nd defendant that under the above circumstances there was a waiver of service of summons and the plaintiff could only be allowed to withdraw the suit on full payment of all costs incurred by the 2nd defendant including costs of written statement, affidavit of documents and the present application. *Held*—That there was a waiver of service of summons and that the 2nd defendant was entitled to all the above costs. *Janaki Nath Saha v. John MacJohn*, 9 C.W.N. (Journal portion) cxxxi.

(6) *Ram Churn Bysack v. Mrs. Ripsimah Harmi*, 10 W.R. 373 = 2 B.L.R. S.N. 11. But see, also, *Brass v. Thiruvengada Pillai*, 1 M.H.C. 247. The Court *Phear and Hobhouse, JJ.* said in the course of the judgment :—"The claim which the plaintiff in any suit makes against the defendant, together with the collateral question as to the liability to pay the costs of the litigation, constitutes generally the whole matter which the Court has to determine by its decision. If the claim be withdrawn, of course nothing but the question of costs remains. Now, the preferring of the claim is clearly a voluntary act on the part of the plaintiff; he need not put it forward unless he likes. But, having put it forward, and having once asked the Court to decide upon it as between himself and the defendant, must he persist in it until a judicial decision is arrived at, even though he himself sees that it is not maintainable, or for any other reason is desirous of giving it up? It is argued very forcibly on the part of the respondents that at any rate if the plaintiff has persisted in his claim up till the day of trial, the interests of justice require that he should not be allowed at that late hour, after having perhaps harassed his adversary to the utmost, to evade a final decision by withdrawing his claim. We do not think, however, that considerations of this kind alone in the absence of legislative enactment, afford the defendant any equitable right to have as against the plaintiff a control over the suit. He can only look to an award of costs in his favor

Where, an application for a declaration of insolvency having been filed, the applicant asked and obtained permission to withdraw the application absolutely, *i.e.*, without permission to renew the application, it was *held* that the Court could not make the payment by the applicant of the opposing creditors' costs a condition precedent to the granting of such permission so as to enable the Court subsequently to revive the proceedings commenced by the application, but that such proceedings were finally determined by the applicant's withdrawal.⁽⁷⁾

The only case in which a Court may enforce a condition, *e.g.*, that the payment of costs be a condition precedent to withdrawal, upon a plaintiff who seeks to withdraw, is where the plaintiff asks not only to withdraw but also liberty to bring a fresh suit.⁽⁸⁾

Where the plaintiff applied to be allowed to withdraw from the suit, with liberty to bring a fresh suit for the same matter, the

for compensation in respect of the charges which he has been at. It seems to us that, except so far as any act of legislature rules to the contrary, a plaintiff is by the nature of the case free at any moment from the time of instituting his suit until that of the decree being made, which judicially determines the merits of his claim, to withdraw that claim from the consideration of the Court, and to say that he no longer desires to ask for any decision upon it. And we think that in the event of his doing so, whether the defendant consents thereto or not, the Court is immediately deprived of authority further to entertain the claim, and should then confine itself solely to the question of costs. It is admitted that Act X of 1859 contains nothing to prevent a plaintiff from withdrawing his suit at any time, if he otherwise has the power to do so. And even S. 97 of Act VIII of 1859, which, according to a decision of a Full Bench, does not apply to the Collector's Court, only prescribes that a withdrawal of the suit shall be a bar to the plaintiff bringing a fresh suit for the same cause, unless the withdrawal were accompanied by permission of Court to that effect; it does not limit the plaintiff's power of withdrawal. In short, no enactment has been shown to us which purports to fetter a plaintiff's discretion in regard to maintaining his suit. On the whole, therefore, we are of opinion that the Deputy Collector was wrong in law when he refused to permit the plaintiff to withdraw his suit. It appears to us that the decrees of both the lower Courts should be reversed, and the order made that the plaintiffs be allowed to withdraw their suit. The plaintiffs, appellants, must pay the defendants, respondents, their costs in the first Court, but the respondents must pay the appellants their costs in this Court and in the lower appellate Court." *Ram Churn Bysack v. Mrs. Ripsimah Harmi*, 10 W.R. 373, 374 = 2 B.L.R.S.N. 11. It was however held in an earlier Madras case that the High Court has no power under the Civil Procedure Code to award costs to the defendant when the plaintiff withdraws, not having asked leave to do so with liberty to bring another suit for the same matter. *Brass v. Tiruvengada Pillai*, 1 M.H.C. 247. (dissented from in *Hossaini Bibi v. Peri Khanum*, 1 B.L.R.O.C.J. 45 = 3 Mad. Jur. 481).

(7) *Haidar Shah v. Jamna Das*, 17 A. 156 at p. 157 = 15 A.W.N. (1895) 43, Referred to in *Sitaram v. Mussammat Chhotikai*, 3 Ind. Cas. 61 (63) = 5 N.L.R. 88 (91).

(8) *Haidar Shah v. Jamna Das*, 17 A. 158, 161.

Court refused the application. Another application for leave simply to withdraw from the suit was granted, the Court dismissing the suit with costs.⁽⁹⁾

Cost, where Court is not willing to give permission to bring fresh suit.

The Civil Procedure Code contemplates a withdrawal not of the suit but from the suit, and such a withdrawal may be either with or without liberty to bring a fresh suit. If a party desires to withdraw from the suit with such liberty, then he must apply to the Court to permit him so to withdraw. If he does not desire to have that liberty, then he can withdraw of his own motion and no order of the Court is necessary. Hence, where a plaintiff applies to the Court for permission to withdraw from the suit with liberty to bring a fresh suit, and the Court is not minded to give the liberty, the proper order to pass is that the application for permission to withdraw from the suit with liberty to bring a fresh suit for the subject-matter of the suit be dismissed with costs. It is not competent to the Court to order on such application that the suit may be withdrawn and the plaintiff to bear all costs and to pay all costs.⁽¹⁰⁾

Costs, where appellate Court allows withdrawal of suit or appeal.

The appellate Court may allow the plaintiff to withdraw the suit dismissed by the original Court with liberty to bring a fresh suit upon terms as to costs, and which, in view of the circumstances of the case, may be too easy.⁽¹¹⁾

The provisions of O. XXIII, r. 1 of the Code of Civil Procedure empower an appellate Court to give a plaintiff, whose suit has been

(9) *Hossaini Bibi v. Peri Khanum*, 1 B.L.R.O.C.J. 45=3 Mad. Jur. 481 (dissenting *Brass v. Thiruvengada Pillai*, 1 M.H.C. 247).

(10) *Mahant Bihariadasji v. Parshottamdas Ramdas*, 10 Bom. L.R. 293=32 B. 345.

(11) *Sardar Ganpat Rao v. Sardar Anand Rao*, Cal. Case-law, Civil Vol. II, p. 286=11 C.W.N. 311. As a rule of practice, respondent should be served with notice of application for leave to withdraw, if notice of appeal had been previously given him. *Hadjee Abdool Raheem Saib v. Jafferjee Tyeh*, 2 Mad. Jur. 331. Appeal struck off, on application of the appellant, on his paying all the legally authorized costs of a respondent, objecting to the withdrawal on the score of his costs. *Muharane Sree-kunta Dabee v. Sahib Perhlad Sein*, (1852); 8 Sud. Dew. Adaw. Rep. (Ben.) 520=12 Ind. Dec. O.S., p. 403. When an appeal is dismissed or withdrawn, the costs of the appeal are ordinarily chargeable to the appellant. The same rule would be applicable where some of several respondents were not parties to a deed of compromise between the appellant and the remaining respondents in accordance with which the appeal was struck off the file without a hearing upon the merits. *Gholam Kasim Khan v. Akbar Khan*, 10th May 1866, p. 329. Index to S. D. A. R. N. W. P. (1843-1871), p. 323.

dismissed by the Court of first instance, permission to withdraw his suit with leave to institute a fresh one.(12)

In a suit for partition the plaintiff failed to implead some necessary parties. An objection as to non-joinder was taken by the defendant in the Court of first instance but escaped the notice of the Subordinate Judge who partly decreed the suit. Both sides appealed and the same objection was again taken. Plaintiff applied to withdraw the suit with liberty to file a fresh one stating that she had forgotten to implead certain necessary parties. The Judge allowed her to withdraw giving her the necessary permission. *Held* that the Judge had jurisdiction to pass the order and the High Court could not interfere in revision.(13)

The plaintiff's suit for recovery of possession of land on declaration of title was decreed in part and the defendants appealed against the decree in so far as it was against them. The plaintiff did not prefer any cross-appeal or cross-objection. *Held* that under r. 33 of O. XLI, it was competent to the High Court in appeal to allow the plaintiff to withdraw from the entire suit with liberty to bring a fresh suit upon the same cause of action; but this power must be cautiously exercised and should not be permitted to be invoked in favour of a litigant so as to enable him to evade the provisions of other statutes, *e.g.*, the Limitation Act and the Court Fees Act.(14)

In the circumstances of the above case the High Court allowed the plaintiff on terms as to costs to withdraw from the suit with liberty to bring, subject to the law of limitation, a fresh suit in respect of the same cause of action only with regard to the lands which had been decreed in his favour by the lower Court.(15)

"A plaintiff settled the matters in dispute in a suit with all except one of the defendants, against whom a decree was made and he was made liable for costs; he appealed, and upon his application at the hearing he was allowed to withdraw from the appeal and was dismissed from the suit with liberty to bring a suit against the plaintiff, no order being made as to costs of the appeal:

(12) *Ajzal Begam v. Akbari Khanam*, 13 A.L.J. 444 (following *Ganga Ram v. Data Ram*, 8 A. 82; not following *Charagudi v. Rajabarada*, 27 M.L.J. 244; *Eknath v. Ranofi*, 35 B. 261).

(13) *Ajzal Begam v. Akbari Khanam*, 13 A.L.J. 444.

(14) *Akimunnessa Bibi v. Bipin Behary Mitter*, 20 C.W.N. 544 = 22 C.L.J. 397.

(15) *Ibid*.

the plaintiff applied to execute the decree of the first Court for costs: the application was resisted on the ground that the order of the appellate Court relegated the defendant to the position of a stranger to the suit, and that, consequently, there was no decree against him capable of execution: *Held*, that the plaintiff was entitled to execute the decree for costs of the original Court as the effect of the order of the appellate Court was not to absolve the defendant from his liability for costs under the decree of the first Court." (16)

Costs on
memo-
randum of
objections in
case of with-
drawal of
appeal.

Where an appeal is withdrawn, costs on the memorandum of objections should be ordered in the absence of any agreement to the contrary between the parties. (16-a)

Costs not
paid in time,
effect of.

Where permission to withdraw from a suit with leave to bring a fresh suit was given to a party, on condition of costs being paid within a certain time, such party, on failing to fulfil the conditions, is precluded from bringing a fresh suit. (17)

Where a suit has been withdrawn with liberty to bring a fresh suit on payment of costs, a subsequent suit in respect of the same cause of action is not *ab initio* void, if the costs are not paid before its institution. Subsequent payment of costs cures the irregularity. (18)

(16) *Balabhadra Singh v. Radhashyam Singh*, 16 Ind. Cas. 381.

(16-a) *Ponnuswamy Nadar v. Somasundaram Chettiar*, 4 M.L.T. 482. (Referring to *Jafar Hussain v. Ranjit Singh*, 17 A. 518.)

(17) *Robert Fischer v. Nagappa Mudaly*, 33 M. 258=7 M.L.T. 226=5 Ind. Cas. 142=6 Ind. Cas. 238. (Distinguishing *Abdul Aziz Molla v. Ebrahim Molla*, 31 C. 965 and *Peria Muthirian v. Karappanna Muthirian*, 29 M. 370.)

(18) *Abdul Aziz Molla v. Ebrahim Molla*, 31 C. 965. The Court (Mookerjee, J. said in the course of the judgment:—"Two objections are taken in this appeal. The first objection is founded on the fact that the plaintiffs had brought a previous suit with respect to the same plot of land against these defendants. That suit was withdrawn, and permission was given to the plaintiffs to bring a fresh suit on payment of the defendant's costs. At the time when the present suit was instituted these costs had not been paid; but it appears that they were paid to the defendant's pleader before the suit came on for trial. The objection, therefore, taken by the learned pleader for the appellant is that as the plaintiffs had not complied with the order passed in the former suit that they were to pay the defendant's costs, the suit was bad *ab initio*, and ought to have been dismissed on that ground. The provisions of law dealing with the consequence of withdrawal of a suit are to be found in S. 373 of the Code of Civil Procedure. If that section were not in existence there is no other provision of law by which a plaintiff after withdrawing a suit would be precluded from bringing a fresh suit, in respect of the same cause of action. Now, what is the effect of S. 373 as regards the

When a plaintiff is permitted to withdraw from a suit on certain conditions and he does not fulfil the conditions imposed, he must be taken to have withdrawn without the permission of the Court, and be precluded from bringing a fresh suit for the same matter. When a plaintiff withdraws without permission, the suit, having regard to the language of the section, must be regarded as practically dismissed.^(18-a)

So also if the order be that the costs be paid within a specified time and that is not done, the withdrawal must be taken to be without permission; ⁽¹⁹⁾ though the Court has power to extend the time for payment when it is absolutely impossible for the party to pay such costs before the day fixed.⁽²⁰⁾

bringing of fresh suits? The second paragraph lays down (I only quote the words that are necessary for the discussion of this point) that, if the plaintiff withdraws from the suit without the permission of the Court, he shall be precluded from bringing a fresh suit for the same matter. Therefore, the only persons who are *prima facie* precluded from bringing a fresh suit are those who withdraw from the former suit without permission to bring a fresh suit on the same cause of action. Now in the present case the plaintiffs had received such permission and the second paragraph of S. 373 does not therefore stand in their way. But it is said that there was an express order that the plaintiffs should pay the defendant's costs. We have not the order on the record. We may take it that the payment of costs was meant by the order to be a condition precedent to the bringing of a fresh suit.

But then the question arises, does that necessarily make the suit void *ab initio*, and will not the subsequent payment of the defendants' costs cure the undoubted irregularity?

There is no express provision by the Indian Legislature as to the consequences of such a course of conduct. But we have referred to the rules of the Supreme Court, 1883. O. XXVI, r. 4, runs as follows: "If any subsequent action shall be brought before payment of the costs of a discontinued action for the same, or substantially the same cause of action, the Court or a Judge may, if they or he think fit, order a stay of such subsequent action, until such costs shall have been paid."

We think that the rule there laid down would be fair rule for the Courts in this country to follow, in the absence of any statutory enactment in the matter, and that though a Court would be warranted in refusing to proceed with a suit like this when the facts are brought to its notice that the plaintiff had not complied with the order requiring payment of costs, yet there is nothing in the law to show that a suit instituted under such circumstances is bad *ab initio* and must *ipso facto* be dismissed, if the payment ordered is made after its institution." *Abdul Aziz Molla v. Ebrahim Molla*, 31 C. 965 at pp. 967, 968.

(18-a) *Hari Nath Dass v. Syed Hossainali*, 2 C.L.J. 480=10 C.W.N. 8. A plaintiff cannot, having regard to sub-S. 2 of S. 43 of the Code of Civil Procedure, bring an action for a claim which he ought to have included in a former suit brought by him which had been practically dismissed. *Hari Nath Dass v. Syed Hossainali*, 2 C.L.J. 480=10 C.W.N. 8.

(19) *Harinath v. Syed Hassain*, 10 C.W.N. 8=2 C.L.J. 480; *Fisher v. Nagappa*, 33 M. 258.

(20) *Peria Muthirian v. Karappanna*, 29 M. 370.

In a recent case where permission to withdraw a suit on payment of costs with liberty to institute another had been granted, but the subsequent suit was brought before the costs had been paid, it was held that it was barred because the former suit was still pending, but that on a later payment of the costs the withdrawal became complete.⁽²¹⁾

In the above case, a suit was allowed to be withdrawn by the plaintiff, with liberty to bring a fresh suit on the same cause of action if not barred, on condition of paying costs to the defendants. A subsequent suit having been brought on the same cause of action without paying the said costs of the defendants, the Munsiff held that the suit was barred for non-payment of costs and dismissed the suit: *Held*, that the Munsiff was not entitled to dismiss the suit; all that he could do was to regard S. 10 as a bar to his proceeding with the trial of the suit, inasmuch as the permission was not operative until the costs were paid, and so there was no withdrawal, with liberty to bring a fresh suit, and until there was such withdrawal, the former suit was still pending.⁽²²⁾ It was further held that the lower appellate Court was right when, on payment of the costs, the decree of dismissal by the Munsiff was set aside and the case sent back to be tried on the merits; for, on payment of these costs, there was the withdrawal complete under O. XXIII (Act V of 1908) of the Code.⁽²³⁾ In cases of this kind the proper order is one which limits the time within which the payment should be made and which goes on to direct that on failure to pay within that time the original suit is dismissed with costs.⁽²⁴⁾

A, having brought an action against B, was allowed to withdraw with leave to bring a fresh suit, and was also ordered to pay the costs. *Held* that the payment of the costs not having in terms been made a condition precedent to bringing a fresh suit, the Court had no power to stay proceedings on the ground that the costs had not been paid.⁽²⁵⁾

(21) *Shital Prosad v. Gaya Prosad*, 19 C.L.J. 529, approving *Abdul Aziz v. Ebrahim Molla*, 31 C. 965.

(22) *Shital Prosad Mondal v. Gaya Prosad Dingal*, 19 C.L.J. 529.

(23) *Shital Prosad Mondal v. Gaya Prosad Dingal*, 19 C.L.J. 529. (Referring *Abdul Aziz Molla v. Ebrahim Molla*, 31 C. 965 and *Edgington v. Proudman*, (1832) 1 Dowl. 152.)

(24) *Shital Prosad Mondal v. Gaya Prosad Dingal*, 19 C.L.J. 529.

(25) *Chitto Sheik v. Kaze Muzaur Hossain*, 2 Hyde 212. *Held*, further, that the Court of appeal had no power to entertain the question, as the order was in the nature

An order made by a Court in a suit brought by one of several members of a joint family for recovery of money due on a promissory note, permitting the plaintiff to withdraw from the suit with leave to bring a fresh suit subject to limitation and on condition that he must pay or deposit the defendant's costs before bringing a fresh suit, is not binding upon the other members of the joint family who were not parties to the suit, and a subsequent and fresh suit brought by the previous plaintiff and the other members of the family cannot, so far as the latter are concerned, be dismissed on the failure of the former depositing or paying into Court the costs as ordered, but must be tried out so far as they are concerned and in the presence of the other plaintiff, whom they are entitled to ask to be joined as a party defendant to the suit.⁽²⁶⁾

The deposit of costs on a day subsequent to the presentation of the plaint may be treated as a sufficient compliance with the order made in the previous suit.⁽²⁷⁾

Where no question of limitation arises, the subsequent suit may be taken to have been duly instituted, as regards all the plaintiffs, on the day on which the costs were deposited.⁽²⁸⁾

Where a party has been permitted to withdraw from a suit with liberty to bring a fresh suit if he should pay costs within a named date, the Court has power to extend the time for payment when it is absolutely impossible for the party to pay such costs on or before the day so fixed.⁽²⁹⁾

Costs, power of Court to extend time for payment of.

of an interlocutory one, and therefore not within its jurisdiction. *Chitto Sheik v. Kasee Muzzur Hossain*, 2 Hyde 212.

(26) *Gopi Lal v. Lala Nagan Lal*, 14 C.L.J. 105 = 10 Ind. Cas. 7 = 15 C.W.N. 998.

(27) *Gopi Lal v. Lala Nagan Lal*, 14 C.L.J. 105 at p. 106 = 10 Ind. Cas. 7 = 15 C.W.N. 998. (Referring to *Abdul Aziz Molla v. Ebrahim Molla*, 31 C 965; explaining and distinguishing *Hare Nath Das v. Syed Hossain Ali*, 10 C.W.N. 8.)

(28) *Gopi Lal v. Lala Nagan Lal*, 14 C.L.J. 105 = 10 Ind. Cas. 7 = 15 C.W.N. 998. (Referring to *Jeun Muchi v. Budhiram Muchi*, 32 C. 339.)

(29) *Peria Muthirian v. Karappanna Muthirian*, 29 M. 370. Justice Subramania Iyer said in the course of the judgment:—"The order of the District Munsif was that costs were to be paid on or before the 24th June 1904. It was not however till the 11th July that the amount of the costs was ascertained and even then the amount was incorrect and it was not till the 29th July that the correct figures were given. Application for extension of time in which to pay was made on the 30th July. We must hold that the District Munsif exercised a sound discretion in extending the time for payment inasmuch as it was absolutely impossible for the plaintiffs to pay the amount of costs into Court on or before the date originally fixed, i.e., the 24th June." *Peria Muthirian v. Karappanna Muthirian*, 29 M. 370 at p. 371.

On an application to set aside an *ex parte* decree the Court passed an order in favour of the applicants, but conditional on their paying to the plaintiff by a certain date a sum of money as damages. This condition was not fulfilled, and the Court—holding that it had no jurisdiction to receive the prescribed payment after the date fixed—disallowed the defendant's application to set aside the decree. *Held* (1) that an appeal lay from this order, and (2) that the Court below had jurisdiction to extend the time for payment of the damages or to pass a fresh conditional order setting aside the decree upon terms, the original order having become inoperative.⁽³⁰⁾

Scale of costs
when suit
withdrawn.

In a suit on mortgage against the respondents they pleaded discharge and want of notice. The Subordinate Judge framed issues on those pleas and required the respondents to prove them. The evidence was taken on both sides and the case on those issues argued. Then the appellants withdrew their suit as against the respondents. The Subordinate Judge in the decree that was passed ordered the respondents to bear their own costs. On appeal the District Judge ordered the appellants to pay the costs of the respondents in the suit. *Held* that since there was a decree passed in the suit an appeal lay to the District Judge against the order of the Subordinate Judge relating to costs and the former could interfere with the discretion of the latter in making the order.⁽³¹⁾ It was also held that the District Judge had power to award two sets of costs on the ordinary scale under O. XXIII, r. 1, sub-cl. (3) of the Civ. Pro. Code.⁽³²⁾

Plaintiff having added Government as a defendant withdrew his suit against them on an answer being filed by them. Plaintiff was rightly ordered to pay half the full fee to the Government Vakil. The Court below having in its decree made the Government liable to pay the other half, *held* that the Vakil was entitled only to half the full legal fee, and that that amount should be payable as ordered by the Court below, by the plaintiff.⁽³³⁾ The discretion of

(30) *Jagarnath Sahi v. Kamta Prasad Upadhyaya*, 36 A. 77=12 A.L.J. 38 (distinguishing *Suranjan Singh v. Ram Bahal Lal*, 35 A. 582).

(31) *Indoor Subama Reddi v. Nelatur Sundararaja Iyengar*, 18 M.L.T. 460.

(32) *Ibid*,

(33) *Government v. Musst. Imambandee*, 4 Sud. Dew. Adaw. Rep. Bengal (1848) 422=10 Ind. Dec. Old Series, p. 289.

the Court in awarding costs under S. 35, Civ. Pro. Code, is not absolute.⁽³⁴⁾

In a land acquisition case, full costs can be allowed only if it is dismissed on the merit. But when the case is withdrawn half of the full costs should be awarded.⁽³⁵⁾

Scale of cost
in case of
withdrawal
of land
acquisition
cases.

The Court-fee paid on that part of the claim which is subsequently withdrawn cannot be allowed as costs.⁽³⁶⁾

(34) *Indoor Subama Reddi v. Nelatur Sundararoja Iyengar*, 18 M.L.T. 460; Referring to *Bew v. Bew*, (1899) 2 Ch. 467; *Namberumal Chetty v. Krishnaji*, 15 M.L.T. 263, and not following *Parshram v. Dorabji*, 2 Bom. L.R. 254.

(35) *Nanhilal Agrari v. Secretary of State for India*, 5 Ind. Cas. 770=11 C.L.J. 217. Justice Mookerjee and Justice Teunon said in the course of the judgment:—"The claimant applied for leave to withdraw the cases; he was allowed to do so by the District Judge;" but was directed to pay full costs to the Government. It has been argued before us that as the cases were withdrawn and as in fact they never came to be heard, an order for payment of full costs should not have been made. In our opinion, this contention is well-founded. Rule 36 (b) of Chapter VI of the Rules and Circular Orders of this Court provides that "cases under Part III of the Land Acquisition Act shall be deemed to be suits and the fees allowable therein may be calculated either on the amount of compensation decreed in excess of the sum tendered by the Collector or on any smaller amount which the Court in its discretion may think proper." Rule 37 (b) then provides that "if a suit be dismissed for default, the amount of the fee to be paid to the defendant's pleader shall be left to the discretion of the Court, provided that such fee shall not exceed the moiety of the fee calculated on the whole value of the suit under Rule 35." The learned District Judge, however, appears to have applied Rule 37 (a) and allowed full costs. But full costs can be allowed only if a suit has been dismissed on the merits. It is obvious, therefore, that in no event should an order for costs have been made in excess of half the full fees of the suit. We, therefore, direct that, so far as Rule No. 1462 is concerned, the order for costs be modified to this extent, namely, that the claimant do pay to the Government half the full pleader's fees payable. The petitioners are entitled to their costs in this Court. We assess the hearing fee at one gold *mohur* in each case, to be paid by the Secretary of State, and not by the Railway Company who have not resisted these applications. *Nanhilal Agrari v. Secretary of State for India*, 5 Ind. Cas. 770=11 C.L.J. 217.

The petitioner was the claimant in several Land Acquisition cases in which references had been made to the District Judge upon receipt of an additional sum out of Court from the Railway Company for whose benefit the lands had been acquired. He applied for leave to withdraw the suits. The Court granted the application, but made him liable for the full hearing fees to be paid to the Government Pleader. *Held*, (Mookerjee and Teunon, JJ.). 1. When a suit has been withdrawn or dismissed for default the maximum amount of pleader's fee to be paid to the defendant is half the ordinary fee under Rules 36 (b) and 37 (b) of Chapter VI of the Rules and Circular Orders of the High Court. 2. When analogous suits are so dismissed for non-prosecution, the Court has discretion as to costs and would not allow half the full fee in each case. In the present instance the High Court reduced the fees in the lower Court to half the fee in one case and one gold *mohur* only in each of the other cases. *Nanhi Lal v. Secretary of State*, 10 C.L.J. (Journal Portion), p. 83-n.

(36) *Ram Jiyawan v. Raja Mahomed Abdul Hassan Khan*, 23 Ind. Cas. 291.

Pleader's
fees.

Where a suit is not decided on the merits after contest but is withdrawn, the Court acts rightly in awarding the defendant only half his pleader's fee as costs.⁽³⁷⁾

Costs in case
of withdrawal
of Small
Cause suit.

A Small Cause Court is not bound to allow a plaintiff to withdraw a suit on the ground that he had received payment from one of the defendants in the suit, that attempt to withdraw having been made after the plaintiff had succeeded in getting a judgment against two defendants which had been set aside by the Court on various grounds, and a new trial ordered. In such a case the Court may permit the withdrawal of the suit upon the terms of plaintiff paying the 1st defendant's costs.⁽³⁸⁾

Costs,
Practice and
Procedure
as to.

(i) Form of
order.

On withdrawal of a suit under that section, the proper order to be recorded is not one of dismissal, but one simply permitting the plaintiff to withdraw the suit, with liberty to bring a fresh suit for the same matter on payment of costs or otherwise as the Court may direct.⁽³⁹⁾

(ii) What is
proper
compliance
with order
as to pay-
ment of costs.

Where the order of the appellate Court was that unless the plaintiff paid to the defendant the costs of the litigation within a certain time after the arrival of the record in the Subordinate Court, the appeal would stand dismissed with costs, payment into Court to the credit of the defendant would be sufficient compliance with the direction of the appellate Court.⁽⁴⁰⁾

(iii) Interfer-
ence by
Court.

The Court will not interfere in appeal with an order that a plaintiff, who is permitted to withdraw from his suit, should pay the defendant's costs.⁽⁴¹⁾

(37) *The Collector of Muttra v. Bibi Ahmadi Begam*, 5 Ind. Cas. 121. Justice Sir John Stanley, Kt., said in the course of the judgment:—"The only question in this appeal is whether the Court below was right in allowing to the appellant half his pleader's fees and not the full amount of certified fees. In awarding costs as between party and party the Court was bound to follow the provisions of Rules 456 and 457 of the Rules of the 4th of April 1894. Under the former rule a party entitled under a decree to be paid costs in a suit by another party shall not be entitled to a larger allowance for legal practitioners' fees in the suit than the fees mentioned in Rules 457 to 467; and Rule 457 prescribes a scale of fees, only in suits or appeals which are decided on the merits after contest. This case was not decided on the merits after contest but the suit was withdrawn. Under these circumstances, the Court below was right in not allowing fees as in a suit decided on the merits after contest. The right scale of fees in such a case is the scale allowed by the Court below." *The Collector of Muttra v. Ahmadi Begam*, 5 Ind. Cas. 121.

(38) *Ramachandra Sastry v. Papu Aiyar*, 3 M H.C. 27.

(39) *T.R. Doucett v. J. P. Wise*, 1 W.R. 322.

(40) *Bishun Singh v. A.W.N. Wyatt*, 14 C.L.J. 515 at p. 516 = 11 Ind. Cas. 729 = 16 C.W.N. 540.

(41) *T.R. Doucett v. J. P. Wise*, 1 W.R. 322.

An ill advised grant of permission to withdraw a suit with (iv) Revision. leave to sue again under O. XXIII, r. 1 (2) (b), ⁽⁴²⁾ may be such a material irregularity as is contemplated by S. 115, ⁽⁴³⁾ of the Code.

Where the District Munsif granted permission after a substantial portion of the plaintiff's case had been heard, on his affidavit that (1) he could not attend the hearing owing to his brother's death, (2) that he wished for the issue of a commission, (3) that he wished to have certain measurements made and a plan prepared; *held* the discretion was not exercised judicially and the order granting leave must be set aside.⁽⁴⁴⁾

Where a suit was allowed by the Assistant Collector to be withdrawn with liberty to re-file it, and there was an omission to consider the question of costs which resulted in substantial injustice being caused to the defendant, *held* that that amounted to a failure to exercise the jurisdiction vested in the Court, and the order was bad.⁽⁴⁵⁾

It has however recently been held by the Calcutta High Court that, to allow a suit to be withdrawn with liberty to bring a fresh suit, is not deciding a case and therefore a High Court is not empowered either under S. 115, Civ. Pro. Code,⁽⁴⁶⁾ or under the Charter Act to interfere with such an order of the lower Court.⁽⁴⁷⁾

Sec. 45. Witness, costs and expenses of.

Right of witness to costs incurred in appearing to give evidence.

Provisions of the Code of Civil Procedure—Process to be served at expense of party issuing—Costs of service.

Duty of every subject to give evidence when called upon to do so in a Court of law.

Right of witness to have his expenses of attendance tendered to him.

English and American law on the point.

Principle underlying the above rule.

Amount of tender.

What is the amount to be tendered to an expert witness.

Tender to foreign witness.

(42) Code of Civil Procedure (Act V of 1908).

(43) *Aiya Goundan v Jagan Mandalathipathy Gopanna Mauradiyar*, 16 M.L.T. 253.

(44) *Aiya Gounden v. Jagan Mandalathipathi Gopanna Mauradiyar*, 16 M.L.T. 253. (Following *Bai Kashi Bai v. Shidappa Annappa*, 37 B. 632).

(45) *Hori v. Sri Thakurji Maharaj*, 13 A.L.J. (Rev.) 10.

(46) Act V of 1908 (Civ. Pro. Code).

(47) *Bansi Singh v. Kishun Lall Thakur*, 26 Ind. Cas. 203=41 C. 632.

Tender to captain of ship and other sea-faring people.

Tender to married woman.

Tender when witness subpoenaed by both parties.

Tender to party who is a necessary witness in his own case.

Costs, when to be tendered.

Right of suit by witness for recovery of expenses.

(i) English law.

(ii) Indian law.

Waiver by witness of tender of expenses.

Recovery of money paid to witness when the same has not been expended.

Tender of expenses in criminal cases—English law.

Right of
witness to
costs
incurred in
appearing
to give
evidence.

A civil suit brought by a witness to recover costs incurred in appearing to give evidence in a proceeding under S. 145, Criminal Procedure Code, is maintainable.⁽¹⁾

A witness in such a proceeding had asked for his costs in the Magistrate's Court and had been referred to the Civil Court. On his bringing a Civil suit it was held that the principle of *res judicata* did not apply in a matter like this and the suit was maintainable.⁽²⁾ Such a suit may come under S. 70 of the Indian Contract Act.⁽³⁾

A witness is entitled to be paid his expenses by the party at whose instance he has been summoned, although he has not applied for them before giving his evidence.⁽⁴⁾

(1) *Nemai Chandra Ghose v. Ajahar Chowdhury*, 8 C.W.N. 178. On the subject-matter of this section, see Taylor on Evidence, 10th Ed., Vol. II, (1906), Ss. 1246—1261 pp. 892—906; Wigmore on Evidence, Vol. III, pp. 2980—2989; Chand's Costs, pp. 18 and 29. See also Chapter on Taxation of Costs, *infra*.

(2) *Nemai Chandra Ghose v. Ajahar Chowdhury*, 8 C.W.N. 178 (179).

(3) *Ibid.*

(4) *London, etc., Bank v. Mahomed Ibrahim*, 4 B. 619. The Court said in the course of the judgment:—"It is a matter of common justice, that a witness should be paid his expenses by the party at whose instance he had been summoned; but Mr. Starling, for the plaintiffs, relying on para. 2 of Chap. V of the Rules of the High Court, objected that the witness, not having made his claim before giving his evidence, could now recover any sum due to him only by a suit. No order such as I proposed to make, it was contended, had ever been made on this side of the Court. The assertion seems not to have been altogether warranted. On inquiring from the Chief Justice I learn that he has frequently made orders for the payment of witnesses' expenses after they had given their depositions. The case, indeed, is exactly covered by No. 188 of the Rules of the late Supreme Court, which says: 'Witnesses in Civil suits, who have been not paid such reasonable sum for their expenses as the Court shall think fit, may apply to the Court at any time in person to enforce the payment of such sum as may be awarded to them.'" *London, etc., Bank v. Mahomed Ibrahim*, 4 B. 619.

The object of the rule is to provide witnesses with an additional security that they shall not be placed in a worse position for having readily discharged their duty.⁽⁵⁾

A witness who attends the Court on a subpoena is entitled to demand at any time his reasonable expenses of such attendance from the party issuing the subpoena even though he only gives evidence as a witness for a party to the suit other than the party summoning him.⁽⁶⁾

Once sworn, a witness must give his evidence, even though his expenses have not been paid ; but he does not cease, on that account,

(5) *London, etc., Bank v. Mahomed Ibrahim*, 4 B. 619 at p. 621.

(6) *In re Bullock*, 28 B. 647 = 6 Bom. L.R. 1025. Chandavarkar, J., said in the course of the judgment :—"Passing, then, to the merits of Mr. Bullock's (witness's) application, one of the grounds on which it is opposed is that the plaintiff, having subpoenaed him only to produce certain documents, the witness might have deputed his clerk for that purpose instead of attending the Court himself. I do not think this is a reasonable ground to urge. When a witness has been summoned to produce documents, whether he should produce them himself or by one of his servants is a question which must be left to his discretion, unless the summons distinctly tells him that he might depute one of his servants with the document. The next objection urged is that as Mr. Bullock now admits, and as he admitted in his deposition in the suit itself, that he had no documents to produce, he might have saved himself all the trouble and expense of attendance at the Court by simply writing to the attorneys of the plaintiff to that effect. Mr. Bullock says that in a letter written to them previous to the suit he had given that intimation, but Mr. Bicknell points out that the intimation was that Burdett and Company's papers which he had with him had been taken away by one Patuck. I think that the plaintiff's solicitors ought to have clearly ascertained from Mr. Bullock before summoning him whether he had any of the documents they wanted or not. It does not lie in the mouth of a party summoning a witness to produce a document or documents to say that if the witness had no documents to produce he was bound to tell them instead of attending the Court in obedience to the summons. Witnesses are generally laymen not familiar with the law or rules of our Courts, and I should not interpret any rule or law so as to lay a trap for them. Lastly I understand Mr. Bicknell to contend that Mr. Bullock, having given evidence for the defendant, has lost his right to ask for his expenses from the plaintiff. A witness subpoenaed by a party to a cause does not lose his right to be paid the reasonable expenses of attendance at the Court by that party merely because he has not been examined for the said party. In this case there is no doubt the other circumstance that the witness was examined for the other party. But that circumstance cannot, in my opinion, make any difference and extinguish the right which the witness had against the party who subpoenaed him if the witness attended the Court on that subpoena. The only question that remains is—for how many days did Mr. Bullock attend the Court on the plaintiff's account? Mr. Bullock says he attended for four days. At the last hearing of this motion Mr. Bicknell disputed that and insisted that he should be allowed to put Mr. Bullock on oath and ascertain from him the number of days. Mr. Bicknell is not present to-day and no one appears for the plaintiff. Had any one on plaintiff's behalf been present, I should have allowed him to examine Mr. Bullock, but as no one appears, I refer the question of the reasonable expenses to be paid to Mr. Bullock to the Prothonotary to settle." *In re Bullock*, 28 B. 647 (649—650) = 6 Bom. L.R. 1025.

to be under the protection of the Court which has commanded his attendance.⁽⁷⁾

Payments made to witnesses are discretionary allowances, and the Court is averse to reviewing such allowances.^(7-a)

The Court in appointing a Commissioner to take evidence in England expects that the fees of such Commissioner will not exceed those which the Supreme Court in England would allow to a special examiner or commissioner acting in England under its orders. If the parties desire that higher fees should be allowed to the Commissioner whom they name, they should obtain an order from the Judge appointing the Commissioner.^(7-b)

Certain persons connected with a Company then in course of liquidation, who were also some of the defendants in a pending suit brought by the Company (and revived subsequent to the order for winding up by the Official Liquidators) for an account and for the recovery of certain sums alleged to have been paid to the promoters of the Company, having been examined under an order obtained under S. 162 of the Companies' Act, 1882, applied through their

(7) *London, etc., Bank v. Mahomed Ibrahim*, 4 B. 619 (621).

(7-a) *Goculdas Bulabdar Manufg. Co. v. James Scott*, 15 B. 209 (210). In the case of *Amirul Hossain v. Khatruvnessa* (28 O. 567 at p. 570), Rampini and Brett, JJ. said:—Witnesses were summoned if not examined, and arguments were heard, and in these circumstances we do not think it necessary to interfere with the discretion imposed by the law on the Subordinate Judge in assessing the costs of the suit. The appeal is dismissed with costs. In the case of the *Goculdas Bulubdas v. James*, 15 B. 209 at p. 214, Farran, J. said:—The next items for consideration are the payments allowed to witnesses. I am informed that, as to some of these payments there are no vouchers. How far that is so I have not been shown. There is, however, the proved fact that these witnesses were examined and the affidavit of Mr. Rycroft, on information and belief, that they have been paid, was before the Taxing Master and under these circumstances I do not feel constrained to yield to the argument on this head. As to the amount allowed by the Taxing Master to each witness, it does not seem extravagant, but at all events the Taxing Master has exercised his discretion in allowing these sums, and the Court is averse to reviewing allowance such as these, which are discretionary. In the matter of *T. F. Brown & Co.*, 14 O. 219 at p. 229, Trevelyan, J. said:—“*Prima facie* a witness in any proceeding is only entitled to his ordinary expenses, although he might in some of those proceedings be entitled to appear by counsel or attorney as the case might be and be examined by them. It does not follow from that that the other side is to pay him the costs of appearing by counsel and attorney. Inasmuch as there is no precedent for witnesses getting such costs, I think that this is not a case in which such an order ought to be made.”

(7-b) *Goculdas Bulabdas Manufg. Co. v. James Scott*, 15 B. 209 (210).

counsel for costs incurred on such examination : *Held*, that no order as to such costs could be made.^(7-c)

The Code of Civil Procedure provides that "Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs. The Court-fee chargeable for such service shall be paid within a time to be fixed before the process is issued."⁽⁸⁾

Provisions of the Code of Civil Procedure—Process to be served at expense of party issuing—Costs of service.

It is a principle of law well established in all civilized systems of jurisprudence that it is the duty of every citizen, when called upon to do so, to give evidence of what he knows concerning any fact in issue or relevant fact, when evidence of such fact is necessary for the determination of any question pending in a Court of law.⁽⁹⁾

Duty of every subject to give evidence when called upon to do so in a Court of Law.

Sir Francis Bacon said as early as 1612 in the Countess of Shrewsbury's Trial, "You must know that all subjects, without distinction of degrees, owe to the king tribute and service, not only of their deed and hand, but of their knowledge and discovery. If there be anything that imports the king's service, they ought themselves undemanded to impart it; much more, if they be called and examined, whether it be of their own fact or of another's, they ought to make direct answer."⁽¹⁰⁾

The Duke of Argyle in the course of his speech in Parliament in 1742 said: "On the present occasion, my Lords, I pronounce

(7-c) *In re Brown and Company Ltd.*, 14 C. 219. See also the following cases cited in argument in the above case:—A witness, although entitled to the attendance of Solicitor and Counsel—see *Breach Loading Armoury Co., In re Merchants Company* (L.R. 4 Eq. 453)—is not entitled to costs of employing them. *Ex parte Waddell* (L.R. 6 Ch. D. 328, 332). In the case of *In re Cambrain Mining Company*, (L.R. 20 Ch. D. 376), no order was made as to the costs of the witness examined. The cases of *The Bank of Hindustan, China and Japan* (L.R. 10 Eq. 675), and *The Lisbon Steam Tramways case* (L.R. 2 Ch. D. 575), refer only to costs of the particular motions then being heard. So also *In re Financial Insurance Company* (36 L.J. Ch. 687). *In re Contract Corporation, Ex parte Carrier* (40 L.J. Ch. 15) a case of a roving enquiry, only costs of motion were allowed—*In re Land Credit Company of Ireland, Trower and Lawson's case* (L.R. 14 Eq. 8) there is no mention of their being entitled to costs, but costs were to have been given against them if they refused to attend. See, also, the cases of *Ramnidhy Koondoe v. Rajah Ojoodhyram Khan* (11 B.L.R. App. 37); *In the matter of Nursey Kessowji*, 3 B. 271.

(8) See Act V of 1908 (Civ. Pro. Code), O. XLVIII, r. 1.

(9) See Wigmore on Evidence, Vol. III, p. 2963. It was laid down as early as 1844 by the Supreme Court at Calcutta in the case of *the East India Company v. Radakissen Bysack*, *Fulton's Reports* 406=1 Ind. Dec., Old Series, p. 886 that the rule for the examination of witnesses *de bene esse* must be on payment of costs.

(10) 2 How. St. Tr. 769, 778.

with the utmost confidence, as a maxim of indubitable certainty 'that the public has a claim to every man's evidence,' and that no man can plead exemption from this duty to his country." L.C. Hardwicke said on the same occasion. "It is undoubtedly true that the public has a right to all the assistance of every individual."⁽¹¹⁾

"It is the undoubted legal constitutional right of every subject of the realm, who has a cause depending, to call upon a fellow-subject to testify what he may knew of the matters in issue; and every man is bound to make the discovery, unless specially exempted and protected by law."⁽¹²⁾

Willes, J., in *Ex parte Fernandez*,⁽¹³⁾ makes the following remarks:—"Every person in the kingdom, except the sovereign, may be called upon and is bound to give evidence, to the best of his knowledge upon any question of fact material and relevant to an issue tried in any of the Queen's Courts, unless he can show some exception in his favor."

Chief Justice Tilghman, said in *Baird v. Cochran*,⁽¹⁴⁾ "From the nature of society, it would seem that every man is bound to declare the truth when called upon in a Court of Justice. . . . The general welfare will be best promoted by considering the disclosure of truth as a debt which every man owes his neighbour, which he is bound to pay when called on, and which in his turn he is entitled to receive."

Perkins, J., in the case of *Israel v. State*:⁽¹⁵⁾ "It is as much the duty and interest of every citizen to aid in prosecuting crime as it is to aid in subduing any domestic or foreign enemy; and it is equally the interest and duty of every citizen to aid in furnishing to all, high and low, rich and poor, every facility for a fair and impartial trial when accused; for none is exempt from liability to accusation and trial."

(11) 1742, Bill for indemnifying evidence, Cobett's Parliamentary History, XII, 675, 693 (the debate being upon a bill to pardon in advance such witnesses as should criminate themselves in testifying to the frauds of Sir Robert Walpole, Earl of Oxford).

(12) Smith, M.R. in *Butler v. Moore*, McNally, Evidence, 258; Wigmore on Evidence, Vol. III, p. 2906.

(13) 10 C.B.N.S. 339.

(14) 4 S. and R. 997 (400).

(15) 8 Ind. 467 (American).

Justice Smith in the case of *West v. State*,⁽¹⁶⁾ observes:—"In no just sense can the requisition upon a citizen of his attendance upon Court to testify as a witness be considered as the taking of private property for public use, within the meaning of the constitution. The object of that provision in the fundamental law was to protect the citizen from the grasping demands of Government, not to absolve him from any of those various personal duties which every good citizen owes to his country, such as the performance of military duty, obedience to the call of the proper authority for his personal service in suppressing a riot, the apprehension of a felon, affording assistance to officers in making arrests when resisted, and the like. There are very many instances, in which the citizen is required to perform personal service or render aid to his Government, without other compensation than that of his participation in the general good and his enjoyment of the general security and advantage which result from common acquiescence in such obligations on the part of all the citizens alike and which is essential to the existence and safety of society."⁽¹⁷⁾

In *Bennett v. Walker*, Justice Carton says:—"This duty to assist others who stand in need of our assistance for the maintenance of their rights necessarily flows from the relations we bear each other as members of the same community, we being mutually dependent upon each other for security and protection."⁽¹⁸⁾

"Ever since the Statute of Elizabeth in England (and before that time it does not appear what the practice was),⁽¹⁹⁾ the indemnity to which the witness is entitled has been required, at least

Right of witness to have his expenses of attendance tendered to him.

(16) 1 Wis. 209 (233).

(17) Mr. Jeremy Bentham in his draft for a Judicial Establishment, in dealing with this subject says:—"What then? Are men of the first rank and consideration, are men high in office, men whose time is not less valuable to the public than to themselves,—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody! What if, instead of parties, they were witnesses? Upon business of other people's, everybody is obliged to attend, and nobody complains of it. Were the Prince of Wales' the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimney-sweeper and a barrow-woman were in dispute about a halfpenny worth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly." See Bentham's Works, Brownings' Edition, Vol. IV, 320.

(18) 23 Ill. 97 (101).

(19) Wigmore on Evidence, Vol. III, S. 2201, p. 2930.

English and
American
law on the
point.

in *civil causes*, to be tendered to him in advance, at the time of serving the subpoena;⁽²⁰⁾ in lack of this, the witness is not compellable to attend.

A witness who is too *poor* to pay his expenses should be exonerated from a charge of contempt⁽²¹⁾ for non-attendance, when such expenses are not tendered beforehand.

A tender at the trial could not cure the lack of a prior tender.⁽²²⁾ But the witness may waive the tender of the entire amount by accepting less.⁽²³⁾

The taxing officers will be justified,⁽²⁴⁾ under special circumstances, in allowing costs for the attendance of witnesses who have not been subpoenaed, or for the detention of witnesses beyond the

(20) 1562, St. 5, Eliz., c. 9, S. 12. Under the Act of Parliament of the reign of Elizabeth (5 E., c. 9, S. 12) if any person, upon whom any process of subpoena out of a Court of Record shall be served, "and having tendered to him, according to his countenance or calling, such reasonable sum for his costs and charges, as, having regard to the distance of the places, is necessary to be allowed", shall, without lawful cause, neglect to appear, he shall *forfeit* 10*l* and yield such further recompense to the party aggrieved, as the Judge in his discretion shall award. The question as to what constitutes the "*reasonable costs and charges*" of a witness under this statute was, in former times, left very much to the discretion of the taxing officers. It is now largely set at rest by the formal adoption of scales of remuneration. (See Taylor on Evidence, 2nd volume, 10th Edition, 1906. S. 1246.) "This condition was never imposed upon the prosecution in criminal cases. But whether it was equally dispensed with in favour of the *accused* in criminal cases was never settled at common law. So far as early precedent was concerned, the Statute of Elizabeth was passed more than a century before the accused obtained the right to compulsory process for his witnesses. Yet before this became his right, and while it was being permitted as a favour, the early practice seems to have applied to him the rule for parties to civil causes. In later times, the tradition became uncertain, and judicial opinion left the matter in doubt. Finally, by Statute in most of the American states, the wise step was taken of declaring both parties in criminal causes exempt from a tender in advance." (See Wigmore on Evidence, Vol. III, S. 2190, p. 2981). In England there are also scales of allowances to witnesses in criminal cases at quarter sessions or assizes. (Archibald Criminal Prac., pp. 226-233). The scale of remuneration in Courts for the trial of either parliamentary or municipal petitions is by statute (31 & 32 V., c. 125, S. 34, amended by 42 and 43 V., c. 75 and 46 & 47 V., c. 51; continued till 31st December, 1905 by 4 Ed. 7 c. 29) the same as in the High Court. In the County Court witnesses are somewhat less liberally remunerated than in the Royal Courts of Justice. (O.C.R. of 1903, Ord. LIII, rr. 37-44 and schedule in Part 4 of Appendix thereto.)

(21) Phillips' Evidence, I, 13; 1836, *People v. Davis*, 15 Wend. 602.

(22) *Bowles v. Johnson*, 1 W. Bl. 16.

(23) *Goodwin v. West*, Cro. Car. 522 (540).

(24) See *D. of Beaufort v. Ld. Ashburnham*, 1863, 32 L.J. C.P. 97; *Churton v. Frewen*, 1867, 36 L.J. Ch. 660.

actual period of the trial, or for services rendered by skilled witnesses, who either prior to the trial have been employed under the direction of the Court,⁽²⁵⁾ or at the trial have been retained to watch the testimony of other witnesses.⁽²⁶⁾

Professor Wigmore in his great work on evidence in examining the principle underlying the above rule as to the right of the witness to be tendered his expenses before being examined in a Court of law, says:—"The truth is that the whole doctrine of requiring a tender in advance is a questionable one. Its defect is, in the first place, that it tends to create the false impression (27) that the witness' duty runs to the parties and not to the community, and that he is rendering his services for money to the party that desires them. It tends to intensify the wholesome partisan spirit of witnesses and to put them in the position of paid retainers. It lowers the moral level of litigation. Its fault is, furthermore, that it places an unequal burden upon litigants, according as they are more or less able in advance to furnish the money for witness' fees. If a poor man in a criminal cause is entitled, without advances, to the testimony of those who can vindicate him, he is equally entitled to it in a civil cause to defend him from injustice or to aid the enforcement of his right; any distinction in this respect between civil and criminal causes is a false one. Moreover, the question is not whether the parties in civil causes should ultimately bear the expenses of their litigation, and whether litigation should be absolutely free; that is a different problem; here we ask only whether payment in advance is necessary; there are other ways of securing the parties' liability for costs. Nor is it the question whether parties shall be licensed to cause inconvenience to their neighbours by summoning promiscuously a horde of unnecessary witnesses, without risk or hindrance; that abuse can be guarded against by penalties for parties who are found by the Court to have summoned witnesses with wanton superfluity; and in many jurisdictions such measures are provided. Nor is it a question whether the burden of advancing the expenses, shall be thrown by the party upon the witness himself; that burden is not considered by the law as a hardship in criminal cases; nor would it extend to more than the expense of travelling to the place of trial, and even this amount

Principle
underlying
the above
rule.

(25) *Robb v. Connor*, 1874, Ir. R. 9 Eq. 373.

(26) *Ryan v. Dolan*, 1872, Ir. R. 7 Eq. 92.

(27) *Wigmore on Evidence*, Vol. III, S. 2192, pp. 2983, 2984.

could then be reimbursed on arrival; moreover, the witness' actual inability to advance his own expenses is a sufficient excuse in contempt proceedings, for his non-attendance. The real question is simply whether parties who can ill afford the expense shall be put at a relative disadvantage to their opponents who by the mere possession of money are enabled to prepare more freely and effectually for the proof of their cause; and in this aspect the requirement of tender is a plain injustice. For these two chief reasons it should be abolished, as an anomaly in the law and a detriment to justice, surviving by mere force of tradition."⁽²⁸⁾

Amount of
tender.

The amount of the expenses required by the English Statute of Elizabeth to be tendered was to be merely "reasonable";⁽²⁹⁾ and the Judges of England set their faces, from the beginning against any attempt to deduce fixed rules, by nice calculation, for applying this principle;⁽³⁰⁾ There are now definite scale of fees fixed by rules in force in England.⁽³¹⁾ The Indian law also contains fixed rules as to the amount to be paid in each particular cases, whether the witness is required in a civil case or a criminal case.⁽³²⁾

It would generally be seen that in all cases the charges are such as to include three general items, namely, the cost of coming to Court, the cost of returning home, and the cost of sojourning at the place of trial during the time required for attendance.⁽³³⁾

(28) *West v. State*, 1 Wis. 209, 293; 1856, *Israel v. State*, 8 Ind. 467; 1877, *Buchman v. State*, 59 id. 1, 14 (but *distinguishing* the case of an expert, *Wigmore on Evidence*, Vol. III, S. 2203).

(29) *Wigmore on Evidence*, Vol. III, S. 2201, note 2.

(30) *Wigmore on Evidence*, Vol. III, S. 2202, p. 2984. The following from 1684, *Braddon's Trial*, 9 How. St. 1127, 1167 may be noted; Witness for defendant: "My Lord, I shall not give any evidence till I have my charges"; L.C.J. Jeffries "Braddon, if you will have your witnesses swear, you must pay them their charges." Defendant: "My Lord, I am ready to pay it, I never refused; but what shall I give him?" L.C.J.: "Nay, I am not to make bargains between you; agree as you can." 1741, *Chapman v. Pointon*, 2 Stra. 1122, cited in *Wigmore on Evidence*, Vol. III, p. 2984.

(31) See Note (20), *supra*.

(32) For these rules see S. 9, pp. 387--412, *supra*. The rules are mostly framed by the several Local Governments and the High Courts, Chief Courts and Courts of the Judicial Commissioners. For scale of process-fees in criminal cases, see pp. 399--406 note, *supra*.

(33) In English law within these items, no further detailed rates or rules were promulgated; except that, under the statute, the reckoning of all three would vary according to the witness's "countenance or calling,"—a distinction proper enough where the separation of ranks of life was so clear and fixed. *Wakefield's case*, Lee cas. t. Hardwicke 813. The Indian rules also regard to status of the person summoned to give evidence in the matter of fixing the charges to be tendered to him. See pp. 399--406, *supra*.

"In the United States the Policy of varying the amount of expenses to be tendered according to the witness's countenance and calling has been abandoned,⁽³⁴⁾—partly because the theory of social democracy could hardly abide a legal discrimination based on social distinctions, but partly also, it may be presumed, because a lack of fixity in charges tends not only to create uncertainty and dispute as to the witness' obligation, but also to induce undue exactions by witnesses and undue pecuniary payments by parties under cover of the required expenses. By statute, therefore, in the United States of America, the rates to be paid for attendance and for travel are now generally prescribed. What has thus been lost in depriving witnesses occasionally of adequate compensation for expenses of maintenance has probably been more than made up by the removal of the greater disadvantages above mentioned. The three general items, however, of travel to and fro and maintenance at the place of trial are almost universally preserved in these statutes."⁽³⁵⁾

The whole of the necessary expenses, as well of their going to the place of trial, as of their return from it, and also during their necessary stay there, ought to be tendered to them at the time of serving the subpoena.⁽³⁶⁾

The tender must cover "sufficient for his subsistence during his probable stay there."⁽³⁷⁾ Expenses of return ought also to be included.⁽³⁸⁾

Professor Wigmore in his great work on the Law of Evidence considers this question in some detail. He first propounds the question and then gives the answer. He says:—"May an additional, but reasonable, charge, proportionate to the value of time spent and skill exercised, be demanded, as a condition precedent to attendance, by an expert witness, that is, by one who is called to testify, not merely to the facts of his simple observation by eye and ear, but to an opinion drawing from the facts such inferences as are receivable only from persons specially qualified by

What is the amount to be tendered to an expert witness.

(34) This practice of making a difference in the amount to be tendered according to the calling and status of the witness is however retained in the Indian law. See pp. 399—406, *supra*.

(35) Wigmore on Evidence, Vol. III, pp. 2984, 2985. For the witness' action against the party to recover his expenses, see *Pell v. Daubeny*, 5 Exch. 955; *Bliss v. Brainard*, 42 N.H. 255.

(36) *Fuller v. Prentice*, 1 H.Bl. 49.

(37) *Horne v. Smith*, 6 Taunt, 9.

(38) *Newton v. Harland*, 9 Dowl. Pr. 16.

experience or study? This question, it is to be noted, is not whether such witnesses should ultimately be paid larger compensation for their attendance; but whether, as a matter of right and privilege, they are not liable to compulsory process unless such compensation is tendered beforehand. The regulation of the amount of the charges is a large question, involving various considerations, not here to be examined; but the specific question whether the expert witness has any greater privilege than the ordinary witness may be determined independently of the policy of the other measure. At first sight, it might be supposed that the exaction of the valuable special services of an expert, without other than the ordinary witness' pittance, was a hardship which ought not to be imposed: Thus Maule, J. said in the case of *Webb v. Page*: (39) "There is a distinction between the case of a man who sees a fact and is called to prove it in a Court of Justice, and that of a man who is selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment in life. The former is bound as a matter of public duty to speak to a fact which happens to have fallen within his knowledge; without such testimony the Courts of justice must be stopped. The latter is under no such obligation."

To the same effect are the observations of Worden, J. in the American case of *Buchman v. State*.⁽⁴⁰⁾ "The position of a medical witness testifying as an expert is much more like that of a lawyer than that of an ordinary witness testifying to facts. The purpose of his service is not to prove facts in the cause, but to aid

(39) 1 C. & K. 23. According to the practice of Courts in England, "An expert witness called to depose to a matter of opinion is, and has always been, entitled to payment for his services; and the amount of his remuneration depends upon the special contract between himself and the person on whose behalf he is called." *Webb v. Page*, 1843, 1 C. & K. 23.

In the High Court in England, a rule now provides that, "as to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed." Under this rule, a Taxing Officer may, in his discretion, allow to *scientific* witnesses for their attendance larger sums than can be awarded to ordinary witnesses under the general scale of allowances. Moreover, the term "*procuring evidence*," in the English Statute includes all preliminary costs incurred in *qualifying* witnesses to give evidence at the trial." R.S.C. 1883, O. LXV, r. 27, sub-S. 9; *Nolen v. Copeman*, 1873, L. R. 8 Q.B. 84; *May v. Selby*, 1842, 11 L. J. C. P. 223; *Murphy v. Nolan*, 1873, Ir. R. 7 Eq. 498; *Turnbull v. Janson*, 1873, 3 C.P.D. 264; *Mackley v. Chillingworth*, 1877, 2 C. P. D. 273; *Turnbull v. Janson*, 1878, 3 C.P.D. 264.

(40) 59 Ind. 1, 13 (American).

the Court or jury in arriving at a proper conclusion from facts otherwise proved. . . . If physicians and surgeons can be compelled to render professional services by giving their opinions on the trial of criminal cases without compensation, then an eminent physician or surgeon may be compelled to go to any part of the State at any and all times to render such service, without other compensation than such as he may recover as ordinary witness-fees." But this argument is specious only. The grounds upon which it may be concluded that no different privilege should be established for expert witnesses than for others, may be summarized as follows :—(1) The expert is not asked to render professional services as a physician or chemist or engineer; he is asked merely, as other witnesses are, to testify what he knows or believes. (2) The hardship upon the professional man who loses his day's fees of fifty or one hundred or more dollars is no greater, relatively, than upon the storekeeper or the mechanic who loses his day's earnings of two dollars or ten dollars; each loses his all for the day; moreover, though the recoupment of the witness-fee of one or two dollars is relatively greater for the mechanic, yet his risk of losing continued employment by enforced absence is greater than for the professional man, and more than equalizes the hardship to him. (3) It is only by accident, and not by premeditation or deliberate resolve with reference to the litigation, that either has become desirable as a source of evidence; neither the expert in blood stains nor the bystander at a murder has expressly put himself in the way of qualifying as a witness, so that no claim based on a special dedication of services for the case can be predicated of one rather than of the other. (4) The practical difficulty of discriminating between various kinds of experts and their earnings, and between that testimony which they give as such and that which they give as ordinary observers, would be serious, and would introduce confusion and quibbling into the law. (5) Finally, so far as concerns the policy of doing whatever should attract and not deter desirable witnesses, it would seem that no special favour need be shown to expert witnesses. No one will ever refrain from entering a professional calling because of the fear of having to spend his time gratuitously at trials; and yet an ordinary person is often deterred from observing (or disclosing his observation) of a street accident or the like, because of the apprehension of being summoned as a witness; so that the latter sort, if either, should be the one to be encouraged by special compensation." These reasons, in one or

another form, have been expounded in the following judicial utterances.⁽⁴¹⁾

Thus Tindal, C.J., said in the case of *Loneragan v. Assurance Co.*⁽⁴²⁾ : "There is no reason for assuming that the time of medical men and attorneys is more valuable than that of others whose livelihood depends on their own exertions"; Park, J., said in the same case "Time to a poor man is of as much importance as to an attorney." To the same effect are the observations of Manning, J., in *Ex parte Dement* ⁽⁴³⁾ :—"It is not intimated by any of them (the precedents) that a physician, when testifying, is to be considered as exercising his skill and learning in the healing art, which is his high vocation; or that a counsellor-at-law, in the same situation, is exerting his talents and acquirements in professionally investigating and upholding the rights of a client. If this were so, each one should be paid for his testimony as a witness, as he is paid by clients or patients, according to the importance of the case and his own established reputation for ability and skill. But in truth he is not really employed or retained by any person; and the evidence he is required to give should not be given with the intent to take the part of either contestant in the suit, but with a strict regard to the truth, in order to aid the Court to pronounce a correct judgment. Perhaps the attitude of one testifying as an expert, of a matter in respect to which he is made conversant or skilled by his ordinary employment, is not so different as is supposed from that of another who testifies to acts or things done by or between the parties to a cause. It generally happens, that, after all the direct facts of a transaction are brought before a Court, a knowledge of other facts, not part of the dealing or affair between the litigants, is necessary to a proper understanding and decision thereupon. For instance (in proving the value of a commodity sold or the foreign law applicable or the usage of trade in interpretation)...in all these instances, persons who may be wholly unacquainted with the parties to a cause, and know nothing of the transactions between them, may be required to come from their offices and the care of their own important affairs into Court to testify for the benefit of strangers, in regard to matters in which they have themselves become conversant only by attending to their own business. And why are

(41) Wigmore on Evidence, Vol. III, S. 2303, pp. 2985, 2986.

(42) 1 Bing. 729 (731).

(43) 53 Ala. 389 (393).

they required to do so? Because they know things important to the right determination of a controversy pending. . . . For in fact they are all witnesses at last. And the same principle which justifies the bringing of the mechanic from his workshop, the merchant from his storehouses, the broker from change, or the lawyer from his engagements, to testify in regard to some matter which he has learned in the exercise of his art or profession, authorizes the summoning of a physician, or surgeon, or skilled apothecary, to testify of a like matter, when relevant to a cause pending for determination in a judicial tribunal. He would be deposing only to things which he had learned in the course of his occupation or profession, or of the preparation for it, and the disclosure of which to the Court would conduce to a correct understanding of a cause before it. His testimony would concern the administration of justice; and of him, as of other witnesses, it could be justly 'claimed by the public as a tax paid by him to that system of laws which protect his rights as well as others.' . . . It is therefore of vital public interest that the tribunals which pronounce these judgments shall have power to coerce the production of any relevant evidence, existing within the sphere of their jurisdiction, requisite to prevent them from falling into error." Similarly Bissell, J., observed in *Board v. Lee* ⁽⁴⁴⁾:—"It is apparently nothing but a question of relative value; and it frequently happens that the loss of time is a less serious one to the professional witness than to the person engaged in the more active business walks of life."⁽⁴⁵⁾

The following observations of Magruder, J., in *Dixon v. People*, ⁽⁴⁶⁾ may also be noted:—"The grounds upon which the right to such extra compensation on the part of expert witnesses has been sustained have generally been three in number: (1) The first ground is that the time of the expert witness is more valuable than the time of ordinary men, and that, by attendance at Court to give his testimony, such a witness meets with a loss of time. . . . Loss of time, as a ground for claiming extra compensation for services as a witness, applies as well to all ordinary witnesses as to expert witnesses. It is conceded that when any witness, whether he is an expert witness or not, is acquainted with any facts which bear upon the matter in controversy in a litigation, he is obliged to testify; and a distinction is drawn between the testi-

(44) 3 Colo. App. 177 (180); 32 Pac. 841.

(45) Wigmore on Evidence, Vol. III, S. 2203, pp. 2936, 2937.

(46) 168 Ill. 179; 48 N.E. 108.

mony of an expert witness who is acquainted with the facts about which he testifies, and an expert witness who is called upon to give his opinion, in reply to a hypothetical question, without any knowledge of facts. Manifestly, the witness who goes to Court and testifies as to the facts of which he knows is subjected to a loss of his time as much as a witness who goes there to testify as an expert upon a mere matter of opinion. (2) The second ground upon which the claim for such extra compensation is based is that the skill and accumulated knowledge of the expert are his property, and that a man's property should not be taken without just compensation . . . There is no infringement here of a property right. It may be conceded that in a certain sense the knowledge of the physician, acquired by special study, is property; but the question here is, not so much whether certain knowledge is property, as whether the requirement that he shall answer a hypothetical question is a taking of his property. Where he is required to make an application of his knowledge to a particular case, so as to secure a particular result,—such as, for instance, the curing of a disease or the healing of a wound,—then he would undoubtedly be entitled to compensation. A physician or surgeon cannot be punished for a contempt for refusing to make a *post mortem* examination unless paid therefor; nor can he be required to prepare himself in advance for testifying in Court, by making an examination, or performing an operation, or resorting to a certain amount of study, without being paid therefor. But when he is required to answer a hypothetical question, which involves a special knowledge peculiar to his calling, he is merely required to do what every good citizen is required to do in behalf of public peace and public order . . . (3) If the precedent is once established that expert witnesses must be paid a reasonable compensation for their testimony, then it will not be long before such testimony will be offered to the highest bidder. The temptation will be to give opinions in favour of that party to the suit who will pay the highest price. The testimony of expert witnesses will thus become partisan and one-sided. The theory upon which such witnesses are required to testify in cases like this is that they are *amici curiæ*, and that, testifying under the sanction of an oath, they do so, not with intent to take the part of either contestant in the suit, but with a view to arriving at the truth of the matter, and for the purpose of aiding the Court to pronounce a correct judgment. . . . Moreover, if a physician is to be allowed extra compensation as an expert witness, then men

pursuing other occupations which require special experience will have the same right to demand extra fees. A banker will claim that he has earned extra compensation, a merchant will make the same claim, and so with men engaged in other branches of business. It will be easy to say in such cases that the testimony called for is the result of special knowledge and acquired skill, and therefore should be paid for. Almost every law suit involves testimony which is in the nature of opinion, in addition to testimony which speaks of the mere facts within the knowledge of the witness. For instance, A sells B a certain quantity of wheat, and delivers the same, and sues for the price of the wheat. One witness testifies as to the contract, which he heard the parties make. Another testifies to the delivery of the wheat, which he saw delivered. These witnesses testify to actual facts heard and seen. But still another witness, who may know nothing about the facts, may yet be required to state the value of the wheat at the time of the contract, or at the time of the delivery; and he may be required to testify from his knowledge of the market prices of wheat, as given in the market quotations. Such a witness, however, as to the value, and as to market prices, is not regarded as an expert witness who is entitled to extra compensation. . .

(4) It can make no difference whether the suit in which the witness is called upon to testify is a suit between private parties, or is a suit between the State and an alleged criminal. In either case the object is to promote public justice, and to aid the due administration of justice. It is just as important to the peace and good order of society that private controversies should be settled upon correct proofs, and in accordance with truthful testimony, as that criminals who violate the laws of the State should be punished. It is the duty of the ordinary witness and of the expert witness to testify as to facts within his knowledge which bear upon the decision of controversies in the Courts. Such duty devolves upon him as a citizen; and in view of the protection which he receives from the laws of the country, in the matter of his personal liberty, and in the matter of the protection of his property, this duty devolves as much upon a physician who is required to testify as an expert witness in answer to hypothetical questions as it does upon the ordinary witness testifying to facts within his own knowledge.⁽⁴⁷⁾

(47) Wigmore on Evidence, Vol. III, S. 2203, pp. 2937, 2938.

It has therefore been generally held that an expert witness is not entitled to demand additional compensation, other than the ordinary witness-fees, before attending to testimony on the stand.⁽⁴⁸⁾

But from this result certain other questions are to be distinguished. (1) Special services other than attendance to give testimony on a trial are not within the duty of any witness; hence, a professional man is entitled to demand special compensation, for such services as a chemical analysis, a *post mortem* examination, or any work necessary to qualify expressly to furnish testimony.⁽⁴⁹⁾ (2) The rate of charge which may be made for a professional man, not as a privilege or condition precedent, but as the measure of the fee due him after testifying—*i.e.*, the ordinary question of the amount of costs taxable to the party liable or claimable by the witness—depends usually upon the statutes prescribing the rate of compensation for witnesses.

Tender to
foreign
witness.

"In the High Court, if a foreign witness, not accessible by subpoena, whose evidence is material in the cause, refused to leave his home unless remunerated for his trouble, the compensation paid to him, if reasonable in amount, will generally be allowed and taxed against the losing party."⁽⁵⁰⁾

Tender to
captain of
ship and
other sea far-
ing people.

Where the captain of a ship has been detained for a long time in England in order to give evidence on a trial, a large sum, such as £100 in all, may be allowed for his detention."⁽⁵¹⁾

"In the English County Courts, special provision is made for an allowance to sea-faring men, &c., detained on shore."⁽⁵²⁾

Tender to
married
woman.

If the witness be a married woman, the tender should be to her, rather than to her husband.⁽⁵³⁾

Tender when
witness
subpoenaed
by both
parties.

If a person be subpoenaed by both parties, before giving evidence he is entitled to be paid by the party actually calling him

(48) Wigmore on Evidence, Vol. III, S. 2203, p. 2988.

(49) See Wigmore on Evidence, Vol. III, S. 2203, p. 2989; *Ex parte Dement*, 53 Ala. 389 (397); *Clark Co.*, 60 Ark. 204 (207); 29 S. W. 459.

(50) *Loneragan v. Roy*, Ex. Ass. 1831; 7 Bing. 725; *Tremain v. Barrett*, (1815) 6 Taunt. 88.

(51) *Steward v. Steele*, (1842) 11 L.J.C.P. 155; *Mount v. Larkins*, (1832) 8 Bing. 108.

(52) C.C.R. 1903, Ord. LIII., r. 32.

(53) *Goodwin v. West*, (1637), as reported Cro. Car. 522; W. Jon. 430.

all the expenses to which he will be liable, after exhausting what he may have received from the opposite side.⁽⁵⁴⁾

Under very special circumstances, on taxation of costs, subsistence money may be allowed to a person who is a necessary witness in his own cause.⁽⁵⁵⁾

Tender to party who is a necessary witness in his own case.

"The reasonable expenses of a witness ought to be tendered to him at the time when he is served with the subpoena,⁽⁵⁶⁾ or, at least, a reasonable time before the trial;⁽⁵⁷⁾ and even though he actually appears, he cannot be attached for declining to give evidence, unless these charges are paid or tendered.⁽⁵⁸⁾ These expenses now include a reasonable remuneration for loss of time.⁽⁵⁹⁾ He has, however, no right to refuse to be examined on the ground that the expenses incurred by him on former attendances have not been paid."⁽⁶⁰⁾

Costs, when to be tendered.

"The law is not very clear as to the right of a witness who has attended a trial in a civil cause in obedience to a subpoena to recover in an action for his expenses and the loss of time. It was formerly considered that expenses only could be recovered, and these only if either an express contract had been made,⁽⁶¹⁾ or if a contract to pay may be inferred from the fact of attendance at the trial.⁽⁶²⁾ Remuneration for loss of time was considered not to be recoverable on the ground that a witness was bound to attend upon the subpoena and that there was therefore no consideration for any promise to pay remuneration.⁽⁶³⁾ The effect, however, of the Common Law Procedure Act, 1852, and the directions of the Judges thereunder as to the scale of allowances to witnesses, and of the present Rules of the Supreme Court, is to recognise the right of witnesses, in certain

Right of suit by witness for recovery of expenses. (i) English Law.

(54) *Allen v. Yowall*, (1844) 1 C. & Kir. 315 (Rolfe, B.); *Betteley v. M'Leod*, (1837) 6 L.J.C.P. 111.

(55) *Dowdell v. Austral Roy. Mail Co.*, (1854) 23 L.J.Q.B. 369. See *Howes v. Barber*, (1852) 21 L.J.Q.B. 254; *Calvert v. Scinde Rail. Co.*, (1865) 18 C.B. (N.S.) 306.

(56) *Fuller v. Prentice*, (1788) 1 H. Bl. 49.

(57) *Horne v. Smith*, (1815) 6 Taunt. 9.

(58) *Bowles v. Johnson*, (1748) 1 W.Bl. 36; *Newton v. Harland*, (1840) 1 M. & Gr. 956; *Brocas v. Lloyd*, (1857) 23 Beav. 129.

(59) *Working Men's Mutual Soc., In re*, (1892) 21 Ch. D. 831.

(60) *Gaunt v. Johnson*, (1848) 6 Beav. 551.

(61) *Hallet v. Mears*, (1810) 13 East 15; *Goodwin v. West*, (1637) Cro. Car. 522.

(62) *Fell v. Daubeny*, (1850) 20 L.J. Ex. 44.

(63) *Willis v. Peckham*, (1820) 1 B. & B. 515.

cases, to remuneration for loss of time; and in several cases⁽⁶⁴⁾ professional men have been held entitled to recover by action the remuneration provided for by the scale. It is submitted therefore that under the present law a witness subpoenaed in a civil cause may recover from the person on whose behalf he was subpoenaed, not only his bare expenses, but such remuneration as is provided for by the scale. No action lies by the witness against the solicitor who subpoenaed him, unless the solicitor has made himself personally liable by express contract."⁽⁶⁵⁾

(ii) Indian Law.

A witness who attends the Court on a subpoena is entitled to demand at any time his reasonable expenses of such attendance from the party issuing the subpoena, even though he only gives evidence as a witness for the other party.⁽⁶⁶⁾

Waiver by witness of tender of expenses.

"A witness may waive his right to demand the payment of his expenses, and if he does so, either directly, by agreeing to take a less sum than that to which he is entitled;⁽⁶⁷⁾ or indirectly, by accompanying the parties to the place of trial without previously making any claim,⁽⁶⁸⁾ he will be liable to all the consequences of disobedience, should he subsequently refuse to appear as a witness."⁽⁶⁹⁾

Recovery, of money paid to witness when the same has not been expended.

"Conduct-money received by a witness with a subpoena, may be recovered back by the party who paid it, as money had and received, where the attendance of the witness has become unnecessary, and no expenses have been incurred under the writ."⁽⁷⁰⁾

Tender of expenses in criminal cases—English Law.

"In *criminal cases* it is not in general necessary that there should be any *tender of fees*, either on the part of the Crown or of a prisoner, to compel the attendance of the respective witnesses."⁽⁷¹⁾

An exception exists, however, in favour of witnesses, who, living in one distinct part of the United Kingdom, are required to obey subpoenas directing their attendance in another; for these are

(64) *Hale v. Bates*, (1858) El. Bl. & El. 575; *Chamberlain v. Stoneham*, (1869) 24 Q.B.D. 113.

(65) *Robins v. Bridge*, (1837) 3 M. & W. 114.

(66) See *In re Bullock*, 28 B. 647 = 6 Bom. L.R. 1025.

(67) *Betteley v. M'Leod*, (1837) 6 L.J.C.P. 111.

(68) *Newton v. Harland*, (1840) 1 M. & Gr. 956.

(69) *Goodwin v. West*, (1637) Cro. Car. 522.

(70) *Martin v. Andrews*, (1856) 26 L.J.Q.B. 39.

(71) *Pell v. Daubeny*, (1850) 20 L.J. Ex. 44; *R. v. Cousens*, (1850) 3 Russ. C. & M. 599; *R. v. Cooke*, (1824) 1 C. & P. 322.

not liable to punishment for disobedience of the process, unless, at the time of service, a reasonable and sufficient sum of money, to defray their expenses in coming, attending, and returning, has been tendered to them.”⁽⁷²⁾

“In criminal cases the right to costs rests in every case on statute. There is no general provision enabling a Court to award costs in favour of prosecutor or defendant in a prosecution for an indictable offence. In order to encourage the due prosecution of offenders, criminal courts have power to grant to those prosecutors and witnesses for the Crown who attend on recognisance⁽⁷³⁾ or subpoena,⁽⁷⁴⁾ such costs as will reimburse them for the expenses they have incurred, or shall incur,⁽⁷⁵⁾ in all cases of felony,⁽⁷⁶⁾ save one or two.”⁽⁷⁷⁾

Where a witness, in consequence of being taken ill during his attendance at the trial, was put to some extra charges, these have been awarded to him.⁽⁷⁸⁾

Expenses may also be allowed to the prosecutor and his witnesses,⁽⁷⁹⁾ though the accused, who had not been apprehended, and was under no recognisance, did not appear to take his trial.⁽⁸⁰⁾

“By the Common law, alike in England and in America, in all criminal cases, the prisoner is entitled to have compulsory process for obtaining witnesses in his favour.⁽⁸¹⁾ In England, by an Act known as “Russell Gurney’s Act,” and passed in 1867, the Court,

(72) 45 Geo. 3, c. 92, S. 4. See, also, 44 & 45 Vict., c. 24, S. 4, sub-S. 3; and 44 & 45 Vict., c. 69, Ss. 15 and 27. Although the Army Act, 1881, contains no positive enactment enforcing the payment of fees to a witness attending a court martial, such a witness cannot be punished for making default in his attendance, unless previously to the trial he was paid or tendered his reasonable expenses, 44 & 45 Vict., c. 58, S. 126, sub-S. (1-a).

(73) *R. v. Paine*, (1884) 7 C. & P. 136.

(74) *R. v. Sheering*, (1886) 7 C. & P. 440.

(75) *R. v. Lewis*, (1857) Dears & B. 326; *R. v. Cludero*, (1849) 3 C. & K. 205.

(76) By 7 Geo. 4, c. 64, S. 22.

(77) See Taylor on Evidence, 2nd Vol., 10th Edn., 1906, S. 1253.

(78) *In re Mallison*, (1832) 1 Lewin C.C. 132.

(79) *Anon*, (1833) 1 Lewin C.C. 133 (Hullock, B.).

(80) *Flannery’s case*, (1832) 1 Lewin C.C. 133; *Anon*, (1833) 1 Lewin C.C. 134 (Gurney, B.). In August, 1851, the Home Secretary in England was authorised to make regulations as to the amount of costs to be allowed to prosecutors and their witnesses in the criminal cases above stated; and rules on this subject for observance in English Courts were promulgated on the 9th of February, 1853. 14 & 15 Vict., c. 55, Ss. 4, 5, 6, repealing 7 Geo. 4, c. 64, S. 26.

(81) 2 Hawk. P.C., c. 46, Ss. 170, 172; 2 Ph. Ev. 434.

before which any accused person is tried either for felony or misdemeanour, may order that any of his witnesses, who shall appear, on recognisance, shall be paid such sum as will compensate them for the expenses, trouble, and loss of time they may have incurred in attending either before the Magistrate or before the Court.⁽⁸²⁾ By the same Act, on certain charges of misdemeanour,⁽⁸³⁾ which may form the subject of vexatious indictments, the Court, in the event of the accused being acquitted may, under certain circumstances, order his costs, and the costs of his witnesses, to be defrayed by the prosecutor.⁽⁸⁴⁾ A similar power also prevails with respect to certain other misdemeanours."⁽⁸⁵⁾

(82) 30 & 31 Vict., c. 35, S. 5.

(83) See Taylor on Evidence, 2nd Vol., 10th Edn. (1906), S. 1260.

(84) By 30 & 31 Vict., c. 35, S. 2.

(85) "The English Debtors Act, 1869" (32 & 33 Vict., c. 62, S. 16).

CHAPTER XI.

SEPARATE SUIT FOR COSTS.

Suit for costs of a former action.

General rule—Decision of the original Court final.

Reason of the above rule.

Suit for costs in case of abatement of suit.

Suit for costs incurred in Rent and Revenue Courts.

Suit for costs incurred in Mamlatdar's Court.

Suit for costs incurred in suit to compel registration of document.

Suit for costs incurred in execution proceedings.

Suit for costs incurred in unsuccessfully objecting to attachment of property, when attachment was wrongful.

Suit for costs incurred in claim proceedings in execution department.

Suit for costs incurred in criminal cases.

Suit for costs in Criminal Court.

Suit for costs incurred under S. 145, Criminal Procedure Code.

Suit for damages and costs caused by a civil action.

Suit for costs of proceedings in which injunction was wrongfully obtained.

Suit for costs where defendant's conduct exposes plaintiff to injunction.

Suit for costs of proceedings under Act XX of 1864.

Suit for costs of enquiry into a Municipal Election petition.

Suit for costs of defending vendor's title.

Suit for costs between attorney and client.

Suit for costs against third party.

Suit for costs incurred by way of Stamp duty and penalty.

Suit for costs when former action was unnecessary and for collateral purpose.

Suit for costs of improperly defending suit.

Suit for costs when plaintiff had no *locus standi* in former action.

Suit for costs incurred unnecessarily cannot be recovered.

Suit for costs of defending action where liability is undefined.

Suit for costs incurred on account of false assertion of authority by agent.

Suit against tenant for costs of ejecting under-tenant.

Suit for costs and damages incurred in consequence of tenant holding over.

Suit for costs in case of warranty and re-sale.

Suit for costs when action brought on account of plaintiff's own wrong.

Suit for costs of suit in cases of indemnity.

Suit for costs advanced by plaintiff to minor defendants under order of Court.

Suit against Hindu sons for costs decreed against their father.

Suit for costs of action against two persons—Recovery by one.

Suit for costs and damages—Points to be proved.

Suit for costs
of a former
action.

It frequently happens that one person is forced to incur expenses in legal proceedings in consequence of a breach of contract, or tortious act of another. Very often provision is made for the reimbursement of the party by the decree or order of the Court which terminates such proceedings. Apart from the costs and expenses thus allowed by the Court in such proceedings, it is often a matter of considerable nicety to know whether costs so incurred can be recovered as damages by way of separate suit against the offending party. The solution of this question would appear to depend upon the rules as to remoteness of the damage.⁽¹⁾

General rule
—Decision of
the original
Court final.

“In the first place, it is a general principle that the right to costs must always be considered as finally settled in the Court where the question is adjudicated on, to which that right is accessory; so that, if any costs are awarded, nothing beyond the sum taxed, according to the rules of the Court, can be recovered as damages; or if costs were expressly withheld by an adjudication in the particular case, none would be recoverable by suit in any other Court.”⁽²⁾

Accordingly, where A filed a suit for specific performance, to compel B to carry out a contract for the sale of land to him, and the suit was dismissed without costs according to the practice in Chancery, because B could not make out a good title, it was ruled that these costs could not be recovered as damages for breach of contract in an action by A against B.⁽³⁾

(1) See Mayne on Damages, 8th Ed., p. 102. On the subject-matter of this chapter see Mayne on Damages, 8th Ed., pp. 102—125; see, also, *Jadeja Ramabhon v. Mehta Dharamshi*, 4 K.L.R. 330. As to suits for recovery of costs incurred by Government, see *The Government of Bengal v. Shurruffutoonissa*, 3 W.R. (P.C.) 31=8 M.L.A. 225. Where costs are incurred in prosecuting a suit but no provision is made in the decree, the proper course is to ask for a supply of the omission, and not to bring a separate suit to recover the same. By the term ‘costs’ is meant the whole of the expenses incurred by either party on account of the suit. *In re A reference by the Judge, S.C. Court. Amritsar*, 73 P.R. 1867 (referred to in *Durbar Singh v. Teeka Devee*, 88 P.R. 1868). Judge may on review extend the order and grant costs, but unless included in the order, plaintiff has no right to recover costs by a separate action. 2 Mad. Jur. 376.

(2) *Hathaway v. Barrow*, 1 Campb. 151; *Sinclair v. Eldread*, 4 Taunt. 7; *Jenkins v. Biddulph*, 4 Bingh 160; *Grace v. Morgan*, 2 Bing. N.C. 534; overruling *Sandbank v. Thomas*, 1 Stark 306; *Doe v. Hare*, 2 Dowl. 245; *Symonds v. Page*, 1 C. & J. 29; *Doe v. Filliter*, 13 M. & W. 47 (49); Mayne on Damages, 8th Ed., p. 102.

(3) *Malden v. Fyson*, 11 Q.B. 292.

And similarly, where a judgment was set aside for irregularity, but without costs, and the plaintiff afterwards brought an action for seizing his goods under the judgment, he was not allowed to recover as special damages the costs of setting it aside."⁽⁴⁾

"The reason of this rule appears to be that costs are, in theory, supposed to be a compensation for the expenses justly and properly incurred in the action.⁽⁵⁾ Therefore, any costs incurred beyond those allowed must be assumed to have been unnecessary; and where costs have been refused, it must be assumed that they were refused on account of some fault in the party to whom they were denied. In either case they would be too remote to be a ground of damage against a third person."⁽⁶⁾

Reason of the
above rule.

(4) *Loton v. Devereux*, 3 B. & Ad. 343. But for this purpose, it is necessary that there should be an actual adjudication against the plaintiff's right to costs. See *Mayne on Damages*, 8th Ed., p. 103. A having been illegally arrested on mesne process, applied to the Court for his discharge. The rule was referred to a Judge at Chambers, who ordered him to be released, and would have given him the costs of the rule, if he had undertaken not to bring an action. On his refusal, no order was made as to costs. He then brought an action of false imprisonment, and it was held that he was entitled to recover those costs as special damage. *Pritchett v. Boevey*, 1 C. & M. 775. See as to sums paid to secure release, *Clark v. Woods*, 17 L.J.M.C. 189; *Norton v. Monckton*, 11 Times L.R. 242.

(5) See Chapter I, *supra*.

(6) *Mayne on Damages*, 8th Ed., p. 103. Accordingly, costs were refused under the following circumstances: The plaintiff deposited Railway shares with a Bank, which left the full control over its securities to the Manager. He sold the shares and forged the plaintiff's name to the transfer deed. On discovering this fraud the plaintiff filed a bill against the transferee and the Railway Company for a cancelment of the transfer and for the issue of new certificates. He succeeded in his suit, but he was refused costs, the Court being of opinion that he had conducted to the result by his own negligence. He then sued the Bank for these costs. The Court held that the failure to recover these costs, or any ascertainable or separate portion of them, could not be said to have followed naturally or directly as a consequence of the neglect of the Company. Lord Justice James seems to have put this on two grounds. First, that although the Bank might have been negligent in the mode of keeping their securities, and therefore would have been liable for the costs of an action of detinue brought to recover them, if lost, this negligence was not the proximate cause of the plaintiff's loss. The real cause was the Manager's forgery. "Suppose the bailee of a key carelessly allowed the key to fall into the possession of a man who committed a burglary, and by means of that key opened a box which contained valuable property. It is scarcely possible to hold that the negligence of the bailee with regard to the key would be followed by responsibility for the loss of every article obtained by the burglar through the instrumentality of the key." But, secondly, and this was of course, conclusive, he pointed out that one of the reasons why the plaintiff had been refused his costs in the equity suit was, that he himself had unconsciously helped the manager to commit the fraud; the costs, therefore, were not the result of the Bank's negligence, but in a much nearer degree of his own. *Re United Service Co.*, L.R. 6 Ch. 212; 40 L.J. Ch. 286.

Suit for costs
in case of
abatement
of suit.

If a suit abates on the ground that no representative of a deceased defendant is brought on record, there is no provision entitling the representatives of the deceased defendant to come to Court and ask for the costs of the suit.⁽⁷⁾ In this case the Court expressed a doubt whether the representatives can file a separate suit for the costs incurred by the deceased party.⁽⁸⁾

Suit for costs
incurred
in Rent and
Revenue
Courts.

Where a Court has jurisdiction and orders costs, that order is final and binding. Where the Court in which proceedings have been formerly held was not entitled to order costs, and costs have been incurred, they may be made the subject of consideration as to damages in a subsequent suit. Where, as in the present case, the Rent Court in the former suits was entitled to deal with the question of costs, and actually dealt with it, such costs cannot be made the subject-matter of fresh litigation.⁽⁹⁾

(7) *Sivaprakasam v. Palaniyappa Mudaliar*, 22 M.L.J. 429=11 M.L.T. 202= (1912) M.W.N. 382. See pp. 281--287, *supra*.

(8) *Ibid*.

(9) *Mahram Das v. Ajudhia*, 8 A. 452= A.W.N. (1886) 189 (followed in *Kadir Baksh v. Salig Ram*, 9 A. 474= A.W.N. (1887) 95; *Forbes v. Solomon Hayes*, 11 C.W.N. celxiii-N; and referred to in *Doma Tibi v. Jagannath*, 15 C.P.L.R. 129; *Palneappa Chetty v. Maung Shwe Ge*, U.B.R. 1904, C.P.C.p. 4; *Palaneappa Chetty v. Maung Po Saung*, U.B.R. 1905, C.P.C.p. 18; *Salig Ram v. Tibi Ram*, 5 A.L.J. 140=A.W.N. (1908) 18.) Mahmood, J., said:—"The third point relates to the sum of Rs. 9-2 the costs of litigation in the Rent Court. Upon this point I am anxious to state the reasons for my conclusions, because there exists some conflict of authority. In the case of *Chengulva Raya Mudali v. Thangatchi Ammal*, 6 M.H.C.R. 192, the Full Bench of the Madras High Court laid down the rule that an action lies in a Small Cause Court for the recovery of costs incurred by the plaintiff in a suit to compel registration of a document. The ratio of this ruling, and in particular of the judgments of Scotland, C.J., and Holloway, J., was that, inasmuch as the Registration Act omitted to provide for costs incurred by a party in the course of obtaining registration, therefore the ordinary Courts were entitled to deal with such costs as ordinary damages. Opposed to this view is a decision of the Bombay High Court in *Jalam Punja v. Khoda Javra*, 8 E.H.C.R. A.C. 29, in which Westropp, C.J., held that no action lies for the recovery of costs incurred by a defendant in defending himself in a possessory suit brought against him in a Mamlatdar's Court under Bombay Act V of 1864. So also in *Kabir v. Mahadu*, 2 B. 360, where a more reasonable view was adopted. It was there held that an action brought to recover costs of proceedings held under Act XX of 1864, is not maintainable when the Court before which such proceedings were taken has made no order as to the payment of such costs. A similar view was taken in *Pranshankar Shivshankar v. Govindlal Parbhudas*, 1 B. 467 where it was ruled that no action is maintainable for damages occasioned by a civil action, even though brought maliciously and without reasonable and probable cause, nor will it lie to recover costs awarded by a Civil Court. This no doubt shows some conflict of authority. My own view is, that the real principle is not limited to damages in tort. Wherever a Court has jurisdiction and a civil suit is brought for the recovery of costs which might have been dealt with in the former litigation, the question may be made the subject of a plea *in limine* upon a matter of

No action can lie for the recovery of costs incurred in the Mamlatdar's Court in defending a claim for possession of land under Bombay Act V of 1863.⁽¹⁰⁾

Suit for cost incurred in Mamlatdar's Court.

An action lies in a Small Cause Court for the recovery of costs incurred by the plaintiff in a suit to compel registration of a document.⁽¹¹⁾

Suit for cost incurred in suit to compel registration of document.

procedure. S. 18 of the Civ. Pro. Code lays down the general rule of *res judicata*, and it is possible that this rule would in such a case be applicable by analogy. But whatever view may be adopted, the *ratio* depends upon the same principles. Where a Court has jurisdiction and orders costs, that order is final and binding. But where the former Court is not entitled to order costs, and costs are incurred, they may, in my opinion, be made the subject of consideration as to damages in a subsequent suit. In the present case the Rent Court in the former suits was entitled to deal with the question of costs, and dealt with it, and they cannot be made the subject-matter of fresh litigation. I am therefore of opinion that the costs cannot be claimed in this suit. For these reasons I concur in the order proposed by the learned Chief Justice." *Mahram Das v. Ajudhia*, 8 A. 452 at 460 and 461 = A.W.N. (1886) 189.

(10) *Jalam Panja v. Khoda Javra*, 8 B.H.C.R.A.C. 29 [referred to in *Mahram Das v. Ajudhia*, 8 A. 452 (461) = A.W.N. (1886) 189; *Palneappa Chetty v. Maung Shwe Ge*, U. B.R. 1904, C.P.C. p. 4; distinguished in *Ramlal v. Bhagubhai*, 2 Bom. L.R. 960 (963).]

(11) *Chengulva Raja Mudali v. Thangatchi Ammal*, 6 M.H.C.R. 192 = 6 Mad. Jur. 303 [referred to in *Mahram Das v. Ajudhia*, 8 A. 452 (460) = A.W.N. (1886) 189; *Pranshankar Shivshankar v. Govindhal Parthudas*, 1 B. 467 (468); *Palneappa Chetty v. Maung Shwe Ge*, U.B.R. 1904, C.P.C. p. 5; *Kumarappa Chetty v. Nga Pyi*, U.B.R. 1905, C.P.C. p. 21, Holloway, J. said:—"The question is whether the plaintiff can recover in the Small Causes Court the costs incurred in compelling registration. The general rule is that costs, where adjudicable upon, are not an element in calculating damages. Under the Registration Act it has several times been decided that costs cannot be given, and in the present case they were not given. It seems, therefore, that if the transaction between the parties imported an obligation to get the document registered, and, through refusal to perform it, the plaintiff was put to the costs in the suit rendered necessary by defendants' breach, those costs are recoverable in the Small Causes Court." Kindersley, J., said in the same case:—"I am inclined to concur in this opinion. As the Civil Court had no power to make any order for costs, there seems to be no sound objection to the recovery of costs by a separate suit." Scotland, C.J., said in the same case:—"I think that the suit was maintainable. The District Court had no power to grant the costs of the special remedy provided by the Registration Act XX of 1866, and I do not see anything in the Act to preclude the plaintiff, who has been improperly driven to pursue that remedy, seeking to recover the necessary expense to which he has been put. The suit then is really one for damages, and assuming the sums claimed to have been reasonably expended in the proper conduct of the proceedings necessary under the Act, I apprehend the plaintiff is entitled to recover those sums, on the general principle that they are the damages directly and proximately consequent upon a legal injury caused by the conduct of the defendant. It seems to me that out of the contract to sell and transfer the defendant's title to the property by a written instrument, there necessarily arose the implication of the duty to do what on his part was required, in order to effect registration (see section 36), without which the instrument could not be effectual to pass the title in accordance with the contract. Upon the ground, therefore, that the defendant's refusal to appear

Suit for costs incurred in execution proceedings.

Inasmuch as where a Court, having jurisdiction, orders or refuses costs, a separate action for such costs cannot be brought, the plaintiff would not be entitled to recover from the defendant the costs incurred by him in the execution department.⁽¹²⁾

Suit for costs incurred in unsuccessful attachment of property, when attachment was wrongful.

A suit will lie to recover costs in unsuccessfully objecting to attachment of property in execution of decree when the attachment was wrongful, and that it is not necessary for the plaintiff to prove that the defendant acted maliciously or without probable cause in making the attachment or resisting the application to have attachment removed.⁽¹³⁾

In the course of the judgment in the above case, their Lordships said:—“One of the latest and most authoritative of the decisions bearing on this subject is that of the Privy Council in *Kissori Mohon Roy v. Harsuk Das*⁽¹⁴⁾ where their Lordships said: “The appellants argued that the respondent could not recover unless he alleged and proved that they had litigated maliciously and without probable cause. That is a rule which obtains between the parties to a suit when the defendant suffers loss through its institution and dependence. It does not apply to proceedings taken by the injured party after the wrong is done to obtain redress. But in this case there has been

and acknowledge his execution of the instrument, which prevented registration, was a breach of his obligation in that behalf under the contract of sale, and consequently a legal injury to the plaintiff, I give my opinion in the affirmative on the question referred.” *Chengulva Raya Mudali v. Thangatchi Ammal*, 6 M.H.C.R. 192 (193, 194) = 6 Mad. Jur. 303.

(12) *Kadir Baksh v. Salig Ram*, 9 A. 474 = A.W.N. (1887), 95 (following *Mahram Das v. Ajudhia*, 8 A. 452; referred to in *Gayuddin v. Gauri*, U.B.R. 1897—1901, Vol. II, 426; *Doma Teli v. Jagannath*, 15 C.P.L.R. 129; *Palneappa Chetty v. Maung Shwe Ge*, U.B.R. 1904, C.P.C., p. 4; *Palneappa Chetti v. Maung Po Saung*, U.B.R. 1905, C.P.C. p. 16; *Forbes v. Solomon Hayes*, 11 C.W.N. cclxiii; *Salig Ram v. Tika Ram*, 5 A.L.J. 140 = A.W.N. (1908) 18).

(13) *Kumarappa Chetti v. Nga Pyi*, U.B.R. 1905, Civ. Pro. Code, p. 18 (referring to *Mahram Das v. Ajudhia*, 8 A. 452; *Kadir Baksh v. Salig Ram*, 9 A. 474; *Kabir v. Mabuo*, 2 B. 362; *Subjan v. Sariatullah*, 3 B.L.R.A.C., 413; *Goma Mukad Patel v. Gokul Das Chimji*, 3 B. 74; *Palneappa Chetti v. Maung Shwe Ge*, U.B.R. 1904, C.P.C., p. 4; *Bhagwan Das v. Law Shin*, U.B.R. 1897—1901, Vol. II, 429; *Kissori Mohan Roy v. Harsuk Das*, 17 I.A. 17; *Walker v. Oläing*, 1 H. & C. 621; *Chengulva Raya Mudali v. Thangatchi Ammal*, 6 M.H.C.R. 192; *Anonymous*, 3 M.H.C.R. 341; *Jalam Panja v. Khoda Javra*, 8 B.H.C.R. A.C. 29; *Pranshankar Shivshankar v. Govindhal Parbhudas*, 1 B. 467).

(14) 17 I.A. 17, cited in *Bhagwan Das v. Law Shin*, U.B.R. 1897—1904, Vol. II, 429.

no action, and no proceeding instituted by the Appellants against the Respondent. . . . The summary proceeding under section 278 was taken by the Respondent for the purpose of getting the release of an attachment issued in a suit to which he was not a party; and it does not appear to their Lordships that in order to entitle him to recover full indemnity for the wrongful attachment of his goods, the Respondent is bound to allege and prove that the Appellants resisted his application maliciously and without probable cause. The Appellants relied mainly upon the English case of *Walker v. Olding*⁽¹⁵⁾ which was cited as an authority for the proposition that a judgment-creditor is not responsible for the consequences of a sale, under a judicial order, of goods illegally taken in execution in satisfaction of his debt. *Walker v. Olding*⁽¹⁶⁾ would have been an authority of importance had the law of execution been the same in India as in England, but there is in that respect no analogy between the two systems. In England the execution of a decree for money is entrusted to the Sheriff, an officer who is bound to use his own discretion and is directly responsible to those interested for the illegal seizure of goods which do not belong to the judgment-debtor. In India warrants for attachment in security are issued on the *ex parte* application of the creditor who is bound to specify the property which he desires to attach and its estimated value . . . The illegal attachment of the Respondent's jute . . . was thus the direct act of the Appellants for which they became immediately responsible in law, and the litigation and delay and consequent depreciation of the jute being the natural and necessary consequences of their unlawful act, their Lordships are of opinion that the liability which they incurred has been rightly estimated at the value of the goods upon the day of attachment."⁽¹⁷⁾

(15) 1 H. & C. 621.

(16) *Ibid.*

(17) See *Bhagwan Das v. Lawshin*, U.B.R. (1897—1901) Vol. II, 439. In the case of *Subjan v. Sariatullah*, 3 B.L.R. A.C. 413, Norman, J., said: "If a decree-holder having obtained a warrant authorising the attachment of the goods of A, points out to the officer of the Court and causes him to attach and remove goods belonging to B as the goods of A, the decree-holder is a wrong-doer, and cannot in any way justify his proceedings under the warrant. In causing B's goods to be attached and taken out of his possession, he procures a trespass to be done to B. If a man for his own profit and advantage wrongfully or without any warrant in law trespasses on the land of another, takes away his goods or procures his goods to be seized and taken out of his possession he is responsible even though he acts innocently, or mistakenly."

In the case of *Goma v. Gokal*,⁽¹⁸⁾ Westropp, C.J., said : " When the wrongful seizure was made at the special instance of the defendant the cause of action was complete and no question of remoteness of damage seems to us to arise here."

Applicant in execution of a decree wrongly attached certain lime belonging to respondent as the property of the judgment-debtor. The respondent got the attachment removed. While it was under attachment the lime was damaged by rain and the respondent ultimately sold it at a loss. He sued in the Court of First Instance for the difference in value. The Court gave him a decree which was upheld in the Lower Appellate Court. The applicant came up in revision on the grounds that the Lower Courts were in error in holding that by attachment ownership was divested from the owner and made over to the attaching creditor, whereas the only effect of attachment was that the custody of the property was temporarily placed in the Bailiff of the Court. It was argued that the owner remained the owner, and it was therefore his business to roof the shed where the lime was and protect his own property, and if he neglected to do so, he should bear the loss. *Held*,—that a wrongful attachment is the direct act of the decree-holder and not of the officer of the Court, and that the decree-holder, who wrongfully attaches the property of a stranger is a trespasser and wrongdoer, and is responsible for all damage.⁽¹⁹⁾

Suit for costs incurred in claim proceedings in execution department.

Costs incurred by the plaintiff in preferring objections in the execution department, under S. 278, Civil Procedure Code,⁽²⁰⁾ cannot be recovered by a separate suit, even if the Court states no reason for ordering that the costs should not follow the event.⁽²¹⁾

A suit cannot be maintained for costs incurred by the plaintiff in resisting a claim made by the defendant under section 246 of the Code of Civil Procedure, the greater part of which was disallowed.⁽²²⁾ It is only when the costs are made a part of the order, and then by execution under it, that a party can in such cases enforce the payment of costs.⁽²³⁾

(18) 3 B. 74.

(19) *Bhugwan Das v. Maung Law Shin*, 2 U.B.R. (1897—1901), p. 429.

(20) Act XIV of 1882.

(21) *Salig Ram v. Tika Ram*, 5 A.L.J. 140=A.W.N. (1908) 18 (referring to *Makram Das v. Ajudhia*, 8 A. 452, and *Kadir Bux v. Salig Ram*, 9 A. 474).

(22) Referred case No. 5 of 1867, 3 M.H.C.R. 341, referred to in U.B.R. 1904 C.P. C., p. 4 (5).

(23) *Ibid*.

In an action for costs brought by a plaintiff against a defendant for unsuccessfully resisting the attachment of certain property in execution of a decree held by such plaintiff, such costs not having been included in the order made in the proceeding under S. 246, Act VIII of 1859—*Held* that a separate suit was not maintainable.⁽²⁴⁾

A suit will, however, lie to recover costs incurred in unsuccessfully objecting to attachment of property in execution of a decree, when it is shown in a suit under S. 283, Civ. Pro. Code, that the defendant had no colourable justification for attaching the property nor for defending the application for removal of attachment.⁽²⁵⁾

(24) See 2 Mad. Jur. 376.

(25) *Palaneappa Chetty v. Maung Shwe Ge*, U.B.R. 1904, C.P.C., p. 4. Irwin, J., said :—"To my mind the principle that where a Court has jurisdiction and orders costs, that order is final and binding, cannot govern a case in which the substantive order, to which the order for costs was subsidiary, is found to be erroneous. When such an order is set aside in appeal or revision, the order for costs usually shares the same fate as a matter of course, but when there is no appeal, and the summary order is found to be wrong by a procedure which provides, not for setting it aside, but for superseding it, then I think there are much stronger reasons for allowing a suit to recover the costs paid under the erroneous order than there are for allowing a suit to recover the costs incurred in a proceeding in which the Court was not empowered to award costs. In this case respondent had obtained possession of the land with a good title about ten years before the institution of the appellant's suit against the mortgagor. He incurred costs in resisting the wrongful attachment, and was compelled to pay appellant's costs of maintaining the wrongful attachment. The latter ought to be refunded to him because the order to pay them was founded on a manifestly wrong finding which might almost be called perverse. The former stand on a somewhat different footing, and if a suit lies to recover them it must be founded, I think, on the wrongful action of appellant in attaching the property. Is such an act, an abuse of process of law, and is such abuse an actionable wrong? Some light is thrown on this question by Pollack's Law of Torts (6th edition), page 310, and footnote (g). The institution of civil proceedings without reasonable and probable cause is not generally an actionable wrong, but whether the real reason for this rule be that an order for costs is sufficient compensation, or that to allow such suits would prolong litigation *ad infinitum*, neither reason is of any force in the present case. It is not in my opinion expedient that a person who attaches property without taking care to ascertain that it is the property of his debtor should escape from liability to pay any expenses thus caused to the real owner. I am thus compelled to dissent from four learned Judges of the High Courts of Bombay and Allahabad. I do so with great reluctance. To disallow the respondent's claim would not, in my opinion, be consistent with justice, equity and good conscience. I will not go so far as to say that when the plaintiff succeeds in a suit under S. 283 he would in every case be entitled to recover his costs in the summary proceeding. It is not necessary to decide that point now. In the present case the appellant had not colourable justification for attaching the land nor for defending the application for removal of attachment. He called no witnesses, and contended himself with a bare allegation that the ten-year old mortgage was forged and that the land was not in respondent's

Suit for costs
incurred in
Criminal
Cases.

A suit will not lie to recover as damages the expenses incurred by the plaintiff in prosecuting the defendant in a Criminal Court.(26)

No suit will lie to recover costs incurred in defending a criminal prosecution. The only way of recovering such costs is by a suit for damages for malicious prosecution.(27)

In a suit for damage for medical attendance, which the plaintiff alleged he had incurred owing to a wrongful assault by the defendants, and also for the costs of prosecuting the defendants and of defending himself on a charge brought against him by the defendants in the Criminal Court, *held*, (1) that the Judge was right in awarding as damages a fair and moderate sum for medical expenses; (2) that, as to the costs of the prosecution of the defendants in the Criminal Courts, there was no principle of law by which the plaintiff would be entitled to recover those costs, that he was not compelled to prosecute in the Criminal Court, nor to engage the services of counsel or vakils, that, if he chose to prosecute in the Criminal Court, unless the Statute entitled him to costs, he could not recover them; (3) that, as to the claim for costs for defending himself in the Criminal Court, it should fail as it was neither alleged nor proved that the prosecution was malicious or instituted without reasonable or probable cause.(28)

possession. There was nothing to rebut respondent's case, which was fully proved. For this reason I think his attachment of the land and defence of the application for removal of attachment amount to an actionable wrong, and the decision of the Township Court on the application was unreasonable." *Palaneappa Chetty v. Maung Shwe Ge*, U.B.R. 1904, C.P.C., p. 4 (7).

(26) *Fazal Imam v. Fazul Rasul*, 12 A. 166 = A.W.N. (1890) 19, followed in *Churamoni Dasi v. Baidya Nath Naik*, 32 C. 429 (430); *Doma Teli v. Jagannath and Pandu*, 15 C.P.L.R. 129 (130). The Civil Courts are not authorized to take cognizance of suits for the recovery of costs incurred in criminal cases. *Nand Komar Potedar v. Robinson*, (1841) 7 Sel. Rep. 47 = 8 Ind. Dec., Old Series, p. 36. A person who is assaulted can pursue his civil in addition to his criminal remedy; but if punishment in person has been resorted to, that must always be an important element in mitigation in subsequently estimating the amount of penalty to be inflicted in pocket. The contention that, in suits for compensation, the plaintiff should be awarded costs upon the full amount claimed in the plaint, though, as a matter of fact, he has been held entitled to recover a much less sum, is wholly untenable. The equitable order in such cases is to allow the plaintiff only costs on the amount decreed as compensation. *Misir Ramji v. Jiwan Ram and Kidar Nath v. Misir Ramji*, A.W.N. (1881) 131.

(27) *Mahomedali v. Bayama*, 14 B. 100.

(28) *Chandan v. Sumera*, A.W.N. (1887) 104.

In a suit for damages for malicious prosecution, the plaintiff is entitled to recover the costs necessarily incurred by him in defending himself on the criminal charge.⁽²⁹⁾

Suit for costs in Criminal Court.

The plaintiff sought to recover the expenses incurred by him in connection with a case under S. 145 of the Crim. Pro. Code. The Courts below held that the suit was not maintainable. The plaintiff appealed to the High Court and contended that there having been a tort committed by disturbance of the possession of the plaintiff, the plaintiff must be entitled to an action by way of damages for expenses to which he was put by reason of such tort. *Held*—where a Court of competent jurisdiction orders or refuses costs no separate action will lie. A mere delivery of a possessory order by a Criminal Court under S. 145, Crim. Pro. Code, does not necessarily predicate any tort on the part of either of the parties but merely indicates that if they approached each other to claim possession there might be a danger of a breach of the peace.⁽³⁰⁾

Suit for costs incurred under S. 145, Crim. Pro. Code.

No action is maintainable for damages occasioned by a civil action, even though brought maliciously and without reasonable and probable cause; nor will it lie to recover costs awarded by a Civil Court.⁽³¹⁾

Suit for damages and costs caused by a civil action.

A suit for compensation for loss resulting from an injunction wrongfully obtained would lie; and in such a suit the plaintiff need not prove malice.⁽³²⁾

Suit for costs of proceedings in which injunction was wrongfully obtained.

The Code of Civil Procedure allows by implication the power of bringing a suit for damages in such a case, leaving that remedy to those who do not wish to take advantage of the remedy given them by the Act.⁽³³⁾

The reason of the above rule is that "the bringing of an ordinary civil suit does not furnish ground for a suit for damages

(29) *Bunnomali Nundi v. Hurrydass Byragi*, 8 C. 710=11 C.L.R. 265.

(30) *A. H. Forbes v. George Solomon Hayes*, 11 C.W.N. Journal portion 268, following *Maharam Doss v. Ajudhia*, 8 A. 452 and *Kadir Baksh v. Salig Ram*, 9 A. 474 and distinguishing *Nemaichunder Ghose v. Ajahar Cowdhury*, 8 C.W.N. 178.

(31) *Pranshankar Shivshankar v. Govindhlal Parbhudas*, 1 B. 467, followed in *Gayuddin v. Gauri*, U.B.R. 1897—1901, Vol. II, 426; referred to in *Mahram Das v. Ajudhia*, 8 A. 452; *Palneappa Chetty v. Maung Shwe Ge*, U.B.R. 1904, C.P.C., p. 4 *Kumarappa Chetty v. Nga Pyi*, U.B.R. 1905, C.P.C., p. 18 (21).

(32) *Manohar Lal v. Gobardhan Prasad*, 13 O.C. 357.

(33) *Edward Wilson v. Kanhya Sahoo*, 11 W.R. 143.

by the defendant although the suit may have been instituted maliciously and without reasonable and probable cause; but some legal proceedings and some incidental proceedings in civil suits involve damage to the reputation person or property of the defendant and a suit for damages may be maintained with respect to them." (34)

(34) *Manohar Lal v. Gobardhan Prasad*, 13 O.C. 357. Chamier, J.C., and Lindsey, A.J.C., said in the course of the judgment:—"The grounds on which a suit may be maintained for compensation for loss resulting from proceedings taken and processes issued by Courts have been the subject of innumerable decisions. It has been observed that a person against whom proceedings are initiated without reasonable and probable cause is *prima facie* wronged and that it might well have been held that an action always lay for thus putting the law in motion; but it has long since been settled that the bringing of an ordinary civil suit does not furnish ground for a suit for damages by the defendant although the suit may have been instituted maliciously and without reasonable and probable cause. In theory at all events an ordinary civil suit does not necessarily involve damage to the defendant for this reason that the only costs which the law recognises and for which it will give compensation are the costs incurred in the suit itself and for those the successful defendant will be compensated so far as the law chooses to compensate him. If the defendant deserves to get costs he will get them in the suit, if he does not deserve them he ought not to get them by means of a subsequent suit. (See the judgment of Lord Bowen, then Lord Justice, in the *Quartz Hill Gold Mining Co. v. Eyre*, L.R. 11 Q.B.D. 674). But some legal proceedings and some incidental proceedings in a civil suit necessarily involve damage to the reputation person or property of the defendant. In the case of some proceedings a suit may be maintained by the defendant without proof of either malice or want of reasonable and probable cause, for example it has been held both in England and in India that a person whose property is wrongfully seized in execution of a decree passed against another person may maintain a suit, for damages against the decree-holder, provided that he pointed out either in his application or at the scene of the attachment the property which was attached, and it has been held that in such a case the decree-holder is liable even though he acted without malice. It has been held repeatedly that a decree-holder should ascertain that the property belongs to his judgment-debtor before he asks the Court or its officer to attach it, and that if he does not do so he acts at his peril; see *Mussamat Subjan Bibi v. Sheikh Sariatulla* (3 B.L.R.A.J. 413); *Kanai Prasad Bose v. Hira Chand Manu* (5 B.L.R. App. &c., 71); *Syed Ruan-ud-din Hosein v. Musammat Fuzalun* (3 W.R. 120); *Mr. J. J. Doyle, Manager, on behalf of Bengal Indigo Co. v. Dwarka Nath Chatterjee* (8 W.R. 89); *Dollar Chand Sahoo v. Ram Sahoy Bhagut* (24 W.R. 139); *Mudhun Mohan Doss v. Gokul Doss* (10 M.I.A. 563); *Kalu Bin Visa Ji v. Damodar Govind* (9 B.H.C. 92); *Vana Jagannath Ji v. Hata Dipaji* (11 B.H.C. 46) and *Kishori Mohun Roy v. Harrukh Das* (17 C. 436). Those cases are clearly distinguishable from a case like the one now before us. In such cases as those the damage is the direct result of the wrongful act of the decree-holder whereas there is in a case like the one before us interposed between the act of the person applying for the injunction and the damage which results from the order, the judicial decision of the Court arrived at after hearing both parties. Then there are other proceedings which necessarily involve damage to the defendant in regard to which it is clear that want of reasonable and probable cause is necessary to support a suit for compensation, but there is some conflict of opinion whether malice also must be proved. In some of the older cases on torts the words 'malice' and 'maliciously'

On general principles "where the wrongful act of one person places another in a position in which he necessarily or reasonably

Suit for costs where defendant's conduct exposes plaintiff to injunction.

are used as if malice was ordinarily of the essence of the cause of action in a suit founded on a tort but it is now recognised that harm done without reasonable and probable cause cannot be made more wrongful by the addition of bad faith or personal ill-will and that save in exceptional cases malice in the sense of improper motive is irrelevant in the Law of Torts (see *Allen v. Flood*, L.R. Appeal Cases (1898), p. 1, and Pollock on Torts, p. 24). Mr. Melville Bigelow in his work on the Law of Torts after discussing the law regarding malicious prosecution says that there is a group of kindred wrongs which deserves to be distinguished and explained, i.e., wrongs of malicious arrest, malicious attachment or execution, malicious search and malicious abuse of process and so forth. He expresses the opinion that in an action for damages for so-called malicious arrest it is enough that the arrest was without probable cause and that damage resulted, malice being only a fiction and not a distinct entity requiring proof. Similarly with regard to an action for damages for so-called malicious attachment or execution he holds that malice is not necessary part of the cause of action and that what must be proved is want of reasonable and probable cause; and with regard to actions for damages for abuse of process he says that malice as a distinct entity probably plays no part in the case, that perversion or abuse of the process gives the name "malicious" to the case, and the malice is fictitious or may be. Other authorities seem to think that malice must be proved in such cases (see the judgment of Lord Halsbury in *Allen v. Flood*, L.R. Appeal Cases, 1898, p. 1) cited above and Salmond on Torts, *passim*). The Indian Law (see Ss. 94, and 95 of the Code of Civil Procedure, 1908) treats arrest and attachment before judgment as being on the same footing as an injunction. If the view which we take of this case is correct it is probably not necessary to prove malice in suits arising out of arrest or attachment before judgment. There are other legal proceedings in regard to which it is clear that a suit for compensation will not lie unless both malice and want of reasonable and probable cause are established. Examples of this class are malicious criminal prosecutions and malicious bankruptcy proceedings. The reason why the law requires proof of malice in such cases has been explained to be that if suits for compensation were permitted without proof of malice people might be too much deterred from enforcing the law and this would be disadvantageous to the public (see the judgment of Lord Herschell in *Allen v. Flood*, L.R. Appeal Cases, 1898, p. 1, cited above). Mr. Melville Bigelow in the 8th American edition of his work on Torts at p. 28 says:—"A man can have no legal right in the sense of full legal right to prosecute another without cause: but a man is permitted to do so which is all there is of it. The person so prosecuting is merely exempt from liability that men may not be discouraged from resorting to the Courts to settle their disputes.....It is lawful in the sense that it is permitted, to prosecute without cause, the permission is on the footing that prosecution shall be in good faith, proof of malice in fact (e.g., the existence of an evil motive) shows that the prosecution was not so begun." That is to say, in certain cases the law accords a privilege upon the condition expressed or implied that it shall not be abused. So long as legal process is honestly used for its proper purpose mere negligence or want of sound judgment in the use of it creates no liability. But the privilege ceases to afford any protection to a person using legal process when it is shown that he has made use of it for some other than its legally appointed and appropriate purpose. The question is in which category the present case falls. English cases with reference to loss caused by injunctions afford little assistance because, for more than fifty years past, it has been the practice of the Chancery Courts to refuse to issue interlocutory injunctions at the instance of a party (The Crown excepted), save on an undertaking

has recourse to law, the costs incurred by the latter will be recoverable from the former. Accordingly, where the defendant had employed the plaintiff to manufacture fire bricks for him marked

as to damages being given, and in pursuance of that undertaking the applicant is held liable for injury resulting from the order whatever may have been the motives of the applicant or the circumstances attending the application; see *Smith v. Day* (L.R. 21 Ch. Div. 421) and *Griffith v. Blake* (L.R. 27 Ch. Div. 474). The few Indian cases that have been reported show some conflict of judicial opinion. The earliest that I have been able to find is that of *Edward Wilson v. Kanhya Sahoo* (11 W.R. 149); in which Kemp and Glover, JJ., said 'It is urged that S. 96 of the Code of Civil Procedure provides a remedy for cases like the present and that in any case it must be shown by the party suing that the defendant who applied for and obtained the injunction did so without any reasonable or probable cause. It appears to us quite clear that the action did lie. The section of Act VIII above quoted allows by implication the power of bringing a suit for damages, where it recites that no one who has already obtained an award of compensation under the section shall be entitled to sue separately for damages, thus clearly leaving that remedy to those who do not wish to take advantage of the remedy given them by the Act.' They do not appear to have drawn any distinction between the grounds on which a Court could award compensation under S. 96 of the Code of Civil Procedure, 1859 (S. 497 of the Code of 1882 and S. 95 of the present Code), for injury resulting from an injunction and the grounds on which a separate suit for damages can be maintained. But in *Goutiere v. Robert* (2 N.W.P. H.C. 353) Turner, C.J., and Spankie, J., expressed the opinion that compensation could be awarded under S. 96 of the Code of 1859 on the ground of injury resulting from the careless or mistaken action of a plaintiff in suing out mesne process, whereas damages could not be awarded in a separate suit except on proof of malice and want of reasonable and probable cause. They said that they believed that in the Courts in England proof of malice had been considered essential to support a suit for damages for suing out mesne process, but they referred to no authorities on the subject. Apart from authority it would seem that to institute a suit without reasonable or probable cause and to apply for and obtain in that suit an injunction whereby a man's business is stopped or other loss caused to him is wrongful and should give rise to a cause of action. This seems to have been the view of the Indian Legislature when enacting the Codes of Civil Procedure of 1859, 1882 and 1908. All three Codes provide that compensation may be awarded for loss resulting from injunction where the injunction was applied for on insufficient grounds, or if the suit is dismissed where there was no reasonable or probable cause for instituting the suit, the reason for allowing compensation in the latter case being, apparently, that if the suit was instituted without reasonable or probable cause there can have been no justification for applying for the injunction. It seems clear that in India at all events the law accords no privilege to a litigant in virtue of which he may apply for an injunction subject only to the condition that it is applied for honestly and for a proper purpose. If as is clear the Code of Civil Procedure lays down that a wrong may have been committed, for which compensation may be granted in a special proceeding, when an injunction is applied for and obtained without reasonable or probable cause, it is difficult to see why the person who has been wronged should be required to prove anything more if he elects to proceed by way of regular suit. Such a view seems to be negatived by the provision that compensation awarded in the special proceeding bars a suit for compensation. We are therefore of opinion that in a suit for compensation for loss resulting from an injunction wrongfully obtained the plaintiff need not prove malice." *Manohar Lal v. Gobardhan Prasad*, 13 O.C. 357 at pp. 359-365.

with what was, to the knowledge of the defendant, but not of the plaintiff, an infringement of the trademark of another maker, who, in consequence, filed a bill in Chancery against the plaintiff for an injunction and account; the plaintiff compromised the suit in Chancery and brought an action against the defendant to recover the amount which he had paid, and the costs to which he had been put. It was objected on demurrer to the declaration that the plaintiff having acted innocently, might have successfully defended the suit. But the Court of Queen's Bench were of opinion that the proceedings in Chancery were well founded, and, therefore, that the plaintiff had a good cause of action for his costs and expenses; and Crompton, J., with the acquiescence of Hill, J., went so far as to say, "if the natural consequence of the act of the defendant is to plunge the plaintiff into a Chancery suit, whatever the result may be, I am not prepared to say that that would not be a sufficient damage to ground an action at law."⁽³⁵⁾

An action brought to recover costs of proceedings held under Act XX of 1864 is not maintainable when the Court, before which such proceedings were taken, has made no order as to the payment of such costs.⁽³⁶⁾

Suit for costs of proceedings under Act XX of 1864.

A District Judge has authority, under S. 23 of the Bombay District Municipal Act, 1884, to award costs of the inquiry, and the order of the District Judge as to costs is capable of being enforced by separate suit.⁽³⁷⁾

Suit for costs of inquiry into a Municipal Election petition.

Ulfat Husain, defendant in this suit, sold certain land to Badlu and others, the plaintiffs. Kallu and certain other persons brought a suit against Ulfat Husain and his vendees for a share of such land, alleging that the same belonged to them, and Ulfat Husain had no title to it. Ulfat Husain did not defend the suit, but Badlu and his co-vendees did, and in the result Kallu and her co-plaintiffs obtained a decree for such share. Thereupon Badlu and his co-vendees brought the present suit against Ulfat Husain

Suit for costs of defending vendor's title.

(35) *Dixon v. Fawcus*, 3 E. & E. 537; 30 L.J.Q.B. 137. See, too, *Ex parte Carr*, 11 Ch. D. 62; 48 L.J. Bkey. 69. See the same cited in *Mayne on Damages*, 8th Ed., p. 117.

(36) *Kabir valad Ranjan v. Mahadu valad Shiwaji*, 2 B. 362; referred to in *Mahram Dass v. Ajudhia*, 8 A. 452 (461) = A.W.N. (1886) 189; *Maung Gyi v. Lu Pe*, 3 L. B.R. 120; *Kumarappa Chetti v. Nga Pyi*, U.B.R. (1905), C.P.C. 18, at p. 21; doubted in *Palaneappa Chetty v. Maung Shwe Ge*, U.B.R. (1904), C.P.C. p. 4.

(37) *Ram Lal v. Bhagubhai*, 2 Bom. L.R. 960 (distinguishing *Jalam Pun a v. Khoda Jara*, 8 B.H.O.A.C. 29).

to recover the value of the share for which Kallu had obtained a decree, and to recover the costs incurred by them in defending Kallu's suit. The suit was based upon the following covenant in the deed of sale:—"If hereafter any co-sharer or co-partner makes a claim, then I shall be responsible for his claim, and the vendees shall have nothing to do with it; and if on proof of the claim of a co-sharer or other ground any part of the land sold is taken away, then I shall pay to the vendees the value of such part." The lower Court gave the plaintiffs a decree for the value of the land for which Kallu had obtained a decree, but dismissed the claim for the costs incurred by the plaintiffs in defending Kallu's suit, on the ground that the deed of sale did not provide for such costs. The plaintiffs applied for revision, on the ground that the deed of sale did provide that the costs of defending any suit that might be brought for the land sold should be borne by the vendor. Straight and Oldfield, JJ., said in the course of the judgment:—"Ulfat Husain, the vendor, was made a party to the suit against the vendees at the instance of Kallu, and, by his not making any defence or traversing the title set up by her, virtually admitted the justice of her claim. In face of this conduct on his part, the vendees nevertheless persevered in defending that action, and incurred the costs they now seek to recover from their vendor. This, we do not think, they were entitled to do, and holding the same view as the lower Court, we dismiss this application."⁽³⁸⁾

Suit for costs
between
attorney and
client.

It is not the practice of the Court to interfere summarily between attorneys and their clients as regards claims for costs. ⁽³⁹⁾

An attorney applied for an order that the plaintiff and the defendant, or either of them, should pay to him his taxed costs on the ground that they had fraudulently and collusively compromised the suit with the object of depriving him of his costs. *Held*, that in cases of this kind, where charges of fraud and collusion are made, it is inconvenient for the Court to dispose of the issues on affidavits alone. ⁽⁴⁰⁾

(38) *Badlu v. Ulfat Husain*, A.W.N. (1883), 85.

(39) *Ramdoyal Serowgie v. Ramdeo*, 27 C. 269=4 C.W.N. 208 (dissenting from *Khetter Kristo Mitter v. Kelly Prosonno Ghose*, 25 C. 887 and dissented from *Cullianji v. Raghoeji*; *Lakshmidai v. Cullianji*, 30 B. 27=6 Bom. L.R. 879; and construed in *In re Tyabji and Co.*, 7 Bom. L.R. 547).

(40) *Ramdoyal Serowgie v. Ramdeo*, 27 C. 269=4 C.W.N. 208 (dissenting from *Cullianji v. Raghoeji*; *Lakshmidai v. Cullianji*, 30 B. 27=6 Bom. L.R. 879, and construed in *In re Tyabji and Co.*, 7 Bom. L.R. 547). Items of an attorney's bill

A person assisting the plaintiff cannot be mulcted in costs of the suit unless he is made a party to the suit. (41)

Suit for costs against third party.

No action will lie for improperly putting the law in motion in the name of a third party, unless it is alleged and proved that it has been done maliciously and without reasonable or probable cause. In the absence of such proof, an action for losses and costs incurred in defending a suit will not lie as against a person who is alleged to have been a mover in that suit, and to have had an interest in it, but who had not been made a party to the record; since such a state of things creates no legal privity from which a promise can be implied on which an action on contract can be founded, nor does it, *ex hypothesi*, constitute a legal wrong. (42)

Where it appears that the plaintiff in a suit is in fact suing on behalf of another person who is not a party to the record, the ordinary practice is to require security for costs, and to stay the proceedings till it is given or to make such person party to the suit. (43)

The rejection by the Court of an application under the Code of Civil Procedure to have a stranger, who has an interest in the suit, made a co-plaintiff on the record, cannot give a ground for an action against such stranger for costs incurred in the suit, which would not otherwise lie. (43-a)

for work done, subsequently to the judgment, in opposing the taxation of the opponent's costs, although done on his client's instructions, will not take the matter out of the Limitation Act. Such items do not form part of the costs of the original application. *Watkins v. Fox*, 22 C. 943 (referred to in *Nathubhai Narandas v. Manordas Laldas*, 36 B. 360 (365) = 14 Bom. L.R. 325 = 15 Ind. Cas. 512; *Balaram Kunbi v. Sadoba Mali*, 17 C.P.L.R. 178 (190). Where a firm of attorneys brought a suit against their clients to recover the costs of an application to the High Court: *Held*, that limitation began to run from the date of the judgment in the application. *Watkins v. Fox*, 22 C. 943 (referred to in *Nathubhai Narandas v. Manordas Laldas*, 36 B. 360 (365) = 14 Bom. L.R. 325 = 15 Ind. Cas. 512; *Balaram Kunbi v. Sadoba Mali*, 17 C.P.L.R. 178 (190); and approving *Balkrishna Pandurang v. Govind Shivaji*, 7 B. 518; *Rothery v. Munnings*, 1 B. & Ad. 5). Subsequent proceedings taken in connection with the taxation of an opponent's costs are not part of the suit or application itself. *Watkins v. Fox*, 22 C. 943 referred to in *Nathubhai Narandas v. Manordas Laldas*, 36 B. 360 (365) = 14 Bom. L.R. 325 = 15 Ind. Cas. 512; *Balaram Kunbi v. Sadoba Mali*, 17 C.P.L.R. 178 (190).

(41) *Ram Coommar Coondoo v. Chunder Canto Mookerjee*, 2 C. 233 (P.C.) = 4 I.A. 28.

(42) *Ibid.*

(43) *Ram Coommar Coondoo v. Chunder Canto Mookerjee*, 2 C. 233 at p. 234 (P.C.) = 4 I.A. 28.

(43-a) *Ibid.*

The cases in which persons other than parties to the suit have been held liable to costs in England, relate to applications either in the cause itself, or to the disciplinary and summary jurisdiction of the Courts. They give no support to the contention that an independent action will, under such circumstances, lie.⁽⁴⁴⁾

Suit for costs incurred by way of stamp duty and penalty.

The plaintiff in a suit upon certain instrument not duly stamped was compelled to pay the amount of duty and penalty. The defendant was the person bound to bear the expense of providing the proper stamp for such instrument. The plaintiff, with reference to S. 41 of the Stamp Act, 1879, sued the defendant to recover such amount. *Held*, that such amount could not be regarded as part of the costs in the suit in which it was paid, and a separate suit to recover it was maintainable.⁽⁴⁵⁾

Suit for costs when former action was unnecessary and for collateral purpose.

"Costs of maintaining a former action will never be recoverable, where the plaintiff might have obtained full satisfaction for the wrong done him without entering upon the suit, and where the costs were incurred for some nearly collateral purpose."⁽⁴⁶⁾

Hence where the plaintiff, in an action against the vendor of land, for not carrying out his contract, claimed as damages the extra costs of a bill for specific performance, Tindal, C.J., said: "The extra costs in Chancery are not a damage which is a necessary consequence of the breach of this contract. The filing a bill for a specific performance is one degree removed from a consequence of the contract, and the plaintiff must take the same consequence of the suit as in other cases."⁽⁴⁷⁾

So in an action of trespass for taking goods under a warrant of attorney and judgment, which were afterwards set aside as illegal, the costs of setting aside the judgment were not allowed.⁽⁴⁸⁾

This rule, and its limitation, were well explained in a later case. The plaintiff had been committed to prison for manslaughter by a coroner's warrant. He was admitted to bail, and subsequently got the inquisition, under which he had been committed, quashed. It was held that in an action against the coroner he might recover

(44) *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, 2 C. 233 at p. 234 (P.O.) = 4 I.A. 23.

(45) *Ishar Das v. Masud Khan*, 6 A. 70.

(46) See Mayne on Damages, 8th Ed., p. 105.

(47) *Hodges v. Litchfield*, 1 Bing. N.C. 492.

(48) *Holloway v. Turner*, 6 Q.B. 923. See, as to damages for taking judgment contrary to agreement, a Scotch case discussed in the *Law Times*, Vol. ciii. p. 146.

as special damage the cost of quashing the inquisition. Lord Campbell, C.J., said: "If the plaintiff had been discharged on a *habeas corpus* instead of being admitted to bail, and had afterwards got the inquisition quashed, I should have thought that he could not have included the costs of quashing in his damages. (49) There the object was to recover damages for seizing and selling the goods, which he might have done without setting aside the judgment. But here he was only released from prison upon giving bail to appear and take his trial. He was still liable to surrender on his own recognizance, and was not a perfectly free man till he had got rid of the inquisition. By doing that he was restored to his original state, but until then the effects of the wrongful imprisonment were not done away with. Therefore this is damage which flowed from the wrongful act of the defendant." (50)

In a contract of lease, where the only thing guaranteed is the payment of the rent by the lessee, and the surety is, in his turn, guaranteed by a third person for such payment of rent alone, the surety, who imprudently defends a suit for rent brought against him by the lessor, cannot recover the costs of such suit from that person, who was his guarantee only in respect of this rent. (51)

"As a further consequence of the principle, that costs of suit must be the necessary result of the defendant's misconduct, it follows that they can never be allowed for where the plaintiff had no *locus standi* in law in the former action." (52)

In the above case it was stated that all such costs were to be deemed to be clearly incurred in consequence of the plaintiff's own obstinacy or ignorance. (53)

"No person has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance to an action which he cannot defend." (54)

(49) See *Holloway v. Turner*, 6 Q.B. 928.

(50) *Foxall v. Barnett*, 2 E. & B. 928; 23 L.J. Q.B. 8. See the same cited in *Mayne on Damages*, 8th Ed., p. 106.

(51) *Gopal Singh v. Bhawani Prasad*, 10 A. 581 = A.W.N. (1888), 211.

(52) *Mayne on Damages*, 8th Ed., pp. 106, 107.

(53) See *Mayne on Damages*, 8th Ed., p. 107.

(54) *Short v. Kalloway*, 11 A. & E. 29; *Ronnebery v. Falkland Islands Co.*, 17 C.B.N.S. 1; 34 L.J.C.P. 34; *Godwin v. Francis*, L.R. 5 C.P. 295; *Pow v. Davis*, 1 B. & S. 220; 30 L.J. Q.B. 257; *The Wallend*, (1907) P. 302; 76 L.J.C.P. 57; or, by an unsuccessful appeal, *Vogan v. Oulton*, 15 Times L.R. 88.

"Accordingly, where a bill, accepted by the plaintiff, was deposited with the defendant as security for a loan, and he, after the loan was repaid, indorsed the bill to a third party, who on its dishonour arrested the plaintiff, only the value of the bill was allowed in an action against the defendant, and not the costs of the arrest, as he ought to have paid it when due."⁽⁵⁵⁾

Suit for costs
of defending
action where
liability is
undefined.

"In the cases just mentioned the resistance made to the original proceeding was not only ineffectual but useless and therefore improper. But there is another class of cases, where the defence is maintained only for the purpose of ascertaining the existence of a liability which is fairly disputed, or the extent of a liability which is previously undefined. The person against whom the claim is made would be acting properly in going to trial, or at all events in not letting judgment go by default." Suppose another person is liable to him upon what is substantially the same cause of action; can he recover against the last named person the costs which he has incurred in ascertaining the extent of his liability, or whether he is liable at all? The law upon this point was much discussed in various cases which have been supposed to conflict with each other ⁽⁵⁶⁾, but which have been reviewed and restored to some sort of harmony in the more recent

(55) *Roach v. Thompson*, 4 C. & P. 194, and so in a similar case where the plaintiff had defended the action. See *Bleaden v. Charles*, 7 Bing 246. And the rule is the same, though the plaintiff is accommodation acceptor, who has been sued on his acceptance, and is now suing the accommodation drawer. *Pierce v. Williams*, 23 L.J. Ex. 322. So in a case in which the plaintiff guaranteed A that defendant would upon demand pay A whatever should from time to time be due. A demand was made upon defendant, and upon non-payment, a writ issued against plaintiff for the amount, this being the first notification he received. He allowed judgment to go by default, and execution was levied upon his goods. It was decided that he might recover against the defendants the costs of the writ, but not of any other proceeding. That was the only expense to which he was necessarily put, as he was supposed by law to have the money ready, without the process of execution. *Ex parte Marshall*, 1 Atk. 262. Where, however, two sureties had entered into a warrant of attorney, to secure the debt of their principal, and upon his default judgment was entered upon the warrant, and execution issued against one surety, who had to pay the debt and the costs of the execution, it was decided that he might recover half of the costs against his co-surety, *Kemp v. Finden*, 12 M. & W. 421. This is quite consistent with the previous cases, because very possibly the execution was the first notice he received that his liability was about to be enforced. See Mayne on Damages, 8th Ed., p. 108.

(56) *Mors le Blanch v. Wilson*, L.R. 8 Q.P. 227, 233; 42 L.J.Q.P. 70; *Barendale v. L.C. & D. Ry. Co.*, L.R. 10 Ex. 34; 44 L.J. Ex. 20; *Fisher v. Val de Travers Asphalt Co.*, 1 C.P.D. 511; 45 L.J.Q.P. 479.

case of *Hammond v. Bussey*.⁽⁵⁷⁾ There the defendant was a coal merchant and the plaintiff was a shipping agent, part of whose business was, and was known by the defendant to be, the supply of coal to steamships calling at Dover. The plaintiff purchased from the defendant a quantity of coal described as "steam-coal" for the purpose of reselling it as coal fit for use in steamers. He then entered into a contract with the owners of certain steamships to supply them with coal, the contract being such as would have been satisfied if the defendant had fulfilled his agreement. The plaintiff's sub-vendees made a claim against him on account of the bad quality of the coal. He communicated with the defendant, proposing that he should co-operate in the defence and consent to be bound by the verdict. The defendant refused to have anything to do with the action, but supplied the plaintiff with various certificates tending to show that the coal was equal to warranty. The sub-vendees succeeded in their action, on the ground that the coal was not reasonably fit for use as steam-coal on board ships. The plaintiff then sued the defendant to recover not only the damages obtained by his sub-vendees but the costs of defending the action. The Judge found that the plaintiff had acted reasonably in defending the former action, and that he was entitled to be repaid his costs by the defendant. This judgment was upheld by the Court of Appeal. They said that the case came within the first and second rules in *Hadley v. Baxendale*,⁽⁵⁸⁾ and that it did not depend on the existence of any contract of indemnity, express or implied, between the original vendor and vendee. The defendant knew that the coal was brought for resale for steamer use. He must have reasonably contemplated that if it was unfit for use the sub-vendees would threaten an action. The plaintiff, who knew little or nothing about the coal, would then apply to him for information, and would be guided as to his future conduct by the answers given. If it was admitted that the coal was unfit for use he would not defend at all, or, if he did defend, would do so at his own risk. But if, as actually happened, he was assured that the coal was good, it would be a proper thing for him to defend the action, and the natural result of his doing so, and failing, would be that he would have to pay costs, which again

(57) (1887) 20 Q.B.D. 79; 57 L.J.Q.B. 58.

(58) *Mayne on Damages*, 8th Ed., p. 18.

ought fairly to be repaid to him, as being part of the sequence of events which might reasonably have been contemplated.”⁽⁵⁹⁾

“Upon an analogous principle in actions brought against two defendants in the alternative, the Court in the exercise of its jurisdiction over costs, has in proper cases ordered the plaintiff to pay the costs of the successful defendant and then to add those costs to the costs which the unsuccessful defendant is ordered to pay to the plaintiff. This has been done in cases of contract, (60) tort, (61) and Admiralty.”⁽⁶²⁾

Suit for costs incurred on account of false assertion of authority by agent.

“One who professes to contract as agent for another must, unless there be something in the transaction to rebut the implication, be taken to warrant that the authority, which he professes to have, does in fact exist; and if he has no such authority, he is liable to make good to the person who enters into the contract upon the faith of his being duly authorised, all the damages which is the natural and proximate consequence of the false assertion of authority.⁽⁶³⁾ And this rule extends to any case where a person professing to have authority as agent induces another to act in a matter of business on the faith of his having that authority.⁽⁶⁴⁾ This will include the costs of unsuccessful legal proceedings taken by such person against the supposed principal for the purpose of enforcing performance of the contract or recovering damages for

(59) In a very similar case the above ruling was followed even to the extent of allowing the plaintiff extra costs; *Agius v. G.W. Colliery Co.*, (1899) 1 Q.B. 413. There, the plaintiff in the second action had paid 20l. into Court as defendant in the first action and succeeded in showing that this amount was sufficient, and recovered his costs. The difference not paid in the first suit was allowed him in the second, but taxed on the scale recognized by the Masters as appropriate where costs between solicitor and client are to be paid by another person. So when the defendants' breach of contract led to the plaintiffs having to defend an action by a person injured, *Bigham, J.*, allowed solicitor and client costs as damages. *Scott v. Foley*, (1899) 16 Times L.R. 55. See, also, *Great Western Ry v. Fisher*, (1905) 1 Ch. 316; 74 L.J. Ch. 241.

(60) *Sanderson v. Blyth Theatre Co.*, (1903) 2 K.B. 533; 72 L.J. K.B. 761, C.A.

(61) *Bullock v. The London Gen. Omnibus Co.*, (1907) 1 K.B. 264; 76 L.J. K.B. 127.

(62) *The River Lagan* (1888), 57 L.J.P. 28; 6 Asp. M.L. Cas. 281; *The Mystery*, (1902) P. 115; 71 L.J.P. 39. See Mayne on Damages, 8th Ed., p. 114.

(63) *Collen v. Wright*, 7 E. & B. 301; 26 L.J.Q.B. 147; affirmed in Ex. Ch. 8 E. & B. 647; 27 L.J.Q.B. 215. Where the principal for whom the defendant professed to be authorised to contract is insolvent, the damages will possibly be nil. *Per Blackburn, J.*, *Richardson v. Williamson*, L.R. 6 Q.B. at p. 279; 40 L.J.Q.B. 145; and *per Honyman, J.*, *Weeks v. Probert*, L.R. 8 C.P. 439; 42 L.J.C.P. 129.

(64) *Oliver v. Bank of England*, (1902) 1 Ch. 610; 71 L.J. Ch. 388; affirmed *sub-nom Starkey v. Bank of England*, (1903) A.C. 114; 72 L.J. Ch. 402.

its breach; if at least it was reasonable under the circumstances of the case that such proceedings should be taken, or if the professed agent was made aware of the litigation and sanctioned it, either expressly, or by allowing it to be continued without avowing his want of authority."⁽⁶⁵⁾

"No action will lie against a person who has made a false representation of authority for which he would otherwise be liable, if, notwithstanding the falsity of the representation, the plaintiff is in a position to enforce all the rights he would have had, if the representation were true; *a fortiori* not, if in point of fact he has enforced them. For the cause of action arises not from the false statement alone, but from the injury which has accrued to the person who acted upon it. This is at once the ground of liability, and the measure of damages."⁽⁶⁶⁾

It must be observed that a person who makes such an untrue statement of authority is equally liable whether he *bona fide* believed in that which he alleged, or actually knew it to be false.⁽⁶⁷⁾ "But the basis of the liability is that another has accepted, and acted upon his statement as true. But for this purpose the representation must be one of fact, and not of law. Because a statement of fact induces the person to whom it is made to dispense with inquiry. But a statement of law is merely an expression of opinion, and every one is bound either to know the law himself, or to take the usual steps for satisfying himself upon it."⁽⁶⁸⁾

On the same principle misrepresentation does not exist when each party is perfectly cognisant of the true state of affairs,⁽⁶⁹⁾ or where the untrue statement has not been the operating motive upon the mind of the other party.⁽⁷⁰⁾

(65) *Collen v. Wright*, 7 E. & B. 301; *Randell v. Trimen*, 18 C.B. 786; 25 L.J. C.P. 307; *Oliver v. Bank of England*, (1901) 1 Ch. 665; 70 L.J. Ch. 377; affirmed *sub nom.* *Starkey v. Bank of England*, (1903) A.C. 114; 72 L.J. Ch. 402.

(66) *Beattie v. Lord Ebury*, L.R. 7 Ch. 777; affirmed in principle, L.R. 7 H.L. 102; 44 L.J. Ch. 20.

(67) *Collen v. Wright*, 8 E. & B. 657; *Weeks v. Probert*, L.R. 8 C.P. 427, 427; 42 L.J.C.P. 129; *Oliver v. Bank of England*, (1902) 1 Ch. 610; 71 L.J. Ch. 389; affirmed *sub nom.* *Starkey v. Bank of England*, (1903) A.C. 114; 72 L.J. Ch. 402.

(68) *Rashdall v. Ford*, L.R. 2 Eq. 750; *Beattie v. Lord Ebury*, L.R. 7 Ch. 777, 802; 44 L.J. Ch. 20; *Eaglesfield v. Londonderry*, 4 Ch. D. 693. See as to what is a statement of law, *per Jessel, M.R.*, 4 Ch. D. at p. 702.

(69) *Per Lord Hatherley*, L.R. 7 H.L. 130; *Eaglesfield v. Londonderry*, 4 Ch. D. 693; *Halbot v. Lens*, (1901) 1 Ch. 344 (350).

(70) *Olapham v. Shillito*, 7 Beav. 149.

Suit against
tenant for
costs of
ejecting
under-tenant.

Similarly, a landlord, being entitled to recover from his tenant all the loss which he may sustain by not being put in possession of the premises at the end of the term, can recover the costs of ejecting an under-tenant who holds over, though it be against the will of the tenant.⁽⁷¹⁾

Suit for costs
and damages
incurred in
consequence
of tenant
holding over.

Where a tenant held over, and an action was consequently brought against the landlord by a person to whom he had agreed to let the premises in the ordinary way, the landlord was held entitled to recover from the old tenant the damages and costs which he had to pay the new tenant, and likewise his own costs of defending the action up to a point which was found to be reasonable.⁽⁷²⁾

Suit for costs
in case of
warranty and
re-sale.

There are several cases, of which *Levis v. Peake* ^(72-a) may be said to be a leading case, in which it appears to have been laid down as a general rule, "that where goods are sold with a warranty by A to B, and B resells with a similar warranty to C, who sues and recovers against him for breach of warranty, B may recover against A not only the costs and damages he had to pay C in the former action, but also his own costs incurred in defending it."⁽⁷³⁾

"In all such cases as those above mentioned, the defendant in the second action will be liable for the costs of the first, if he has advised or sanctioned a defence being set up; because by directing a defence he has admitted that there were reasonable grounds for defending."⁽⁷⁴⁾

(71) *Henderson v. Squire*, L.R. 4 Q.B. 170.

(72) *Bramley v. Chesterton*, 2 C.B.N.S. 592; 29 L.J. C.P. 23.

(72-a) 7 Taunt, 153.

(73) *Lewis v. Peake*, 7 Taunt. 153; *Mainwaring v. Brandon*, 8 Taunt. 202; *Pennel v. Woodburn*, 7 C. & P. 117. See, also, *Mayne on Damages*, 8th Ed., pp. 109, 118. "But it has been pointed out by Parke, B. (10 M. & W. 255) that *Lewis v. Peake*, was decided on the ground, that the plaintiff was not aware at the time he sold the horse, that the warranty was not complied with. Accordingly, where plaintiff had purchased a horse of the defendant with a warranty of soundness, and sold it with a like warranty to J.S., and the horse turning out unsound, J.S. brought an action against him which he defended and failed; the jury having found that the plaintiff ought to have discovered that it was unsound at the time he sold it to J.S., it was held that he was not entitled to recover as specific damages the costs incurred by him in defending the former action." (*Wrightup v. Chamberlain*, 7 Sec. 598.) Because these costs arose, not from the breach of warranty by the defendant but from his own carelessness in giving a similar warranty again. See *Mayne on Damages*, 8th Ed., p. 118.

(74) *Williams v. Burrell*, 1 C.B. 402; *Howes v. Martin*, 1 Esp. 162. "It would seem that slight evidence upon this point may warrant a jury in finding that the defence was sanctioned. A sued B in an action, in which B would have a remedy over against C; B gave notice to C of the nature of the action, and called on him to come in and defend it. This C refused to do, but did not forbid a defence being taken.

"In no case can the costs of defending an action be recovered when that action is brought, not merely for the wrongful act of the defendant in the second action, but also for some wrongful act of the original defendant himself."⁽⁷⁵⁾

Suit for costs when action brought on account of plaintiff's own wrong.

A man has no right, merely because he has an indemnity, to defend a hopeless action, and put the person guaranteeing to a useless expense.⁽⁷⁶⁾

Suit for cost of suit in cases of indemnity.

Although the indorser of a bill of exchange is in a certain sense a surety for the acceptor there is no such privity between them as will enable the indorser, who has been forced to pay the bill, to recover against the acceptor *re* exchange, much less costs incurred by him in an action on the bill.⁽⁷⁷⁾

The same principle applies where a person authorises another to do an act in his name, and indemnifies him against the consequences. Thus, where a landlord authorised a broker to distrain, and undertook to indemnify him against all costs and charges in respect of any law expenses or actions that might arise or be brought against him, and the broker distrained in a perfectly regular way, but the tenant brought a vexatious and groundless

B suffered judgment by default, and put A to the proof of his claim, at the writ of enquiry. It was held that there was evidence to go to the jury that C had sanctioned the defence, and the jury having included these costs in the damages in the action by B against C, the Court refused a new trial." (*Blyth v. Smith*, 5 M. & G. 405). "In another case, silence on the part of the defendant in the second action, when written to by the defendant in the first action for instructions how to act, was considered a sanction of the defence to the first action." *Rolph v. Crouch*, L.R. 3 Ex. 44; 37 L.J. Ex. 8.

(75) See Mayne on Damages, 8th Ed., p. 119. Covenant by assignee of lease containing covenant repair, against lessee who had covenanted with him that he had repaired; breach that he had not repaired in consequence of which, plaintiff, who had himself assigned over with a similar covenant, had been sued by his assignee, and forced to pay 120*l.* to settle. The jury in the second action found that the plaintiff had only been damaged by the breach of defendant's covenant to the extent of 50*l.* On leave reserved to add the costs plaintiff had incurred in the former action, the Court held, that as the amount paid in it was greater than that found by the jury to have been the damage caused by the defendant's non-repair the difference must be taken to have been damage caused by the plaintiff's own non-repair. (See Mayne on Damages, 8th Ed., p. 119, and the cases noted therein). This being so, the defence of the action brought against him by his assignee, and the costs so incurred, were not the necessary consequence of the defendant's breach of contract. *Short v. Kalloway*, 11 A. & E. 28.

(76) *Walker v. Hatton*, 10 M. & W. 259; *Gillett v. Rippon*, 1 M. & M. 406; *Knight v. Hughes*, *ibid*, 247; *Maxwell v. British Thompson-Houston Co.*, (1904) 2 K.B. 342; 73 L.J.K.B. 644.

(77) *Dawson v. Morgan*, 9 B. & C. 618.

action against him which he defended, and the tenant was nonsuited, the broker was held entitled to recover from the landlord the costs of defending the action. It was urged that the landlord only bound himself to indemnify against the costs of costs of actions which might be brought on the ground that there was no right of distress, but it was considered that the indemnity extended to all actions to which the broker might be subjected, except for actual misconduct or default of himself or his servants.⁽⁷⁸⁾

So where an execution creditor pointed out to the sheriff a wrong person as his debtor, and the sheriff arrested him and was then sued for the wrongful arrest, and defended the action without communicating with the creditor; it was held that the sheriff could only recover these costs in an action against the creditor, if the defence of the action by him without communication with the creditor was a reasonable course to take under the circumstances, and that whether it was so or not was a question for the jury.⁽⁷⁹⁾

It would seem that the costs of preferring an unsuccessful appeal can in no case be recovered, although the person preferring the appeal has a contract of indemnity in his favour.⁽⁸⁰⁾

Suit for costs
advanced by
plaintiff
to minor
defendants
under order
of Court.

The plaintiff had sued the defendants and their father for the specific performance of an agreement entered into by the father to sell some lands which had belonged to him and the defendants as members of a joint family. The defendants, being minors, were then represented by an officer of the Court as guardian *ad litem*. In the course of the suit, the plaintiff had, in accordance with an order of the Court, paid from time to time to the guardian *ad litem* sums for purposes connected with the defence of the suit. Though the defence failed, the Court did not make any provision for the recovery of the amount paid by the plaintiff. Hence the present suit to recover the amount advanced. It was held, by Justice Subramania Ayyar, that the Court in the former suit had power neither to direct the plaintiff to make the payments which were made to the guardian *ad litem*, nor to award the amount so paid as costs in the cause. The *present suit for that amount* could not, therefore, be held to be unsustainable for the reason that the matter was one for the Court to have dealt with in the previous suit. But the plaintiff could not succeed under S. 70 of the Contract Act

(78) *Ibbett v. De la Salle*, 6 H. & N. 293; 30 L.J. Ex. 44.

(79) *Caldbeck v. Boon*, 7 Ir. Rep. C.L. 32.

(80) *Vogan v. Oulton*, 15 Times Law Rep. 33.

inasmuch as, in the circumstances of the case, the defendant could not, within the meaning of the section, be said to have enjoyed the benefit of the plaintiff's expenditure. Though there is authority for the view that payments or charges connected with legal matters in which infants are concerned would come under the head of necessities, if there are reasonable grounds therefor, still, S. 68 of the Contract Act not having been relied on in the Courts below, the plaintiff could not, in second appeal, be allowed to raise such an issue as would necessitate an enquiry. Justice Davis was of opinion "that a matter of this kind could and ought to have been settled in the suit in which it arose. The plaintiff having succeeded, a supplementary issue should have been framed and tried as to the amount due to the plaintiff on account of the advances made by him to the guardian *ad litem* for conducting the defence, and then a decree should have been given to the plaintiff for the total costs found to have been properly incurred in the case by the guardian out of those advances. If this had been done there would have been no necessity for the present suit."⁽⁸¹⁾

The sons cannot succeed in exempting their joint ancestral property from being taken in execution of a decree for costs against their father when the latter defended the suit representing his sons.⁽⁸²⁾

Suit against Hindu sons for costs decreed against their father.

(81) *Venkata Vijaya Gopalraju v. Timmaya Pantulu*, 22 M. 314.

(82) *Lala Ram v. Narain Singh*, A.W.N. (1893) 201. In this case one Khushali the father of a Joint Undivided Hindu family, purchased on behalf of the family, out of family funds, the equity of redemption of a certain property. The mortgagee thereof brought a suit against Khushali for the sale of the property, Khushali defended the suit, and a decree was given against him with costs. As he failed to pay these costs, certain ancestral property belonging to the family was attached and sold. The sons of Khushali then brought this suit against him and the purchaser of the property, alleging that they were not bound by their father's acts, and were entitled to recover the property which had been alienated in consequence of those acts. The Court of first instance gave the plaintiffs a decree which the lower appellate Court affirmed. The purchaser appealed to the High Court. Oldfield and Tyrrell, JJ., said in the course of the judgment:—"This appeal must be decreed. The plaintiffs, sons of Khushali, sued to recover what has been found to be joint ancestral property sold in execution of a decree for costs against Khushali. The costs were decreed in a suit brought for the sale of some mortgaged property in which Khushali had bought the equity of redemption. It is found that the plaintiffs were equally with him owners of the said property, and it must be held that Khushali defended that suit representing the plaintiffs. Under such circumstances the plaintiffs cannot succeed in exempting their joint ancestral property from being taken in execution." *Lala Ram v. Narain Singh*, A.W.N. (1893) 201 (202).

Suit for costs
of action
against two
persons—Re-
covery by
one.

Two persons were indicted for a conspiracy. It was held that "if one employed an attorney he might, in an action for malicious prosecution, properly charge the costs of defending both, because each was interested in the acquittal of the other. But if each had a distinct defence, as, for instance, if one alone proved an *alibi*, it was said that the case might be different. There, however, the costs would be easily severable, and the jury would be bound to consider how they should be borne."⁽⁸³⁾

Suit for costs
and damages
—Points to
be proved.

In a suit to recover costs and damages for loss incurred by the wrongful acts of the defendant, the plaintiff must show that the loss was the necessary and unavoidable consequence of those acts.⁽⁸⁴⁾

(83) *Rowlands v. Samuel*, 11 Q. B. 39.

(84) *Mussamat Subjan Bibi v. Sheikh Sariatulla*, 3 B.L.R.A.C. 413 = 12 W.R. 329, distinguished in *Manohar Lal v. Gobardhan*, 13 O.C. 357 (360). Where special damage is the gist of a plaintiff's case, and he fails to prove such damage, he is precluded from recovering ordinary damages. *Edward Wilson v. Kanhya Sahoo*, 11 W.R. 143.

CHAPTER XII.

CONTRIBUTION FOR COSTS.

Principle as to contribution for costs.

Illustrative cases.

Contribution for costs among

- (i) co-contractors.
- (ii) co-sharers.
- (iii) co-sureties.
- (iv) Members of Malabar tarwad.
- (v) Joint tort-feasors.
- (vi) Co-defendants having separate defences and also being tort-feasors.
- (vii) *Pro forma* defendants.

Mortgagee of joint property impleaded in partition suit.

Cognizability by Small Cause Court.

Cognizability by Revenue Court.

THE broad principle recognized in Courts of Common Law and Principle Equity alike is that where several persons are co-debtors for the same debt which as between themselves is payable in several shares and one is compelled to pay the whole or a part greater than his share he is entitled to recover from each of the other a contribution or proportion of the excess beyond his own share.⁽¹⁾

Costs awarded in a *bona fide* litigation can be recovered by a suit for contribution unless the opposing parties can show any misconduct in adding parties whose costs they were ordered to pay.⁽²⁾

Where one of several joint contractors who has been obliged to satisfy the whole demand, sues to recover a proportional amount from his fellow contractors, such a claim is maintainable when it can be shown that the former has been compelled to do that which the latter was legally compelled to do, or, in other words, when he

Illustrative cases—
Contribution for costs among (i) co-contractors.

(1) See Story on Equity Jurisprudence, 2nd English Edition, pp. 319 and 335; Leake on Contracts, 3rd Edition, p. 59; Lindley on Partnership, 5th Edition, p. 368 and cases cited in *Musammat Kaniz Fizza Bibi v. Sheo Narain Misr*, 10 O.C. 108 (110).

(2) *Shreevararayan v. Palthia Kovilakath Veerarayan*, 7 M.L.T. 194, doubting *Merry Weather v. Nixon*, 16 R.R. 810; 8 Term. Report 186, following *Shakul Kameed Alim Sahib v. Syed Ibrahim Sahib*, 26 M. 373 (375).

has been compelled to satisfy a demand, parcel of which his fellows were liable to satisfy, the latter's liability in such cases existing irrespectively of a promise on his part to indemnify or of a request on his part.⁽³⁾

Where only one of several co-contractors is sued, he cannot call upon his co-contractors to contribute to the costs of the suit.⁽⁴⁾

(ii) co-sharers.

Where the plaintiff, one of several co-sharers, paid the shares of revenue due by other co-sharers, to save the estate from sale, and then brought a suit for the balance of the revenue, after deducting his own share, against all the co-sharers, the lower Court made the plaintiff pay the costs of the defendant, who had not made default in payment of revenue. *Held* that, since the payment by the plaintiff of the full amount of revenue was an act whereby all the share-holders benefited, inasmuch as the mere payment of their respective shares by the share-holders who did not default would never have protected the estate, the plaintiff was entitled to get the costs of his suit against all the share-holders, to be levied from them in the proportion of their respective shares in the estate.⁽⁵⁾

The appellant and the respondent along with other persons were co-sharers in an under-proprietary tenure. The superior proprietor sued the respondent and the other co-sharers for arrears but did not implead the appellant. The suit was decreed; the respondent paid the whole decretal amount and now brought the present suit for contribution against the appellant for the share of rent due from her. The appellant contended that as she was not a party to the former suit she was not bound by the decree and that she could not be held liable to the respondent because at the time when the respondent paid the sum decreed she had no interest in the payment inasmuch as at that time she had no interest in the holding and the superior proprietor's claim for rent was barred by limitation as against her. She also urged that she was not liable for any part of the costs incurred by the respondent in the former suit. *Held*, that a person liable with others jointly and severally for rent does not lose his right of contribution against the

(3) *Punjab v. Petum Singh*, 6 N.W.P. 192.

(4) *Punjab v. Petum Singh*, 6 N.W.P. 192, followed in *Musammat Kaniz Fiza Bibi v. Sheo Narain Misr*, 10 O.C. 108.

(5) *Radha Jibon Mustafee v. Forlong*, 2 Hay. 122.

others by failing to ask the Court to make them parties to the suit inasmuch as the liability to contribute does not depend upon the decree but on the fact that he and the co-sharers were in the position of joint promisors *qua* the superior proprietor and where one of such promisors has to discharge the whole debt or a part greater than his share he is entitled to recover from each of the others a contribution or proportion of the excess beyond his own share.⁽⁶⁾ It was further held in this case that as the respondent could not have avoided payment of the whole rent at the time when he was sued and when he had to pay it, a cause of action for contribution accrued on the payment,⁽⁷⁾ and that there could be no right to contribution in respect of costs.⁽⁸⁾

One of several sureties, who is compelled to pay the whole debt, (iii) Co-sureties. can in equity compel the others to contribute towards payment of it. This equitable right is one independent of contract although it may be taken away by special agreement. As a general rule, one co-surety cannot recover from the others the cost of defending an action, unless he is authorised or induced by the latter to do so, or unless, from some combination of circumstances, it became necessary to defend such suit.⁽⁹⁾

A suit was brought for maintenance against a *karnavathi* and (iv) Members of Malabar *farwad*. her *anandravans* which was decreed against the former and dismissed with costs against the latter. The present suit was brought for contribution by some of the plaintiffs in that suit, from whom the costs were recovered against others: *Held*, that as there was no misconduct on the part of the plaintiffs in impleading the *anandravans* as defendants and as costs had been ordered in a *bona fide* litigation, the defendants were bound to contribute.⁽¹⁰⁾

A suit for possession of a plot of land and for damages for (v) Joint tortfeasors. demolition of a wall and removal of building materials was decreed with costs against the parties to this suit. The decree was executed for costs against the present plaintiff, and he sued his co-defendants

(6) *Musamat Kaniz Fizza Bibi v. Sheo Narain Misr*, 10 O.C. 108 (referring to *Boulter v. Peplow*, 9 C.B. 493).

(7) *Musamat Kaniz Fizza Bibi v. Sheo Narain Misr*, 10 O.C. 108 (109).

(8) *Ibid*, following *Runjit v. Patam Singh*, 6 N.W.P. 192; see, also, *Jamshed Ali Khan v. Zahur-ul-Hasan Khan*, 18 O.C. 340.

(9) *Mrs. K. C. Byrne v. C. H. Macleod*, 86 P.R. 1868; see, also, *M. Constantine v. W. Drew*, 1 N.W.P. 100.

(10) *Shruvararayan v. Pullhia Kovila Katti Vararayan*, 7 Ind. Cas. 268.

in the previous suit for contribution. *Held*, that the suit would not lie.⁽¹¹⁾ Chatterjee, J., said in the course of the judgment :—"The law relating to right of contribution among joint tort-feasors is best summed up by Pollock in his *Work on Torts* thus : 'In short the proposition that there is no contribution between wrong-doers must be understood to affect only those who are wrong-doers in the common sense of the word as well as in law. The wrong must be so manifest that the person doing it could not at the time reasonably suppose that he was acting under lawful authority, or to put it summarily, a wrong-doer by misadventure is entitled to indemnity from any person under whose apparent authority, he acted in good faith ; a wilful or negligent wrong-doer has no claim to contribution or indemnity'."⁽¹²⁾

No right of contribution exists as between defendants who in collusion with each other set up a false defence to defeat the plaintiff's case.⁽¹³⁾

The finding arrived at as to such collusion between the defendants in the previous suit cannot be used as evidence to establish such a fact, in a subsequent suit for contribution for costs paid by one of such defendants against others ; for that finding was arrived at in the previous case in which the plaintiffs and defendants in the subsequent suit were all co-defendants and a third party was the plaintiff.⁽¹⁴⁾

(vi) Co-defendants having separate defences and also being tort-feasors.

In a suit against one defendant for possession of certain property, which was claimed as his by the original defendant, certain third persons got themselves added to the array of parties as defendants and put in a defence in opposition to and exclusive of that of the first defendant. The plaintiff in that suit obtained

(11) *Sudhu Singh v. Lehna Singh*, P.L.R. 1900, p. 525=7 P.R. 1901. *Held*, also, that as the costs were realized from the plaintiff within the jurisdiction of the Small Cause Court, the cause of action arose within the jurisdiction of that Court and it was, therefore, competent to try the suit. *Sudhu Singh v. Lehna Singh*, P.L.R. 1900, p. 525=7 P.R. 1901, (referring to *Gobind Chunder Nundy v. Srigobind Chowdhry*, 24 C. 330; *Vayangara Vadoka Vittil Manja v. Pariyangol Padingara Kuruppath Kadugochen Nayar*, 7 M. 89, and *Fakire v. Tasaddug Husain*, 19 A. 462).

(12) *Per* Chatterjee, J., in *Sudhu Singh v. Lehna Singh*, P.L.R. 1900, 525 (526-527)=7 P.R. 1901.

(13) *Gobind Chunder Nundy v. Srigobind Chowdhry*, 24 C. 330=1 C.W.N. 179 (following *Manja v. Kadugochen*, 7 M. 89 and distinguishing *Brojendra Kumar Roy Chowdhry v. Rash Behari Roy Chowdhry*, 13 C. 300).

(14) *Gobind Chunder Nundy v. Srigobind Chowdhry*, 24 C. 330=1 C.W.N. 179 (following *Surender Nath Pal Chowdhry v. Broja Nath Pal Chowdhry*, 13 C. 352 (F.B.)).

a decree, the claims of both sets of defendants being found to be unsupported, and the decree gave costs jointly against all the defendants. The decree having been executed for costs against the first defendant, he sued the other defendants for contribution. *Held* that the suit would not lie.⁽¹⁵⁾

Before a plaintiff can obtain contribution in respect of a decree for costs, he must show that some equity exists between him and his co-judgment-debtors making the latter liable to contribution. A suit was brought against several persons amongst whom were included the plaintiff and defendant to the present suit. The suit was dismissed in appeal, neither the plaintiff nor the defendant who were made *pro forma* defendants contested the claim. A decree for costs was made against all the defendants including parties to the present suit. The costs were recovered from the plaintiff to the present suit. In a suit by the plaintiff against the defendant for contribution it was *held* that the suit was not maintainable.⁽¹⁶⁾

Where co-sharers who have paid their share of revenue assessments are made defendants in a suit for contribution, together with other co-sharers whose proportion was paid by the plaintiff, the

(15) *Fakire v. Tasaddug Husain*, 19 A. 462=A.W.N. (1897) 107. (*Kristo Chunder Chatterjee v. Wise*, 14 W.R. 70, *Sreepully Roy v. Loharam Roy*, 7 W.R. 384, *Abdul Wahid Khan v. Shaluka Bibi*, 21 C. 496 (503) and *Suput Singh v. Imrit Tewari*, 5 C. 720, referred to.) The Court, Edge, C. J., and Blair, J., said in the course of the judgment:—"It appears to us that it lay upon the plaintiff here to show that there was either some contract between him and the defendants, or some equity which created a duty on these defendants to contribute to the costs in question as between themselves. Apparently the plaintiff and defendants here were wrong-doers. They were holding on to property to which the plaintiff in the former suit was entitled, and to which they (or either or any of them) were not entitled. Each was acting independently and for his own benefit, and setting up a title against the plaintiff to the former suit which was independent of, and separate from, and inconsistent with, the title set up by the other defendants. Their claims were mutually exclusive. There was no contract between them. One was not acting as the servant of the other; and there was no equity between these persons, whose cases were antagonistic to each other. It appears to us that the principle upon which *Kristo Chunder Chatterjee v. Wise*, 14 W.R. 70 and *Sreepully Roy v. Loharam Roy*, 7 W.R. 384, were decided is the correct principle to apply in this case. It is the principle which we believe the Privy Council would have applied; at least so we conclude from the judgment of their Lordships in *Abdul Wahid Khan v. Shaluka Bibi*, 21 C. 496 (503). That there may in some events be contribution between wrong-doers is shown from the judgment in *Suput Singh v. Imrit Tewari*, 5 C. 720. No facts were alleged or proved here, and no facts existed, which would entitle the plaintiff to obtain contribution from the defendants in respect of these costs." *Per* Edge, C.J., and Blair, J., in *Fakire v. Tasaddug Husain*, 19 A. 462=A.W.N. (1897) 107.

(16) *Mulla Singh v. Jagannath Singh*, 7 A.L.J. 720=32 A. 585=6 Ind. Cas. 684.

defendants who have paid are entitled to their costs of appearing, etc., notwithstanding the fact that the plaintiff may have made no claim against them, but has joined them merely for the sake of conformity.⁽¹⁷⁾

Mortgagee of
joint property
impleaded in
partition
suit.

A, B and C, being defendants in a partition suit, were ordered to pay the costs of the plaintiff therein. A was impleaded because he held a mortgage which had been executed in his favour by B over a portion of the property. Upon a warrant of attachment being issued against A, he paid the whole amount due in respect of the costs, and now sued B and C for contribution. *Held* that he was entitled to contribution.⁽¹⁸⁾

Cognisability
by Small
Cause
Court.

A suit by one of several joint judgment-debtors, who had satisfied a joint decree for costs, for contribution against the other joint judgment-debtors is not a suit exempted from the jurisdiction of a Court of Small Causes.⁽¹⁹⁾

A suit for costs paid by one of two persons jointly liable is cognizable by the Small Cause Court.⁽²⁰⁾

Cognizability
by Revenue
Court.

The respondent was the lambardar of a village and the applicants were co-sharers. The respondent sued certain under proprietors for enhancement of rent. He then filed a suit in the Civil Court claiming from the applicants their share in the costs of the litigation on the ground that they were benefited by the enhancement. The applicants pleaded that the claim was covered by cl. (16), S. 108 of the Oudh Rent Act, 1886, and consequently was only cognizable by the Revenue Court and not by the Civil Court. *Held*, that the claim was covered by cl. (16), S. 108, Oudh Rent Act, 1886, and was not cognizable by the Civil Court.⁽²¹⁾

(17) *Golam Ahmed Shah v. Beharyoll*, Marsh. 339.

(18) *Shakul Kameed Alim Sahib v. Syed Ebrahim Sahib*, 26 M. 373 (374) (distinguishing *Fakire v. Tasaddug Husain*, 19 A. 462 and commenting on *Merryweather v. Nizon*, 8 T.R. 186).

(19) *Bhairon v. Ram Baran*, 28 A. 292=A.W.N. (1906) 6=3 A.L.J. 6, following *Bisva Nath Shah v. Naba Kumar Chowdhary*, 15 C. 713.

(20) *Bisva Nath Shah v. Naba Kumar Chowdhary*, 15 C. 713 (followed in *Bhairon v. Ram Baran*, A.W.N. (1906) 6=3 A.L.J. 6=28 A. 292). See, also, *Sudhu Singh v. Lehna Singh*, P.L.R. (1900), p. 525=7 P.R. 1901.

(21) *Subba Singh v. Bakhtawar Singh*, 5 O.C. 298.

CHAPTER XIII.

INTEREST ON COSTS.

General.

Illustrative cases :—

- (i) Where costs form part of the entire decree.
- (ii) Where parties agree to submit the matter to discretion of executing Court.
- (iii) Where a just demand has been resisted by defendant for long time.
- (iv) Where decree under which costs were recovered is reversed.
- (v) Powers of executing Court—Execution of order of Privy Council, which awards costs but makes no mention as to interest thereon.

Rate of interest on costs incurred in British India.

Interest on costs of translation and printing.

“INTEREST cannot be allowed on costs where the decree itself is silent on the point, unless submission is made by the parties to the discretion of the Court.⁽¹⁾ The view once taken that S. 222 and S. 209 of the last Code did not affect the special provisions as to allowance of interest in the Transfer of Property Act⁽²⁾ has been dissented from and overruled.”⁽³⁾

Where costs form a part of the entire decree they would carry Court rate of interest.⁽⁴⁾

Illustrative cases :—
(i) Where costs form part of the entire decree.

Interest not provided for in the Privy Council order may, however, be allowed in execution where the parties have agreed to submit the matter to the discretion of the executing Court.⁽⁵⁾

(ii) Where parties agree to submit the matter to discretion of executing Court.

(1) *Bhosa Rughbur v. Bhosa Raj*, (1971) 3 A.H.C.R. 319; *Forester v. Secretary of State*, 4 I.A. 137=3 C. 161.

(2) *Amolak Ram v. Lachmi Narain*, 19 A. 175.

(3) *Achalabala Buz v. Surendro Nath Dey*, 24 C. 706; *Subbaraya v. Ponnuswami*, 21 M. 364; *Maharajah of Bhartpur v. Rani Kanno*, 23 A. 181 (191) (P.C.).

(4) *Tara Sundari Devi v. Khedan Lal Sahu*, 14 C.W.N. 1089 (1094). As regards interest on costs it is settled law (see *Raj Kumar Singh v. Sheo Narain Sahu*, 12 C.W.N. 364), that the costs must be included in the account which is to be made up as a whole on the decree nisi, and the decree being thus for a lump sum, the costs which are indistinguishable from the rest of the sum due bear interest *ipso facto* at the Court rate until realisation. 14 C.W.N. 1089 (1095).

(5) *Forester v. The Secretary of State*, 3 C. 161=4 I.A. 137=2 Suth. P.C. Rul. 628 (P.C.).

(iii) Where a just demand has been resisted by defendant for long time.

Where a just demand has been resisted by a defendant for a considerable time after receiving notice of the claim, the plaintiff is entitled to get full costs with interest.⁽⁶⁾

(iv) Where decree under which costs were recovered is reversed.

Where a decree under which costs were recovered is reversed, no express order is needed for refund of the costs; the party who recovered having no right to retain the same. Interest is awardable on costs to be so refunded.⁽⁷⁾

A successful appellant, claiming refund of costs with interest recovered from him in execution of the lower Court's decree subsequently reversed in appeal, can claim interest on the amount recovered from him.⁽⁸⁾

Costs paid in compliance with a decree subsequently reversed may be ordered to be refunded with interest by the Court which made the original decree.⁽⁹⁾

A party to a suit whose case has been dismissed in both the lower Courts with costs is entitled, when the decrees of the lower Courts are reversed by the Privy Council and the case remanded for re-trial, to apply for a refund of the costs already paid under the decrees of the lower Courts, but not for interest on such costs. Such an application need not be made to the Privy Council, but may be made to the Court in which the suit was instituted.⁽¹⁰⁾

(v) Powers of executing Court—Execution of order of Privy Council, which awards costs but makes no mention as to interest thereon.

The general rule is that an executing Court ought not to award interest where the decree itself does not award it.⁽¹¹⁾

(6) *Naklu Mal v. Phagu Shah*, 56 P.W.R. 1910.

(7) *Kedar Nath Pakrasee v. Doya Moyec Debia*, 20 W.R. 49.

(8) *Ram Sahai v. The Bank of Bengal*, 8 A. 262=A.W.N.(1886) 87, referring to *Forester v. The Secretary of State*, 3 C. 161=4 I.A. 137=2 Suth. 628 (P.C.) and followed in *Ayyanaiyar v. Shastram Ayyar*, 9 M. 506, *Arunachelam v. Arunachallam*, 15 M. 203=2 M.L.J. 1, and *Phul Ghund v. Shankar Sarup*, 20 A. 430=A.W.N. (1898) 100.

(9) *Dorab Ally Khan v. Abdool Assees*, 4 C. 229=3 C.L.R. 358.

(10) *Dorab Ally Khan v. Abdool Assees*, 4 C. 229=3 C.L.R. 358, referred to in *Mohanund Mondul v. Mafur Mondul*, 26 C. 820=3 C.W.N. 770.

(11) *Forester v. The Secretary of State*, 3 C. 161=4 I.A. 137=2 Suth. 628 (P.C.) referred to in 22 B. 42.

Interest cannot be allowed upon costs when the decree of the Privy Council is silent on the subject.⁽¹²⁾

Thus, when the order of the Privy Council awards costs, but is silent as to interest on the costs so awarded, it is not competent to the High Court, executing the order, to direct payment of the costs with interest.⁽¹³⁾

Where interest on costs is not awarded by the order of the Privy Council, the Courts in this country ought not to allow such interest in execution.⁽¹⁴⁾

A decree-holder is not entitled to claim interest on costs when not allowed by the decree. The proper course is for the parties to apply to the Court which made the decree to amend it; but in the stage of execution, the decree must be executed simply as it is.⁽¹⁵⁾

Where the decrees of the Sudder Court and of the Privy Council made no provision for interest on the costs awarded in those Courts, the lower Court cannot, in execution, allow interest on such costs.⁽¹⁶⁾

Interest not provided for in the order of the Privy Council may, however, be allowed in execution where the parties have agreed to submit the matter to the discretion of the Court executing the order.⁽¹⁷⁾

In the execution of a decree of the Privy Council the High Court allowed interest at 6 per cent. from the date of the order in council on the costs incurred in British India by the successful appellant.⁽¹⁸⁾

Rate of interest on costs incurred in British India.

Interest on costs may not exceed 6 per cent. Where high interest has been awarded up to date of suit, no further interest should ordinarily be allowed.⁽¹⁹⁾

(12) *Maharanees Broje Soonduree Debia v. Anund Moyee Debia*, 16 W.R. 302.

(13) *Forester v. The Secretary of State*, 3 C. 161=4 I.A. 137=2 Suth. 628 (P.C.), followed in *Tokhan Singh v. Girwar Singh*, 32 C. 494=9 C.W.N. 372=1 C.L.J. 118.

(14) *Forester v. The Secretary of State*, 3 C. 161=4 I.A. 137=2 Suth. 628 (P.C.), followed in *Dakhina Mohan Roy Chowdhury v. Saroda Mohan Roy Chowdhury*, 23 C. 357.

(15) *Ulfatunnissa v. Mohan Lal Sukul*, 6 B.L.R. App. 33. See, also, *Lekhraj Roy v. Mahtab Chand*, 21 W.R. 147.

(16) *Rajah Leelanund Singh v. Maharajah Joy Mungul Singh*, 15 W.R. 335.

(17) *Forester v. The Secretary of State*, 3 C. 161 (P.C.)=4 I.A. 137=3 Suth. P.C. J. 405=3 Sar. P.C.J. 717=P.R. 1877 (P.C.) 1.

(18) *A. B. Miller v. Madho Das*, A.W.N. (1897) 70, referring to *Nilmadhub Das v. Bisumbhur Das*, 21 W.R. 411.

(19) *Cassim Ali v. Tanda Mya*, L.B.E. (1899-1900), p. 332.

Interest on
costs of
translation
and printing.

Where the Privy Council reversed a decree of the High Court with £276 12s. 2d. as costs in England, and affirmed the decree of the Zillah Court with costs in the Courts below. *Held* (1) that "the Courts below" included the High Court, and that "costs in the Courts below" included the cost of translation and printing incurred in the High Court; (2) that the decree of the Zillah Court having given interest on the costs incurred, the decree-holder was entitled to interest on the costs incurred on account of translation and printing; and (3) that the decree of the Privy Council had made no provision for interest on the £276.⁽²⁰⁾

⁽²⁰⁾ *Muddun Thakoor v. Mr. Malcolm Brown Morrison*, 18 W.R. 253-9 B.L.R. App. 22.

CHAPTER XIV.

APPEAL AS TO COSTS—POWERS OF APPELLATE COURT.

Provisions of the Code of Civil Procedure—Previous case-law.

Grounds of interference by appellate Court :—

- (i) Where there is a question affecting jurisdiction of Court.
- (ii) Where question of principle is involved.
- (iii) Where order of lower Court offends against some well-recognised point of law.
- (iv) Where there is misapprehension of fact and law.
- (v) Where there is a wrong exercise of discretion.
- (vi) Where there is want of exercise of discretion.
- (vii) Order being against the uniform practice of the Court.
- (viii) Where there is a violation of an established principle.
- (ix) Where the order of lower Court is based on unsatisfactory reasons.
- (x) Where no reason is assigned for disallowing costs to successful party.
- (xi) Where the order of the lower Court is not clear.

Certain other illustrative cases.

Jurisdiction of appellate Court in respect of costs—*Forum* of appeal.

Second appeal.

Letters Patent appeal.

Construction of appellate Court's decrees as to costs.

It was originally proposed to enact in S. 96 of the Code of Civil Procedure⁽¹⁾ that: "No appeal shall lie on a matter of costs only where by law such costs are left to the discretion of the Court, except by leave of the appellate Court, obtained on an application accompanied by a memorandum of appeal." As, however, objection was taken the clause has been omitted, with the result that the matter is still regulated by the previous case-law. Under the Code of 1859 it was held that a regular appeal would lie on a mere question of costs, although as the lower Court had a discretion in the matter, any interference with its order ought also to be exercised with discretion. Though, however, an improper exercise of discretion might be matter of regular appeal, no special appeal would lie unless the award of costs was contrary to law.⁽²⁾ A similar rule

(1) Act V of 1908.

(2) *Gridhari Lal Roy v. Sundar Bibi*, B.L.R. Sup. Vol. F.B. 496. For earlier cases, see *Doucett v. Wise*, 1 W.R. 322, etc., cited in *Ameer Ali's C.P.C.*, 2nd Ed., 1916, p. 217.

was laid down⁽³⁾ under the Code of 1877. Under the last Code first appeals were given not merely from decrees but also from any part of the decrees,⁽⁴⁾ and necessarily therefore against the part of the decree awarding costs. But such an award was then, as before, a matter of discretion, and the Court of Appeal would generally only interfere where a matter of principle was involved,⁽⁵⁾ whether in first appeal from a decree⁽⁶⁾ or order,⁽⁷⁾ or in second appeal.⁽⁸⁾

The Bombay High Court⁽⁹⁾ citing, certain English decisions, has held that the principle to be deduced from them is that appeal Courts should interfere with the exercise of discretion by the lower Courts as to costs when there has been any violation of any established principle,⁽¹⁰⁾ misapprehension of facts,⁽¹¹⁾ or where there has been no real exercise of discretion at all.⁽¹²⁾ These principles will be of general application in first appeals and appeals from orders. In the case of second appeals it must be shown that the order complained of comes within the provisions of S. 100 of the Code of Civil Procedure.⁽¹³⁾

(3) *Balkissen Das v. LutchmEEPut Singh*, 8 C. 91 (94).

(4) Therefore, that part which relates to costs is appealable if the decree is appealable. See *Vasudev v. Bhavan*, 16 B. 241; *Balkissen Das v. LutchmEEPut Singh*, 8 C. 91 (94).

(5) *Secretary of State v. Marium Hossein Khan*, 11 C. 359; Ameer Ali's C.P.C., 2nd Ed., 1916, p. 218.

(6) *Ibid.*

(7) *Moshingan v. Mozari Sayad*, 12 C. 271; that is, appealable orders, an appeal lying from that part of the order relating to costs.

(8) *Bunwari Lall v. Chowdhry Drup Nath Singh*, 12 C. 179; Ameer Ali's Code of Civil Procedure (Act V of 1908), Notes under S. 35, 2nd Ed., pp. 217, 218.

(9) *Ranchordas Vitthaldas v. Bai Kasi*, 16 B. 676 (682); followed in *Kushal Sadashiv v. Punamchand Jusrupji*, 22 B. 164; *Parshram v. Dorabji*, 2 Bom. L. R. 254.

(10) The English cases are numerous; see Morgan and Wurtzburg on Costs, p. 266. Ann. Practice, Notes to O. 65, r. 1, p. 963, Vol. II, p. 467; *Parshram v. Dorabji*, 2 Bom. L. R. 254 (255).

(11) *In re Gilbert*, 28 C. D. 549; *Robertson v. Robertson*, 6 P. D. 119; *Parshram v. Dorabji*, 2 Bom. L. R. 254 (255).

(12) As where costs have been awarded arbitrarily, *Daulat Ram v. Durga Prasad*, 15 A. 333; Ameer Ali's C. P. C., 2nd Ed., 1916, p. 218.

(13) Act V of 1908. The following extract from an article in the 4th volume of the All. Law Journal may also be noted:—"Does an appeal lie upon a question of costs or is the question of costs purely in the discretion of first Court? Mookerjee and Holmwood, JJ., held that such an appeal will lie when a matter of principle is involved. This rule of law had also been laid down by the Calcutta High Court in *Banwari Lall v. Chowdhry Drup Nath*, 12 C. 179; *Moshingan v. Mozari*, 12 C. 271. See also *Daulat Ram v. Durga Prasad*, 15 A. 333. The question arose in a suit for partition of joint zemindari property in which the defendants in addition to

If an order is itself appealable as affecting the jurisdiction of the Court or the merits of the case, an appeal will lie from that part of the order which relates to costs; but, as in the case of decrees, in those cases and those cases only where the order is appealable, will an appeal lie against the direction as to costs, which is ancillary to the order.⁽¹⁴⁾

Grounds of interference by appellate Court :—
(i) Where there is a question affecting jurisdiction of Court.

An appeal for costs will be entertained if a question of principle is involved. The English cases are numerous.⁽¹⁵⁾

(ii) Where question of principle is involved.

The appellate Courts have the fullest power and the widest discretion to alter, vary, or reverse any portion of a decree under appeal including the portion that deals with costs. It is the settled practice of the appeal Court never to interfere with the Judge below in his order as to costs, unless the order offends against some well-recognised principle or unless the appeal Court feels that it would be unjust to the party against whom it is made if the order be allowed to stand.⁽¹⁶⁾

(iii) Where order of lower Court offends against some well-recognised point of law.

to their share in the proprietary interest had taken a *Mokarari* (lease) of a fraction of the share owned by the plaintiff. The partition which was effected by the Court below allotted to the defendants two parcels, one corresponding to their share in the proprietary interest and the other corresponding to their share comprised in their *Mokarari*, while the plaintiff was allotted a parcel which represented his share in the proprietary interest reduced by the share granted by him as *Mokarari* to the defendants. In a very learned judgment delivered by Mookerjee, J., who reviewed a number of English and Indian Cases, it was held that as the plaintiff in a partition suit commenced it for his own advantage, convenience and security, and as the defendant, as joint owner, held his undivided share always subject to the right of the plaintiff to demand partition, the parties must each bear their own costs of the suit up to the stage of the preliminary decree, and the costs of the partition should be divided between the parties in proportion to their respective shares in the estate, but that if there had been a frivolous contest, the party by reason of whose opposition unnecessary costs were incurred might be made liable. In support of the first portion of the rule the decision in the case of *Sham Soondar v. Jardine, Skinner & Co.*, (1869) 12 W.R. 160, was referred to, while as regards the latter portion reliance was placed on *Porter v. Lopes*, (1877) 7 Ch. D. at p. 367. As the relation between the parties was also that of lessor and lessee, it was further held that the costs of the partition as between the lessor and the lessee should be borne by them in proportion to their respective interests in the share covered by the *Mokarari*. *Nawab Dildar Ali v. Bhawani Sahai*, 5 O.L.J. 642. See 4 A.L.J. Journal Portion, p. 316.

(14) *Balkissen Das v. Luchmaeput Singh*, 8 C. 91.

(15) See *Morgan and Wurtzburg on Costs*, p. 160; see, also, *The Secretary of State v. Marjum Hossein Khan*, 11 C. 359; *Bunwari Lall v. Chowdhry Drup Nath Singh*, 12 C. 179; *Moshigan v. Mozari Sajad*, 12 C. 271, cited in *Ranchordas Vithaldas v. Bai Kasi*, 16 B. 676 (680).

(16) *Ahmedbhai v. Sir Dinshaw M. Petit*, 13 Bom. L.R. 1061 (1062). Davar, J., said in the course of the judgment :—"The learned Judge below has thrown the whole costs of the suit on the plaintiff. We are unable to concur in the justice of that order.

(iv) Where there is misapprehension of fact and law.

Where the original Court has made an erroneous order for costs under a misapprehension of fact and law, an appeal lies from such order under the Civil Procedure Code, although the appellant complains of nothing else but the order for costs so erroneously made.⁽¹⁷⁾

I am quite aware that the order as to costs is one of discretion with the Judge hearing the suit, and I am quite cognisant of the fact that it is the settled practice of the appeal Court never to interfere with the Judge below in his order as to costs unless the order offends against some well-recognized principle or unless the appeal Court feels that it would be unjust to the party against whom it is made if the order be allowed to stand. I feel sure that the learned Judge who made the order would himself have made a different order, if the question of costs had been argued before him fully and his attention drawn to the hardship of the order directing the plaintiff to pay the whole of the costs of the prolonged hearing before him. No doubt the plaintiff was liable to pay the costs of both sets of defendants up to a certain stage of the hearing. He filed a suit against the executor-defendants and failed. He brought in the other defendants and they were dismissed from the suit. The question of *res judicata* was a proper question to argue before the Court and it was argued at the right time. The plaintiff was bound to pay all the costs of both sets of defendants up to the time the learned Judge delivered his judgment on the point of *res judicata*. After that, I think, if the defendants had done what they were bound, in our opinion, to do, and raised the question of misjoinder of parties and of causes of action and the question of executor-defendants' liability to perform the contract specifically had been argued, the hearing of the suit would not have taken more than one full day. The order as to costs, that, under the circumstances, would have been just one, would have been to award to both sets of defendants their costs up to the time when the Court decided the question of *res judicata* and the costs of one full day after that. All other costs all parties ought to have been left to bear themselves. I feel that in the interests of justice it is imperative that we should vary the order of the lower Court as to costs in the manner I have indicated above. Subject to that variation, we dismiss the appeal and direct the appellant to pay the respondents' costs of this appeal. * * * Mr. Raikes has argued that an order for costs is always discretionary with the lower Court, that when the lower Court makes that order, it must be presumed that the Court made it in the exercise of its discretion and that the appeal Court must refrain from interfering with that order, however strongly it may feel that the order is unjust to party against whom it is made. We are not prepared to accede to this argument. In India the appellate Court is invested with the fullest power to alter, vary, amend or reverse *any portion* of the decree under appeal including that part which deals with costs. And although the appellate Court may in practice impose upon itself certain limitations, we cannot think any appellate Court, having the power to reverse or revise an order, would stay its hands if it felt that the order was an unjust one." *Ahmedbhai v. Sir Dinshaw M. Petit*, 13 Bom. L. R. 1061 (1088-1089, 1095-1096).

(17) *Ranchordas Vithaldas v. Bai Kasi*, 16 B. 676, followed in *Madho Singh v. Laldu*, 6 O.C. 52 (56); approved in *Khushal Sadasiv v. Funam Chand Jusrupji*, 23 B. 164 (168); referred to in *Ahmed Bhai Habibbhoj v. Sir Dinshaw Maneckji Petit, Bart.*, 13 Bom. L.R. 1061 (1093) = 12 Ind. Cas. 813 (830); *Nadir Shaw Hormusji Sukhia v. Pirojshaw Rattanjee Ruinagar*, 15 Bom. L.R. 130 (164); *Faraprosunno Mookerjee v. Satish Chandra Singh*, 4 O.W.N. 90 (91); *Ghasita Mal v. Jamiyat Rai*, 14 Ind. Cas. 284 (285) = 118 P.L.R. 1912 = 120 P.W.R. 1912. Bayley, C.J., said in the course of the judgment:—"This is an appeal from the lower Court's order as to costs, on the

The discretion conferred on Civil Courts in the matter of awarding costs, must be exercised according to general principles and not arbitrarily.⁽¹⁸⁾ (v) Where there is a wrong exercise of discretion.

So, where, in a suit in which the defendant succeeds in full, the Court orders the parties to bear their own costs, an appeal lies from such order.⁽¹⁹⁾

An order regarding costs will not be interfered with, unless it is plain that an unwise discretion has been exercised in awarding them.⁽²⁰⁾

ground that it has been made contrary to principle. The suit was instituted by the plaintiff for possession of a house he had purchased from the 1st defendant for the price of Rs. 42,000. The first defendant executed the conveyance, but did not give possession. He was residing in the house with the other defendants, members of his family, who are respondents in appeal, and the latter claimed an independent interest in the house under a will made in their favour by the original owner, and declined to give up possession. The respondents put in a separate written statement of their own, and appeared by separate counsel. At the hearing, all the issues raised for them by their counsel were decided unfavourably to them, and a decree for possession was passed against them, the decree at the same time declaring that they had no interest in the house. As to their costs, the Court ordered the plaintiff to pay them, and recorded its reasons for so doing as follows :—(His Lordship then read the reasons as set out above, and continued). The reason, in substance, is that the respondents were unnecessary parties to the suit, and should not have been joined. It is clear that the Court was in error in holding that the respondents were unnecessarily made parties to the suit. They were actually in possession, and, therefore, were properly made defendants. There is, we think, therefore, no doubt that the Court made the order complained of under a misapprehension of fact and law as to who were, or were not, necessary and proper parties to the suit brought by the plaintiff. That being the case, an appeal, we think, lies under Ss. 220 and 540 of the Civil Procedure Code against an order for costs so erroneously made, whether there is, strictly speaking, any principle involved in such an appeal or not. In England, similar appeals for costs have been allowed both before and after the passing of the Judicature Acts. The Courts have reversed the order for costs before those Acts in *Owen v. Griffith*, 1 Ves. 249; *Angell v. Davis*, My. & Cr. 360; *Palmers v. Walesby*, L.R. 3 Ch. App. 732; and *Norton v. Cooper*, 5 De G.M. & G. 728; and since those Acts in *In re Gilbert*; *Gilbert v. Hudleston*, 28 Ch. D. 549; *Johnstone v. Cox*, 19 Ch. D. 17; *Harris v. Petherick*, 4 Q.B.D. 611; *Wilmott v. Barber*, 17 Ch. D. 772; and *The Monkseton*, 14 P.D. 51. The principle to be deduced from these decisions is that appeal Courts should interfere with the exercise of discretion by the lower Courts as to costs when there has been any misapprehension of facts, or violation of any established principle, or where there has been no real exercise of discretion at all. There being in this case a clear misapprehension of fact and law, we think the order must be reversed, and, instead of that part thereof which directs the plaintiff to pay the costs of the defendants, we order that each party do pay his and their own costs. The appellants' costs of appeal to be paid by the respondents." *Ranchordas Vilhaldas v. Bai Kasi*, 16 B. 676 (681-682).

(18) *Wahed Ali v. Ghafur-un-nissa*, A.W.N. (1905) 75.

(19) *Ibid.*

(20) *Mussammat Jeewunnee v. Hakim*, 81 P.R. 1869.

The High Court, although it has undoubted jurisdiction, will never interfere with the discretion of the Courts below, as to costs unless it appears that the discretion has been materially and wrongly exercised to the detriment of a party.⁽²¹⁾

An appellate Court will not interfere with an exercise of discretion of a lower Court unless it has proceeded on a manifestly wrong ground, such as the application of an erroneous principle, or a misapprehension of the facts.⁽²²⁾

So long as the discretion was in fact exercised, an appellate Court will not interfere simply because it would itself have exercised the discretion differently.⁽²³⁾

Where costs are in the discretion of the Judge, the Court of appeal will assume that the Judge exercised his discretion, unless it is satisfied that he has not exercised his discretion.⁽²⁴⁾

In a probate proceeding, a *caveat* was filed by one of the relatives of the deceased. The *caveat* having been withdrawn at the hearing, the Judge discharged it with costs without passing any order allowing fees to counsel on the higher scale as required by Rule No. 205 of the Rules of the Allahabad High Court, dated the 18th January, 1898, and passed a decree for probate. The decree subsequently drawn having contained only the usual lower scale fee, counsel for the applicant, instead of taking objections to the decree by adopting the procedure laid down by Rules 89, 90, of the Rules mentioned above, brought the matter to the notice of the Judge in open Court, who, thereupon, ten days after the delivery of the judgment, ordered that fees on the higher scale should be entered up in the decree. The High Court, in a Letters Patent Appeal from this amended decree, allowed a reasonable fee to counsel for the applicant, commensurate with his work in the matter, and held (1) that counsel should have taken the procedure mentioned by

(21) *The Bank of Upper India, Limited v. Bishen Dayal*, A.W.N. (1892) 10.

(22) *Parshram Bhawoo v. Dorabji Pestonji*, 2 Bom. L.R. 254.

(23) *Ibid.*

(24) *Ibid.* The Court said :—In referring to a qualification on the Court's discretion, in the matter of costs, "I had in mind the proviso to S. 220 which is as follows :— 'Provided that, if the Court directs that the costs of any application or suit, shall not follow the event, the Court shall state its reasons in writing.' It is true the rules of this Court dispense with the necessity for stating reasons in writing, but I cannot think it was the intention of the framers to absolve the Court from observance of the rule that in the absence of reason to the contrary costs should follow the result." *Parshram v. Dorabji*, 2 Bom. L.R. 254 (255).

rules 89 and 90 of the Allahabad High Court Rules mentioned above, (2) that a Resolution of the Court that, in an order for costs, fees should always be taken to be fees on the higher scale, might be looked at for the purpose of interpreting an order as to costs, though such resolution was not published in the Gazette, and (3) that, in allowing fees on the higher scale, without regard to the amount of such fees, the Judge who passed the amended decree in the probate matter did not exercise a proper judicial discretion.⁽²⁵⁾

The awarding of costs being entirely in the discretion of the Court, such discretion should not be interfered with in appeal unless it can be made out that the Court has utterly failed to exercise its discretion or has acted in an arbitrary and unjudicial manner.⁽²⁶⁾

The uniform practice of Courts in this Presidency is to award costs only on the amount decreed to plaintiff. Where the award of costs by the Courts below was against this practice it may be set aside in appeal.⁽²⁷⁾

No appeal will lie merely as to costs unless there has been violation of an established principle,⁽²⁸⁾ in which case there will be a right of appeal.

Ordinarily, costs should follow the event, and when the lower Court does not act on this rule it ought to give a sufficient reason. Where the reason given by the Subordinate Judge for disallowing the costs of a successful plaintiff is unsatisfactory, the High Court can and will interfere under S. 25 of Act IX of 1887.⁽²⁹⁾

The discretion allowed to the Court by the Civil Procedure Code is one which must be judicially exercised.⁽³⁰⁾ Where, therefore, the first Court gave plaintiff a decree for the full amount claimed, but ordered payment to be made by instalments, whereupon the plaintiff appealed to the Commissioner, who stated that he was of opinion that there was no reason for such instalments, but that "under the circumstances of the case" the plaintiff should not be

(25) *H. E. Clark v. E. Caleb*, A.W.N. (1905) 83.

(26) *Iqbal Narain v. Suraj Narain*, 24 Ind. Cas. 673=1 O.L.J. 156.

(27) *Periakaruppan v. Palaniappa*, 13 M.L.J. 210. (*Per Davis, J.*) referring to *Velu Pillai v. Ghose Mohamed*, 17 M. 293.

(28) *Gurdinomal Hardasmal v. Wadhmal*, 6 S.L.R. 226 (227) referring to *Khushal Sada Shiva v. Panamchand Jusurpi*, 22 B. 164.

(29) *G. Narayana Iyer v. S. Venkatarama Iyer*, (1912) M.W.N. 366.

(30) *Sehju Mal v. Panjala*, 21 P.R. 1893. See also *G. Narayana Iyer v. S. Venkatarama Iyer*, (1912) M.W.N. 366.

allowed the costs of his appeal, *held*, on a further appeal by plaintiff, that there was no reason for not allowing him the costs of his appeal to the Commissioner, who had not exercised his discretion judicially in the present case.⁽³¹⁾

(xi) Where the order of the lower Court is not clear.

Where the trial Judge made an order that the costs should follow the event but it was not clear as to how the learned Judge intended the order to be worked out their Lordships of the High Court, in appeal, felt themselves at liberty to interfere with the order, as the order as interpreted was not a proper order.⁽³²⁾

Certain other illustrative cases.

The usual rule is that costs should be allowed to the successful party and where no good ground exists for not following the rule the appellate Court rectify the error of the original Court.⁽³³⁾

A Court has full discretion as to costs, but that discretion must be exercised on general principles and not arbitrarily.⁽³⁴⁾

In a suit for the recovery of a debt, where the amount has been deposited in Court, the Court has a discretion as to the disposal of costs.⁽³⁵⁾

Where, in a suit for defamation, a decree was given for the plaintiff for nominal damages, but he was ordered to pay the defendant's costs, *held*, that the order as to costs was in the discretion of the Court below, and therefore no special appeal would lie from

(31) *Sehju Mal v. Panjala*, 21 P.R. 1888.

(32) *Numberumal Chettiar v. Krishnaje*, 26 M.L.J. 356 (357) = (1914) M.W.N. 310. "An appellate Court will not interfere with an exercise of discretion of a lower Court unless it has proceeded on a manifestly wrong ground, such as the application of an erroneous principle or a misapprehension of the facts. So long as the discretion was in fact exercised, an appellate Court will not interfere simply because it would itself have exercised the discretion differently." "If the costs are in the discretion of the Judge the Court of Appeal will assume that the Judge exercised his discretion unless it is satisfied that he has not exercised his discretion. It is not easy to lay down any general proposition as to what are the circumstances in which an appellate Court should interfere, if it so desires, with an order as to costs where the order purports to be made in the exercise of the discretion vested in the Judge." *Numberumal Chettiar v. Krishnaje*, 26 M.L.J. 356 (360, 361) = (1914) M.W.N. 310, referring to *Parshram v. Dorabji*, 2 Bom. L.R. 254, and *Bew v. Bew*, (1899) 2 Ch. 472.

(33) *Chela Ram v. Mengh Raj*, 65 P.L.R. 1915 = 22 P.W.R. 1915.

(34) *S. M. Bhugobati Pal v. Mahomed Ali*, 7 C.W.N. 647 (648). Case where it was held that the order of the first Court ordering that plaintiff who was the unsuccessful party was not to pay any costs to defendant was bad. *S. M. Bhugobati Pal v. Mahomed Ali*, 7 C.W.N. 647 (648).

(35) *Ramasami Reddi v. Lakshmiambal Ammal*, 13 Ind. Cas. 200 = (1911) M.W.N. 568.

such order; the rule as laid down in *Girdhari Lal Roy v. Sunder Bibi*,⁽³⁶⁾ being that an order as to costs cannot be interfered with in special appeal unless it is illegal.⁽³⁷⁾

In accepting the appeal from the order refusing to set aside the *ex parte* decree passed second time in this case, the Chief Court cancelled all the proceedings subsequent to the passing of the first *ex parte* decree including the orders allowing costs on the occasion of setting aside the *ex parte* decree and granting the adjournments.⁽³⁸⁾

Where an appeal from the decree of a Subordinate Judge in a suit, the value of the subject-matter of which exceeded Rs. 5,000, was preferred to the District Court merely on the question of costs, the circumstance that the appeal related merely to the question of costs did not alter the original scope of the suit, the appeal in which in ordinary course would have lain to the High Court, and the District Court had therefore no jurisdiction to entertain such appeal.⁽³⁹⁾

In a suit on mortgage against the respondents they pleaded discharge and want of notice. The Subordinate Judge framed issues on those pleas and required the respondents to prove them. The evidence was taken on both sides and the case on those issues argued. Then the appellants withdrew their suit as against the respondents. The Subordinate Judge in the decree that was passed ordered the respondents to bear their own costs. On appeal the District Judge ordered the appellants to pay the costs of the respondents in the suit. *Held* that since there was a decree passed in the suit an appeal lay to the District Judge against the order of the Subordinate Judge relating to costs and the former could interfere with the discretion of the latter in making the order.⁽⁴⁰⁾

Where an appeal relates to costs only, the appellate Court has no jurisdiction to remand the case for trial upon its merits.⁽⁴¹⁾

(36) B.L.R. Sup. Vol. 496.

(37) *Futeeh Parooee v. Mohender Nath Mozoomdar*, 1 C. 385 = 25 W.R. 226, followed in *Bunwari Lal v. Chowdhry Drup Nath Singh*, 12 C. 179 (181) referred to in *Madho Singh v. Lattu*, 6 O.C. 52 (55).

(38) *Umat-ul-Mugni Begum v. Salig Ram*, 51 P.W.R. 1915.

(39) *Hemanchal Singh v. H. Maxwell*, A.W.N. (1883) 134.

(40) *Indoor Subama Reddi v. Nelatur Sundararaja Iyengar*, 18 M.L.T. 460.

(41) *Muthra Pershad v. Bunde Roy*, 5 N.W.P. 20.

The last clause of S. 596 of the Code of Civil Procedure⁽⁴²⁾ relates to the subject-matter of the suit and therefore there is no right of appeal when the two Courts differ only as to costs.⁽⁴³⁾

Second
appeal.

A second appeal lies as to costs against an appellate decree.⁽⁴⁴⁾

It is competent to the High Court on second appeal to interfere with that portion of an appellate decree which relates to costs.⁽⁴⁵⁾

But the discretion of the Courts below in the matter of awarding costs, when properly exercised, cannot be interfered with by the High Court on second appeal.⁽⁴⁶⁾

Under the Code of Civil Procedure a Court has full power to give and apportion the costs in any manner it thinks fit, and a second appeal does not lie from the legal exercise of a discretionary power.⁽⁴⁷⁾

The grounds taken in second appeal should be full and specific and should clearly indicate the error of law assigned, or the substantial error or defect in law or procedure or investigation which is imputed, and in the latter case it should be made to appear on the face of the grounds of appeal that such error or defect probably produced error or defect in law in the decision on the merits by stating what bearing the supposed error or defect had on the merits of the case.⁽⁴⁸⁾

In a second appeal, the Court cannot interfere with an order as to costs unless the order is illegal. The Court cannot examine the reasons and review the exercise of the discretion of the lower

(42) Act XIV of 1882.

(43) *Thakur Baldeo Bakhsh Singh v. Thakur Lalji Singh*, 10 O.C. 65, dissenting from *Raja Sree Nath Roy Bahadur v. Secretary of State for India in Council*, 8 C.W.N. 294; referring to Select Cases Nos. 55 and 139; following a Full Bench ruling at p. 83, Miscellaneous Rulings, Volume VI, Weekly Reporter, (which Dwarkanath Mitter, J., personally dissented) it was held that, no appeal lies from an order of a lower Court, rejecting an application for filing an award under S. 327, Act VIII, 1859, even though the order awards costs. *Preonath Choudhry v. Ramdhun*, 11 W.R. 104.

(44) *S. M. Bhugobati Pal v. Mahomed Ali*, 7 C.W.N. 647, relying *Daulat Ram v. Durga Prasad*, 15 A. 333.

(45) *Dungar Mal v. Ram Chandar*, A.W.N. (1898) 130, referring to *Daulat Ram v. Durga Prasad*, A.W.N. (1893) 110.

(46) *Periakaruppan v. Palaniappa*, 13 M.L.J. 210.

(47) *Ohhabba Ram v. Thakur Jawahir Singh*, 6 O.C. 39.

(48) *Ibid.*

Court in the matter of costs.⁽⁴⁹⁾ Even if the discretion is exercised wrongly, that is not a sufficient reason for interfering in second appeal.⁽⁵⁰⁾

A second appeal lies against an order about costs only; but in every such appeal the appellant must be required to show that the order of the first appellate Court is contrary to some specified law in the ordinary sense, and that there is thus some good ground for an appeal under S. 584, Civil Procedure Code.⁽⁵¹⁾

When a question of costs is purely in the discretion of the lower Court no second appeal will lie, but when a matter of principle is involved a second appeal will lie.⁽⁵²⁾

Where A was sued upon the allegation that he had instigated his co-defendant B to refuse to deliver up a document for the recovery of which the suit was brought, and where no relief was prayed as against A, but the lower Courts awarded a decree in favour of the plaintiff directing A to pay half the costs of suit: *Held*, that the question was one of principle, and that a second appeal lay to the High Court against the decree directing A to pay such costs.⁽⁵³⁾

Following the law laid down in *Ranchor Das v. Bai Kasi*,⁽⁵⁴⁾ it was *held* that an order of an appellate Court as to costs is "contrary to law," within the meaning of S. 584, Civil Procedure Code, not only when the Court's discretion has been exercised contrary to law, in the ordinary sense, but also when that discretion has been exercised in such circumstances as would justify the correction of the order by the appellate Court, had it been passed by a Court of original jurisdiction.⁽⁵⁵⁾

(49) *Ma Lon Ma v. Maung Tun U*, 15 Ind. Cas. 429.

(50) *Ibid*.

(51) *Maula Bakhsh v. Musammal Musuman*, 8 O.C. 251, referring to and discussing *Chabba Ram v. Thakur Jawahir Singh*, 6 O.C. 39, and *Madho Singh v. Lattu*, 6 O.C. 59.

(52) *Bunwari Lal v. Chowdhry Drup Nath Singh*, 12 C. 179, referred to in *Vasudev Ramchandra v. Bhavan Jivraj*, 16 B. 241 (242); *Madho Singh v. Lattu*, 6 O.C. 52 (55); *Nawab Dildar Ali Khan v. Bhowani Sahai Singh*, 5 O.L.J. 642 (644) = 34 O. 878.

(53) *Ibid*.

(54) 16 B. 676.

(55) *Madho Singh v. Lattu*, 6 O.C. 52.

Letters
Patent
appeal.

An appeal lies under the Letters Patent from an order as to costs merely when that order is only incidental to a "judgment."⁽⁵⁶⁾

Construction
of appellate
Court's
decree as to
costs.

The words "appeal allowed with costs" in the order of the High Court would mean "the costs of the High Court only and not the costs of the original Court as well."⁽⁵⁷⁾

Where in decreeing a suit in the plaintiff's favour, the first Court directed the defendants to pay the plaintiff's costs, but following the direction in S. 206 of the Civil Procedure Code (Act XIV of 1882) set out at the end of the ordering portion of the decree the amounts of costs respectively incurred by the several defendants; and on the defendants' appeal to the High Court, the decree was reversed and the plaintiff was directed to pay to the "defendants-appellants the costs of the appeal" and "the costs incurred by them in the lower Court." *Held*, on a construction of the High Court's decree, that the defendants were entitled to recover in addition to the costs of the appeal the several amounts entered against their names in the decree of the first Court as their costs.⁽⁵⁸⁾

(56) *Numberumal Chettiar v. Krishnaje*, 26 M.L.J. 356 (357) = (1914) M.W.N. 310, distinguishing *Manali Saravana Mudaliar v. Rajagopala Chetty*, 17 M.L.J. 569.

(57) *Surenāra Nath v. Girija Nath*, 15 C.L.J. 658.

(58) *Raghu Nandan Lal v. Rajendra Prasad Narain Singh*, 14 C.W.N. 556 = 11 C.L.J. 207 = 5 Ind. Cas. 342.

CHAPTER XV.

SECURITY FOR COSTS.

Provisions of the Code of Civil Procedure relating to security for costs :—

- (i) Security for costs, when may be required from plaintiff :—
 - (a) Residence out of British India.
 - (b) Where plaintiff is a woman.
 - (c) Effect of failure to furnish security.
- (ii) Security for costs in appeal :—
 - (a) Stay of proceedings and of execution by appellate Court.
 - (b) Stay by Court which passed the decree.
 - (c) Security in case of order for execution of decree appealed from.
 - (d) No security to be required from the Government or a public officer in certain cases.
 - (e) Exercise of powers in appeal from order made in execution of decree.
 - (f) Appellate Court may require appellant to furnish security for costs.
- (iii) Security for costs in appeal to Privy Council :—
 - (a) Security and deposit required on grant of certificate.
 - (b) Admission of appeal and procedure thereon.
 - (c) Revocation of acceptance of security.
 - (d) Power to order further security or payment.
 - (e) Effect of failure to comply with order.
 - (f) Powers of Court pending appeal.
 - (g) Increase of security found inadequate.
- (iv) Security in case of arrest before judgment :—
 - (a) Where defendant may be called upon to furnish security for appearance.
 - (b) Security.
 - (c) Procedure on application by surety to be discharged.
 - (d) Procedure where defendant fails to furnish security or find fresh security.
- (v) Security in case of attachment before judgment :—
 - (a) Where defendant may be called upon to furnish security for production of property.
 - (b) Attachment where cause not shown or security not furnished.
 - (c) Removal of attachment when security furnished or suit dismissed.
- (vi) Security in case of suit on negotiable instruments tried summarily—
Power to set aside decree and grant stay of execution.
- (vii) Security for costs in case of plaintiff's insolvency :—
Procedure where assignee fails to continue suit or give security.
- (viii) Withdrawal of suit or abandonment of part of claim —Payment of costs.

Cases in which security for costs is demanded :—

- (i) Where plaintiff is a woman.
Reason of the above rule.
Illustrative cases.
Application of the above rule to an infant female plaintiff, or her next friend.
- (ii) Where stranger put forward as plaintiff—Nominal plaintiff.
- (iii) Where plaintiff is resident out of British India :—
 - (a) Indian cases.
 - (b) English cases.
 - (c) Further illustrative cases.
- (iv) Where the winding up company is out of jurisdiction.
- (v) Where a person is merely on his defence.
- (vi) Where there is a claim and counter-claim.
- (vii) Where defendant obtains conduct of the case.
- (viii) Where a party is merely interpleading.
- (ix) Where defendant is in the position of a *quasi*-plaintiff.
- (x) Where party is a convict.
- (xi) Where petitioner in divorce proceedings is abroad.
- (xii) Where plaintiff is a pauper or insolvent.
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- (xiii) Where plaintiff is a lunatic.
- (xiv) Where plaintiff is a married woman—English law.
- (xv) Where the plaintiff is a privileged person.
- (xvi) Where the action is by the Attorney-General at the instance of a relator.
- (xvii) Where plaintiff's residence is not properly described.
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Stay of proceedings.

When application may be made.

Delay in applying for security for costs, effect of.

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Security for costs in appeal.

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Powers of appellate Court.

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Restoration of appeal dismissed on failure to furnish security in appeal to Privy Council.

Restoration of application praying for security for costs.

Enforcement of order against surety—Practice.

Extension of time for payment of security.

Time for demanding costs in appeal.

Practice.

Res judicata.

THE Code of Civil Procedure ⁽¹⁾ contains the following provisions relating to security for costs:—"Where at any stage of a suit it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are, residing out of British India, and that such plaintiff does not, or no one of such plaintiff does, possess any sufficient immoveable property within British India other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within the time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant."

Provisions of the Code of Civil Procedure relating to security for costs:—
(i) Security for costs when may be required from plaintiff:—

Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming when-
ever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub-rule (1).

(a) Residence out of British India.

On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India.⁽²⁾

(b) Where plaintiff is a woman.

In the event of such security not being furnished within the time fixed the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

(c) Effect of failure to furnish security.

Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

The dismissal shall not be set aside unless notice of such application has been served on the defendant.⁽³⁾

"An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court

(ii) Security for costs in appeal:—

(a) Stay of proceedings and of

(1) Act V of 1908.

(2) Civ. Pro. Code (Act V of 1909), O. XXV, r. 1. The object of the above Order execution
XXV, Rule (1), is to provide for the protection of defendants in cases specified in the rule where, in the event of success, they may have difficulty in realizing their costs from the plaintiff.

by appellate Court.

(3) Civ. Pro. Code (Act V of 1908), Order XXV, r. 2.

may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the appellate Court may for sufficient cause order stay of execution of such decree.

(b) Stay by Court which passed the decree. Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making is satisfied:—(a) that substantial loss may result to the party applying for stay of execution unless the order is made; (b) that the application has been made without unreasonable delay; and (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

Notwithstanding anything contained in sub-rule (3), the Court may make an *ex parte* order for stay of execution pending the hearing of the application.⁽⁴⁾

(c) Security in case of order for execution of decree appealed from. Where an order is made for the execution of a decree from which an appeal is pending the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the appellate Court, or the appellate Court may, for like cause, direct the Court which passed the decree to take such security.

Where an order has been made for the sale of immoveable property in execution of a decree, and an appeal is pending from

(4) Civ. Pro. Code (Act V of 1908), O. XLI, r. 5. The nature and extent of the liability of a surety under this rule depends on the words of the security bond. *Amir Ali, In the matter of*, 13 W.R. 403. Thus where the bond was to perform all orders and decrees passed in appeal, it was *held* that the obligation under the bond extended to the final decree passed in second appeal. *Shivlal v. Apaji*, 2 B. 654; 3 B. 204. Where the judgment-debtor executes a security-bond under clause (c) of sub-r. (3) cited above, and the bond amounts to a mortgage, it was *held* that section 99 of the Transfer of Property Act applied to the case, and the decree-holder could not bring the property comprised in the bond to sale except by means of a regular suit. *Tokhan Singh v. Girwar Singh*, 32 C. 494. But the alteration in the language of section 99 of the Transfer of Property Act, now O. XXXIV, r. 14, renders such a suit unnecessary, and the decree-holder may now proceed to realize the security by bringing the mortgaged property to sale in execution. See Mulla's Civil Procedure Code, 5th Ed., 1913, p. 766.

such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of. (5)

"This rule does not apply unless (1) there is an order made for the execution of a decree and (2) there is an appeal pending from that decree. (6) A judgment-debtor whose application for a stay of execution is refused under r. 5 of O. XLI, Civ. Pro. Code, may apply under this rule. The application contemplated by sub-r. (1) is an application by judgment-debtor (who has appealed from the decree) for security to be given by the decree-holder for the restitution of any property that may be taken in execution or for the payment of the value of such property if the decree of the Lower Court is reversed in appeal. Thus if A obtains a decree against B for the recovery of certain immoveable property and an order is made for execution of the decree, B may, after filing an appeal from the decree apply, for an order requiring A to give security for the restitution of the property to him (B), or for the payment of the value thereof, if the appeal is decided in his favour. The application may be made to the Court which passed the decree or to the Appellate Court. If the application is made to the Court which passed the decree, such Court shall, on sufficient cause being shown by B for requiring the security, direct A to give the security. But if the application is made to the Appellate Court, that Court may, in its discretion, require security to be given." (7)

"No such security as is mentioned in rr. 5 and 6 (8) shall be required from the Secretary of State for India in Council or, where the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity." (9)

"The powers conferred by rr. 5 and 6 shall be exerciseable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree." (10)

(5) Civ. Pro. Code (Act V of 1908), O. XLI, r. 6.

(6) *Janardan v. Nilkanth*, 25 B. 583.

(7) *Ibid.*

(8) Cl. O. XLI, Civ. Pro. Code (Act V of 1908).

(9) Civ. Pro. Code (Act V of 1908), O. XLI, r. 7.

(10) Civ. Pro. Code (Act V of 1908), O. XLI, r. 8.

(f) Appellate Court may require appellant to furnish security for costs.

“The Appellate Court may, in its discretion either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both. Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immoveable property within British India other than the property (if any) to which the appeal relates.

Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal.⁽¹¹⁾

(11) Civ. Pro. Code (Act V of 1909), O. XLI, r. 10. This rule applies not only to appeals from substantive decrees but also to appeals from interlocutory orders under S. 104 and to appeals from orders in execution under S. 47, (*Dagdu v. Chandra Bhan*, 24 B. 314), but it does not apply to appeals under cl. 15 of the Letters Patent, (*Sesha Ayyer v. Nagarathma*, 27 M. 121). The opinion has also been expressed that every appeal from a decree of a single Judge of a Chartered High Court passed in the exercise of ordinary original civil jurisdiction to other Judges of the same Court is an appeal not under the Code, but under cl. 15 of the Letters Patent. The reason given is that the provisions of the Code relating to appeals, that is, Ss. 96 and 104 relate to appeals from one Court to another of *higher* grade, and that the only provision of law which allows an appeal from the decree of one or more Judges of a Chartered High Court to other Judges of the same Court is that contained in cl. 15 of the Letters Patent, *Sabhapathi v. Narayanasami*, 25 M. 555 (558). From this point of view, neither this rule nor any other rule of this Order can apply to an appeal from a decree of a single Judge of a Chartered High Court passed in the exercise of ordinary original civil jurisdiction. However this may be, it is clear that the provisions of this rule do not apply if there be a rule inconsistent therewith made by a Chartered High Court as it is empowered to do under S. 129 of the Code, *Nawab Behram Jung v. Haji Sultanali*, 14 Bom. L.R. 1106. It has been held by the High Court of Madras that this rule applied also to pauper appeals; thus an appellant, who has presented his appeal in *forma pauperis*, may be called upon to give security for costs under this rule, but very special grounds must be shown to support such an application, *Seshayyengar v. Jainulavadin*, 3 M. 66; *Srinivasa v. Subramania*, 17 M.L.J. 58. On the other hand, it has been held by the High Court of Bengal that this rule does not apply to appeals preferred in *forma pauperis*: *Nusseerooddeen v. Ujjul*, 17 W.R. 68. See also *Mussamat Hafiza v. Abdul Karim*, 12 C.W.N. 163; except in the case referred to in the proviso to sub-r. (1), the power of the Appellate Court to require security for costs is discretionary. The mere fact that the appellant is poor or insolvent is no ground for demanding security for costs, *Jivan Ali v. Basa Mal*, 8 A. 203; *Hewson v. Deas*, 21 C. 526. See also 3 B. 241. Similarly, mere non-payment of the costs of the original hearing is no ground for calling upon the appellant to furnish security under this rule, unless his conduct be shown to be vexatious, that is, such as indicates a wilful determination on his part not to obey the order of the Court in respect of costs, *Ahmed v. Shaik Essa*, 13 B. 458; *Ramsong v. Balubhai*, 5 Bom. L.R. 661. But the Court will, as a general rule, demand security for costs from a poor or insolvent appellant, if it is proved to the satisfaction of the Court that the appellant is not the real litigant, but a mere puppet in the hands of others who are well able to furnish security, *Assenollajoo v. Solomon*, 14 C. 533; or that the merits of the case are plainly in favour of the respondent, *Mushur v. Deno*, Bourke 119. At what stage respondent

"Where the certificate of fitness to appeal to the Privy Council is granted, the applicant shall, within six months from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the latter date,—(a) furnish security for the costs of the respondent, and (b) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit, except—(i) formal documents directed to be excluded by any order of His Majesty in Council in force for the time being; (ii) papers which the parties agree to exclude; (iii) accounts or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary and which the parties have not specifically asked to be included; and (iv) such other documents as the High Court may direct to be excluded. Where the applicant prefers to print in India the copy

(iii) Security for costs in appeal to Privy Council.
(a) Security and deposit required on grant of certificate.

should apply for security. The respondent should apply promptly or else it might be urged that he had waived his right. *Bhobenath v. Radha Prosad*, 5 C.W.N. 119; *Wise v. Jugbondoo*, 7 M.L.A. 431; *Thakur Das v. Kishori Lal*, 9 A. 164. When an order is made under this rule for security for costs, it is not necessary that any specific sum should be named in the order. It is sufficient if the order directs the appellant to furnish security "for the costs of the original suit" or "for the costs of the appeal" or "for the costs of the appeal and the original suit." *Lekha v. Bhauna*, 18 A. 101. The Appellate Court may, under exceptional circumstances, extend the time for furnishing security (see S. 148). Thus where the appellant alleged that he had been, on account of plague in Bombay, unable to raise the money required for security within the time fixed by the Court, the Court extended the time for giving security. The time for giving security may be extended either before its expiry or afterwards. *Badri Narain v. Sheo Koer*, 17 C. 512; 17 I.A. 1; *Rajab Ali v. Amir Hossein*, 17 C. 1; *Jumnabai v. Vissondas*, 21 B. 576. The appeal should not be rejected if the order for security has been made without notice to the appellant. *Sirajulhaq v. Khadim*, 5 A. 380; *Timmu v. Deva*, 5 M. 265. An appeal, although it may have been rejected by the Appellate Court under this rule upon failure of the appellant to furnish security, may be restored on sufficient grounds at the Court's discretion. *Balwant v. Daulat*, 8 A. 315=13 I.A. 57. But no appeal lies from an order refusing to restore it. *Firozi v. Abdul*, 30 A. 143. An order rejecting an appeal under this rule is not appealable as an order under O. XLIII, for it is not one of the orders specified therein. Nor is it appealable as a decree, for it does not conclusively determine the rights of the parties with regard to any of the matters in controversy in the appeal within the meaning of the definition of decree (S. 2, cl. (2)). *Lekha v. Bhauna*, 18 A. 101. An order is made under sub-r. (1) directing an appellant to furnish security for costs. The order is indefinite in that it does not fix an exact date on or before which security is to be given. The appellant, believing that the time for giving security has expired, applies to the Court to receive the amount fixed by the order as security. The Court holds that the time for furnishing security has expired, and refuses the application. The appellant is entitled to appeal from the order under cl. 15 of the Letters Patent, as the effect of the order would be to finally deprive the appellant of his power of prosecuting his appeal. *Vidhyapurana v. Vidhyanidhi*, 25 M. 654.

of the record, except as aforesaid, he shall also, within the time mentioned in sub-rule (i), deposit the amount required to defray the expense of printing such copy.”⁽¹²⁾

(b) Admission of appeal and procedure thereon.

“Where such security has been furnished and deposit made to the satisfaction of the Court, the Court shall—(a) declare the appeal admitted, (b) give notice thereof to the respondent, (c) transmit to His Majesty in Council under the seal of the Court a correct copy of the said record except as aforesaid, and (d) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them.”⁽¹³⁾

(c) Revocation of acceptance of security.

“At any time before the admission of the appeal, the Court may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon.”⁽¹⁴⁾

(d) Power to order further security or payment.

“Where at any time after the admission of an appeal but before the transmission of the copy of the record, except as aforesaid, to His Majesty in Council, such security appears inadequate, or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid, the Court may order the appellant to furnish within a time to be fixed by the Court, other and sufficient security, or to make, within like time, the required payment.”⁽¹⁵⁾

(e) Effect of failure to comply with order.

“Where the appellant fails to comply with such order, the proceedings shall be stayed, and the appeal shall not proceed without an order in this behalf of His Majesty in Council, and in the meantime execution of the decree appealed from shall not be stayed.”⁽¹⁶⁾

(f) Powers of Court pending appeal.

“Notwithstanding the grant of certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs. The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court,—(a) impound any immoveable property in dispute or any part thereof, or (b) allow the decree appealed from to be executed, taking such security from the respondent as the Court thinks fit for the due performance of any

(12) Civ. Pro. Code (Act V of 1908), O. XLV, r. 7.

(13) Civ. Pro. Code (Act V of 1908), O. XLV, r. 8.

(14) Civ. Pro. Code (Act V of 1908), O. XLV, r. 9.

(15) Civ. Pro. Code (Act V of 1908), O. XLV, r. 10.

(16) Civ. Pro. Code (Act V of 1908), O. XLV, r. 11.

order which His Majesty in Council may make on the appeal, or (c) stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any order which His Majesty in Council may make on the appeal, or (d) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, as it thinks fit, by the appointment of a receiver or otherwise.⁽¹⁷⁾

Application of the character mentioned in this rule ought always to be made in the first instance, at any rate, to the Court in India, which has ample power to deal with the matter according to the circumstances of the peculiar case, and has knowledge of details which the Judicial Committee cannot possess on an interlocutory application. If the application is refused by the High Court, and the Judicial Committee is of opinion that the application ought to have been granted, it may grant a stay of execution. But more than this it will not do; for instance, it will not appoint a receiver of the property under attachment nor take the security. In such cases, the Judicial Committee will grant leave to the applicant to apply to the High Court with an intimation of its opinion. The High Court is bound to take notice of such order, it being an order of His Majesty the King in Council, and to govern itself accordingly.⁽¹⁸⁾

"Where at any time during the pendency of the appeal the security furnished by either party appears inadequate, the Court may, on the application of other party, require further security. In default of such further security being furnished as required by the Court,—(a) if the original security was furnished by the appellant, the Court may, on the application of the respondent, execute the decree appealed from as if the appellant had furnished no such security; (b) if the original security was furnished by the

(g) Increase of security found inadequate.

(17) Civ. Pro. Code (Act V of 1908), O. XLV. r. 13.

(18) See *Jariotool Bulool v. Hoseinee Begum*, 10 M.L.A. 196, 202 (where the application was made by the appellant after execution of the decree requiring the respondent to give security and the Court thought it had no power to demand security after execution of the decree); *Chatrapat Singh v. Dwarkanath*, 22 C. 1; 21 I.A. 170 (where the application was made by the respondent for a stay of execution, and the Judges of High Court had differed in opinion as to the propriety of staying execution); *Vasudeva v. Shadagopa*, 29 M. 379; 33 I.A. 132 (where the application was made by the respondent for a stay of execution, and the High Court granted a stay for three months only, believing it had no power to grant a stay until the disposal of the appeal to the Privy Council). Mulla's Civ. Pro. Code, 5th Ed., p. 804.

respondent, the Court shall, so far as may be practicable, stay the further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit.”⁽¹⁹⁾

(iv) Security in case of arrest before judgment :—
(a) Where defendant may be called upon to furnish security for appearance.

“Where at any stage of a suit other than a suit of the nature referred to in S. 16, cls. (a) to (d), the Court is satisfied, by affidavit or otherwise,—(a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him,—(i) has absconded or left the local limits of the jurisdiction of the Court, or (ii) is about to abscond or leave the local limits of the jurisdiction of the Court, or (iii) has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof, or (b) that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance: Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim: and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court.”⁽²⁰⁾

(b) Security.

“Where the defendant fails to show such cause the Court shall order him either to deposit in Court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule. Every surety for the appearance of the defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.”⁽²¹⁾

(19) Civ. Pro. Code (Act V of 1908), O. XLV, r. 14.

(20) Civ. Pro. Code (Act V of 1908), O. XXXVIII, r. 1.

(21) Civ. Pro. Code (Act V of 1908), O. XXXVIII, r. 2.

"A surety for appearance of a defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation. On such application being made, the Court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance. On the appearance of the defendant in pursuance of the summons or warrant or his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find such security."⁽²²⁾

"Where the defendant fails to comply with any order under r. 2 or r. 3, the Court may commit him to the Civil prison until the decision of the suit, or, where a decree is passed against the defendant, until the decree has been satisfied. Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees: Provided also that no person shall be detained in prison under this rule after he has complied with such order."⁽²³⁾

"Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—(a) is about to dispose of the whole or any part of his property, or (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security."

"The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof. The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified."⁽²⁴⁾

(22) Civ. Pro. Code (Act V of 1908), O. XXXVIII, r. 3.

(23) Civ. Pro. Code (Act V of 1908), O. XXXVIII, r. 4.

(24) Civ. Pro. Code (Act V of 1908), O. XXXVIII, r. 5.

(c) Procedure on application by surety to be discharged.

(d) Procedure where defendant fails to furnish security or find fresh security.

(v) Security in case of attachment before judgment:—
(a) Where defendant may be called upon to furnish security for production of property.

(b) Attachment where cause not shown or security not furnished.

"Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit."⁽²⁵⁾

(c) Removal of attachment when security furnished or suit dismissed.

"Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with the security for the costs of the attachment, or when the suit is dismissed."⁽²⁶⁾

(vi) Security in case of suit on Negotiable Instruments tried summarily. Power to set aside decree, and grant stay of execution.

In the case of suits on Negotiable Instruments for which a summary procedure is prescribed by the Code of Civil Procedure, it is provided as follows:—"After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court to do, and on such terms as the Court thinks fit."⁽²⁷⁾

(vii) Security for costs in case of plaintiff's insolvency.

"The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct.

Procedure where assignee fails to continue suit or give security.

Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate."⁽²⁸⁾

(25) Civ. Pro. Code (Act V of 1908), O. XXXVIII, r. 6.

(26) Civ. Pro. Code (Act V of 1908), O. XXXVIII, r. 9.

(27) Civ. Pro. Code (Act V of 1908), O. XXXVII, r. 4.

(28) Civ. Pro. Code (Act V of 1908), O. XXII, r. 8.

This rule lays down the procedure to be followed where the plaintiff becomes insolvent. As to the case of the insolvency of a *defendant* in a presidency-town it is now provided by S. 18 of the Presidency-Towns Insolvency Act, 1909, that where a defendant to a suit has been adjudged an insolvent, the Court may, at any time after the making of the order of adjudication, stay any suit or other proceeding pending against the insolvent before any Judge or Judges of the Court or in any other Court subject to the superintendence of the Court. It is further provided by the same section that any Court in which proceedings are pending against a debtor may, on proof that an order of adjudication has been made against him under the Act, either stay the proceedings or allow them to continue on such terms as it may think just. (29)

At any time after the institution of a suit the plaintiff may, as (viii) With-
against all or any of the defendants, withdraw his suit or abandon drawal of suit
part of his claim. Where the Court is satisfied—(a) that a suit or abandon-
must fail by reason of some formal defect, or (b) that there are other ment of part
sufficient grounds for allowing the plaintiff to institute a fresh suit of claim—
for the subject-matter of a suit or part of a claim, it may, on such Payment of
terms as it thinks fit, grant the plaintiff permission to withdraw costs.
from such suit or abandon such part of a claim with liberty to
institute a fresh suit in respect of the subject-matter of such suit or
such part of a claim. Where the plaintiff withdraws from a suit or
abandons part of a claim, without the permission referred to in sub-
rule (2), he shall be liable for such costs as the Court may award
and shall be precluded from instituting any fresh suit in respect
of such subject-matter or such part of the claim. Nothing in this
rule shall be deemed to authorize the Court to permit one of several
plaintiffs to withdraw without the consent of the others. (30)

The Code of Civil Procedure⁽²¹⁾ provides that "on the application of any defendant in a suit for the payment of money in which

(29) As to cases governed by the Provincial Insolvency Act, 1907, see S. 16, sub-S. (2). *Mullah's Civ. Pro. Code*, 5th Ed., 1918, p. 629. This rule does not apply to a case where there has been only an application to declare the plaintiff an insolvent and a vesting order made, but the proceedings are subsequently annulled, and the party is not declared an insolvent. Therefore in such a case, where a suit has been dismissed for the non-appearance of a plaintiff or the Official Assignee on the date fixed for hearing, it is r. 9 of O. IX that applies, *Amrita Lal v. Rakhali*, 27 O. 217. As to the procedure to be followed under this rule, see *Lekhraj v. Shamlal*, 16 B. 404. This rule does not apply to proceedings in execution. See *Civ. Pro. Code*, O. XXII, r. 12.

(30) Civ. Pro. Code (Act V of 1908), O. XXIII, r. 1.

(31) Civ. Pro. Code (Act V of 1908), O. XXV, r. 1.

the plaintiff is a woman, the Court may at any stage of the suit make an order, to give, within a time fixed by the Court, security for the payment of costs incurred and likely to be incurred by the defendant, provided that the Court is satisfied that such plaintiff does not possess any sufficient immoveable property in British India."

Reason of
the above
rule.

"It has always been a principle of the law relating to security for costs that persons privileged from legal process can be called upon to give such security.⁽³²⁾ In accordance with that principle, when legislation exempted women from arrest and imprisonment in execution of money decrees, it provided that 'on the application of any defendant in a suit for money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order' (i.e., an order for security for costs) 'if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India independent of the property in suit.' This provision is now added to the Civil Procedure Code."⁽³³⁾

The Court has a discretion in exercising the above powers of requiring security from a female plaintiff, and it will not order the plaintiff to give security unless grounds are shown tending to show that the defence is true.⁽³⁴⁾

The latter clause of the section relating to security from a female plaintiff was introduced by the Debtors Act⁽³⁵⁾ which prohibits the arrest or imprisonment of a woman in execution of a decree for money, and it is to be observed that it is only in suits for money that the power given under this clause of the section can be exercised. When therefore litigation is harassing and vexatious, or where the real plaintiff is not before the Court, or where, though liable in certain events for the defendant's costs, the plaintiff is a person of no means, in such cases the Court would doubtless exercise this power for the protection of the defendant. But there are cases in which the plaintiff in a suit for money (the claim being real and open to no objection) cannot be rendered liable for the defendant's costs of suit. In illustration one may refer to an administration suit by a creditor or legatee where the claim is admitted, or to a suit on a

(32) *Aldbrough v. Burton*, (1834) 2 Myl. and K. 401; *Goodwin v. Archer*, (1727) 2 P.W. 452.

(33) *Bai Porebai v. Devji Meghji*, 23 B. 100 (101).

(34) *Shama Sundary Dassee v. Rash Behary Dhur*, 3 C.W.N. 753.

(35) VI of 1888.

mortgage or promissory note, where there is no defence. Is it to be supposed that it was intended that the defendant in such cases should be in a position to ask as a matter of absolute right that security may be given for costs that he may choose to incur needlessly? It surely was not intended by this section that a perverse litigant should have the right of calling on the Court to assist him in throwing an obstacle vexatiously and unnecessarily in the way of a woman desirous of prosecuting a just claim, which possibly is not even denied.

It would appear that the power given under the section is discretionary and one which the Court ought or ought not to exercise according to the circumstances of each case, and that, unless it is shown that the exercise of its power is necessary for the reasonable protection of the defendant, the Court ought not to interfere. This was in substance the opinion of Wilson, J., who in a similar application used these words: "I should be very sorry to lay down, and I guard myself against laying down, that this section is imperative on the Court, and that the Courts have no discretion but to order security to be given."⁽³⁶⁾

Suits which are not exclusively for money but which will result in a decree for money on the relief sought come within the purview of S. 380 of the Code of Civil Procedure.⁽³⁷⁾ Illustrative cases.

(36) *Per Sale, J.*, in *In re Premchand Moonshree*, 21 C. 832 (837), referring to *Degumbari Dabi v. Aushootosh Banerji*, 17 C. 610 (613).

(37) Act XIV of 1882=O. XXV, r. 1 of the present Code (Act V of 1908). *Soonabai v. Thribhuvana Das*, 10 Bom. L.R. 337=32 B. 602. The Court said:—"The phrase 'suits for money' is not one which lends itself to very precise definition, and the matter is somewhat complicated by the difficulty of ascertaining the exact object which the Legislature had in view in adding this clause to the section. The clause was added by the Debtors Act (VI of 1888), which also added S. 245-A prohibiting the arrest or imprisonment of a woman in execution of a decree for money; and it has been held that the reason of the rule was to make provision for the costs of the successful defendant as against a woman plaintiff: See, for instance, *Sale, J.*'s remarks in *In the goods of Premchand Moonshree*, 21 C. 832. This explanation is not perhaps perfectly satisfactory, since it fails to account for the circumstance that the rule is restricted to suits for money. But I cannot discover that the Legislature had any other or further object than that ascribed to it by Mr. Justice Sale, and therefore in my opinion the rule should receive a liberal interpretation. This view is in conformity with previous decisions of which I need only notice *Degumbari Dabi v. Aushootosh Banerjee*, 17 C. 610; and *Bai Porebai v. Devji Meghji*, 23 B. 110. Applying the rule to the case before us, I think that both suits should be regarded as suits for money. Money is involved in the prayers in the plaints, and a determination in the plaintiff's favour would entail a decree for money."

A suit to recover certain specified articles and money alleged to have been wrongfully seized and taken possession of by the defendant or to recover the value thereof is a suit for money within the terms of the second paragraph of S. 380 of the Civil Procedure Code,⁽³⁸⁾ the term "suit for money" as there used being wider than a suit for debts.⁽³⁹⁾

A suit by a lady against the adopted son of her deceased husband and others for a declaration of her title to certain ornaments and other moveable properties alleged to have been wrongfully removed from her custody by the defendants and for recovery of possession of the same and in the alternative for the value of the properties, is a suit for payment of money within the meaning of O. XXV, r. 1, cl. (3) of the Civil Procedure Code.⁽⁴⁰⁾

N, a widow, brought an action against D, praying that D might be restrained from repeating or publishing certain defamatory statements concerning N, and that D might be ordered to pay Rs. 5,000 or such other sum as the Court should think fit as damages. D took out a summons in Chambers calling upon N to show cause why she should not give security for payment of D's costs under O. XXV, r. 1, Civil Procedure Code.⁽⁴¹⁾ *Held*, that under the circumstances of the case it would be a wrong use of the Court's discretion if the Court practically defeated the suit at that stage when it was almost, if not quite, ripe for hearing, by ordering the plaintiff to lodge security.⁽⁴²⁾

(38) Act XIV of 1882.

(39) *Degumbhari Debi v. Ashootosh Banerji*, 17 C. 610. Circumstances under which the Court will order security for costs to be given by a female plaintiff in such a suit considered. *Degumbhari Debi v. Ashootosh Banerjes*, 17 C. 610.

(40) *Anandamoi Chowdhurani v. Gokul Chandra Roy*, 16 C.W.N. 763=14 Ind. Cas. 290, following *Degumbhari Debi v. Ashootosh Banerji*, 17 C. 610; *Sonabai v. Tribhovanadas Narotamdas Malvi*, 32 B. 602. It has been held that a suit like the present which, though it may not be exclusively for money, will ordinarily result in a decree for money, and the relief sought comes within the purview of S. 380 of the old Code of Civil Procedure corresponding with cl. (3) of r. 1 of O. XXV of the amended Code. These cases are *Degumbhari Debi v. Ashootosh Banerji*, 17 C. 610, and *Sonabai v. Tribhovanadas Narotamdas Malvi*, 32 B. 602.

(41) Act V of 1908.

(42) *Namubai v. Daji Govind*, 35 B. 421=12 Bom. L.R. 1071=8 Ind. Cas. 1055. Robertson, J., said in the course of the judgment:—This is a summons taken out by the defendant calling upon the plaintiff to show cause why she should not deposit security for the defendant's costs under O. XXV, r. 1. The discretion given by that rule is one of the most difficult that a Court can be called upon to exercise. On the one hand it is clear that to refuse to make the order would, in a number of cases,

With reference to the application of the above rule as to Application of the above rule to an infant female suing by her next friend, the following observations of the infant female plaintiff, or her next friend, Court in the case of *Bai Porebai v. Devji* (43) may well be noted.

open the door to very great injustice being done to the defendant, who would be put in the position of having either to defend the suit at his own cost or to pay something to the plaintiff to settle the suit. On the other hand it is perfectly clear that a rigid application of the power to order security to all the cases, except the very narrow class, which was suggested by the defendant's counsel in this case, might very often result in nothing less than an entire denial of justice to the plaintiff merely on the ground that he or she had not sufficient money to prosecute the suit. In this case practically the only test I can apply to see whether I ought to make this order or not is the test of *bona fides*. Is this a *bona fide* suit brought by this lady for the vindication of her honor and incidentally for the protection of her right to be paid maintenance? She is a Hindu widow and if she sits down under this accusation of unchastity, it is clear that it will not be long before steps are taken to deprive of her maintenance. For the purpose of seeing, whether it is a *bona fide* suit or not, it appears to me that Ex. B to the plaint is a most important document. That purports to be decision of a meeting of the caste, which took place on the 12th of July last. It is signed by six of the leading members of the caste and states: "On hearing a very bad report the details of which are given below we pass the following resolution: Daji Govind Warang, liquor vendor in a shop at Wadala, is circulating a report that Namubai (that is the plaintiff), the widow of Babu Balaji Thakur, is in illicit intercourse with Waman Hari Mahatre a resident of the same place." I am not dealing with the point whether or not that is in any way evidence against Daji Govind Warang that he actually did circulate that report; but it shows that those who are in the best position to know were of opinion that he had been circulating the report and therefore there is not the slightest reason for doubting the plaintiff's *bona fides* in believing that it was Daji Govind Warang who did circulate the report. I do not think that the letter written by his solicitors on behalf of the defendant, is couched in such terms as would be likely to remove the strong suspicion that it was the defendant who had circulated this report, which would arise on the perusal of Ex. B. to the plaint; further I do not think myself that the written statement of the defendant is altogether so free from ambiguity as his counsel has suggested it is. Under these circumstances without in the least expressing an opinion of what the result will finally be, it appears to me beyond all reasonable doubt that the plaintiff in filing this suit has been actuated by perfectly *bona fide* motives, and that it is filed in the *bona fide* belief that the defendant is the person who thus circulated this report, and for the *bona fide* purpose of protecting her right to maintenance, and defending herself against the gravest charges of immorality. Under these circumstances, it appears to me that it would be a wrong exercise of the discretion that I have under O. XXV, r. 1, if I were to practically defeat the suit at this stage when it is almost, if not quite ripe for hearing, by ordering the plaintiff to lodge security. At the same time I think that I am entitled, as a discretion is given me under the section, to exercise that discretion only upon certain terms, which I think I am entitled to impose upon the plaintiff. And I only refuse this application on the distinct undertaking by the plaintiff that she will abandon all Police Court proceedings, which she has instituted against the defendant. If she does not do that, then I shall be prepared to hear any renewed application that the defendant may make for the exercise of my discretion under O. XXV, r. 1. *Namubai v. Daji Gobind*, 35 B. 421 = 12 Bom. L.R. 1071 = 8 Ind. Cas. 1055.

"No exception is made, in the section of the Code of Civil Procedure empowering the Court to require security from a female in certain cases, of the case of a woman who is a minor, suing by her next friend, and the Court cannot introduce such an exception into the section. The Code is applicable generally to all descriptions of parties, whether plaintiff or defendant, and its provisions apply as well to minors as to others. Thus a minor can be directed to file a written statement under S. 112 and his suit is liable to be dismissed if he fails to do so; and an affidavit of documents may be required of a minor defendant.⁽⁴⁴⁾ Doubtless it is not intended that an infant party to a suit should personally obey such orders. It is evident from the provisions of the Code that it is intended that his next friend or guardian should obey the orders of the Court on his behalf. Hence in construing the Code the Court cannot read an exception as to infants into its provisions generally, but rather a proviso that orders given to an infant may be obeyed for such infant by his next friend or guardian, nor can the Court do so when construing the particular section of the Code requiring security for costs from females in certain cases.

The order as to giving security for costs is, however, a discretionary one, and the question still remains whether such an order ought to be made in the case of a female infant suing by her next friend. The practice has always been not to demand security for costs either from an infant directly or from his or her next friend,⁽⁴⁵⁾ and no order as to costs is made against an infant plaintiff.⁽⁴⁶⁾ The next friend of an infant is liable for the costs of the suit if unsuccessful.⁽⁴⁷⁾ How complete this liability is, and how far it extends, is shown by S. 447 of the Code, which provides that a next friend cannot, *ipso motu*, retire from his position without giving security for the costs already incurred, unless the Court relieves him from that obligation.

If, then, the next friend of an infant plaintiff and not the infant plaintiff himself or herself is and has always been liable for the costs of the suit, a provision that a woman shall not be imprisoned for debt gives rise to no inference that the Legislature

(44) *Nathu Mull v. Malhar Row*, 19 B. 250.

(45) *Fellows v. Barret*, (1836) 1 Keen. 119; *Hind v. Whitmore*, (1856) 2 Kay and J. 458; *Pennington v. Alvin*, (1823) S. & S. 264.

(46) *Simpson on Infants* (2nd Ed.), p. 468.

(47) *Frank v. Mainwaring*, (1839) 4 Beav. 37; *Morgan and Wurtzburg*, p. 352, S. VII; *Simpson on Infants*, p. 482; *Civil Procedure Code* (Act XIV of 1882), S. 440.

intended in any way to change the practice as to a female infant plaintiff giving security for costs. We think, therefore that, except in exceptional cases the old practice ought still to be observed.⁽⁴⁸⁾

Hence, unless in exceptional cases, neither an infant female plaintiff nor her next friend ought to be required to give security for costs.⁽⁴⁹⁾

The words "such plaintiff" in the second paragraph of S. 380, Civ. Pro. Code, cannot be construed as applying to an infant plaintiff's next friend. In the case of infant plaintiffs, unless the circumstances are exceptional, they cannot be required to give security for costs.⁽⁵⁰⁾

In the case of an infant the Court need not run any risk of stopping the suit filed on behalf of an infant, which may be a proper suit to bring, merely because of some inability on the part of the next friend to give security for costs. The Courts have apparently considered that the interests of other parties to the suit are sufficiently protected by the power they have in a proper case of moving the Court either to stay the suit as not being for the benefit of the infant, or if there is a just cause other than the poverty of the next friend, to have him removed.⁽⁵¹⁾

(48) *Bai Porebai v. Devji Meghji*, 23 B. 100 (101, 102).

(49) *Bai Porebai v. Devji Meghji*, 23 B. 100 (followed in 18 M.L.J. 155 (156); applied in 35 B. 339=13 Bom. L.R. 480 (481); referred to in 32 B. 602 (605)=10 Bom. L.R. 337; distinguished in 27 B. 100 (103).)

(50) *Mani Bai v. Lodd Govind Doss*, 18 M.L.J. 155. The Court, White, C.J., and Wallis, J., said in the course of their judgment:—"In this case an order has been made requiring the next friend of a female infant plaintiff to give security for the costs of the suit. It is not contended that the order can be supported unless there is jurisdiction to make the order under S. 380 of the Code of Civil Procedure. We do not think the words "such plaintiff" in the second paragraph of the section can be construed as applying to the infant plaintiff's next friend, and there is no evidence in the present case that the plaintiff does not possess sufficient immoveable property within British India. Assuming, however, that the Court would have jurisdiction to make the order if satisfied that the next friend "did not possess sufficient immoveable property," we are of opinion that the order should not have been made in the present case. We agree with the decision in *Bai Porebai v. Devji Meghji*, 23 B. 100, that in the case of infant plaintiffs unless the circumstances are exceptional, the English practice, under which an infant plaintiff could not be required to give security for costs, should be followed. We do not think the circumstances of the present case are of so exceptional a character as to warrant the making of the order. *Mani Bai v. Lodd Govind Doss*, 18 M.L.J. 155.

(51) *Bhaishankor v. Mulji*, 13 Bom. L.R. 480=35 B. 339. Cases will be found collected in the Annual Practice for 1909, Vol. I, p. 183, where it is said with regard to next friends—"Security for costs.—He (the next friend) is not obliged to give security for costs, although he may be impecunious and a stranger but if he appeals and is insolvent he may have to give security."

(ii) Where stranger put forward as plaintiff—Nominal plaintiff.

Where it appears that the plaintiff in a suit is in fact suing on behalf of another person who is not a party to the record, the ordinary practice is to require security for costs, and to stay the proceedings till it is given.⁽⁵²⁾

Where the plaintiff is a pauper or insolvent and is a mere nominal plaintiff, *i.e.*, if he is a person really put forward by some other person behind him to bring an action on behalf of that person, in such cases security will be ordered on the ground of poverty or insolvency of the nominal plaintiff.⁽⁵³⁾

Thus, an order for security for costs was made in the following cases :—(i) Where a plaintiff has assigned his debt and sues for the benefit of the assignee.⁽⁵⁴⁾ (ii) Where a person of no means is put forward as a nominal plaintiff.⁽⁵⁵⁾ (iii) An undischarged bankrupt suing on a cause of action which arose since the bankruptcy is not a mere nominal plaintiff.⁽⁵⁶⁾

Where a plaintiff is suing as trustee in bankruptcy in his official name, security is not ordered⁽⁵⁷⁾ even where he is himself insolvent.⁽⁵⁸⁾

In winding-up proceedings security will be ordered as in other cases.⁽⁵⁹⁾

(iii) Where plaintiff is resident out of British India.
(a) Indian Cases.

When an inhabitant of foreign territory sues within British territory, it is imperative on the Court to demand security from him for the payment of all costs that may be incurred by the defendant

(52) *Ram Coomar Coondoo v. C. Canto Mookerjee*, 2 Q. 233 (P.C.) = 4 I.A. 23.

(53) See judgment of Esher, M.R.—*Cook v. Whellock*, (1890) 24 Q.B.D. 658, C.A.

(54) *Lloyd v. Hathern Station Brick Co.*, (1901) 85 L.T. 158, C.A. ; *Elliot v. Kendrick*, (1840) 12 A. and E. 597 ; *Perkins v. Adcock*, (1845) 14 M. and W. 808 ; *Goatley v. Emmot*, (1854) 15 C.B. 291 ; and see the cases discussed by Bowen, L.J., in *Cowell v. Taylor*, (1885) 31 Ch. D. 34, C.A.

(55) *Burke v. Lidwell*, (1844) 1 Jo. and Lat. 703 ; *Masneal v. Biggart*, (1870) 18 W. R. 470 ; *Ball v. Ross*, (1940) 1 Soc. N.R. 217 ; *Tenant v. Brown*, (1826) 5 B. and C. 208 ; and see *Tredwell v. Byrch*, (1835) 1 Y. and C. 476.

(56) *Cook v. Whellock*, (1890) 24 Q.B.D. 658, C.A. ; *Affleck v. Hemmond*, (1913) 3 K.B. 162.

(57) *Pooley's Trustee v. Whetham*, (1884) 28 Ch. D. 38, C.A.

(58) *Cowell v. Taylor*, (1885) 31 Ch. D. 34, C.A. ; *Denston v. Ashton*, (1869) L.R. 4 Q.B. 590, and *cf. Re Strand Wood Co.*, (1904) 2 Ch. 1, C.A., *infra*. But an insolvent trustee of a deed of arrangement is within the rule as to an insolvent plaintiff suing for the benefit of another, (*Greener v. E. Khan & Co.*, (1906) 2 K.B. 374, C.A.)

(59) *Re Pretoria Petersburg Ry. Co.*, (1904) 2 Ch. 359.

in the suit, even though the defendant also is a resident of foreign territory. (60)

The meaning to be given to the word "residence" in legislative enactments depends upon the intention of the Legislature in framing the particular provision in which the word is used. The 'residence' intended by the sections of the Code relating to security for costs from persons residing out of British India is residence under such circumstances as will afford a reasonable probability that the plaintiff will be forthcoming when the suit is decided. (61)

It is well settled as a general rule that if a person resident (b) English Cases. abroad is an actor or plaintiff in proceedings in an English Court (not being a defendant in an action, who is plaintiff in a cross action, nor being a plaintiff suing a defendant who already has money of the plaintiff in his hands which in fact gives him security), and has not assets within the jurisdiction which can be reached, he

(60) *Koroona Moyee Debia v. Ooma Churn Deb*, 12 W.R. 465. Ben. Reg. XIV of 1829, S. 2, cl. 1, enacts, that every person being an inhabitant of a foreign territory, shall be required to furnish security for costs; such security to be furnished by a plaintiff, or appellant, within six weeks of the date on which his plaint or appeal is filed: and that unless such security be so furnished, the suit of such person, if plaintiff, should not be proceeded in, or appeal admitted unless he had furnished the necessary security to cover costs in the appeal. *Wise v. Jugbandoo Bose*, 7 M.I.A. 431. Appeal to the *Sudder Court* from a decree of the *Zillah Court* by a party then temporarily absent in *England*, but having real estates and factories within the jurisdiction of the Court. No security was furnished by the appellant's *Vakeel* within six weeks after lodging the appeal. The respondent in the first instance put in an answer to the reasons of appeal filed by the appellant, but afterwards filed a petition for dismissal, for non-compliance with the requirement of Ben. Reg. XIV of 1829, S. 2, cl. 1, contending that the appellant was a resident in a foreign territory, and had not furnished security within six weeks as required by that Regulation. The *Sudder Court* held, that such security ought to have been furnished by the appellant, who, residing in *England, pendente lite*, was to be considered as resident in a foreign territory within the meaning of the Regulation, and dismissed the appeal. Such judgment reversed on appeal by the Judicial Committee, and the suit remitted to *India* for trial, on the ground, that the *Sudder Court* had not, by Regulation XIV of 1829, any power *ex mero motu*, to dismiss the appeal, (1) as the appellant was guilty of no default under that Regulation, not having been called upon by the respondent or the Court to furnish security for costs; (2) or of laches in not voluntarily offering security. The Regulation providing only that a suit, or appeal, should not be proceeded with, until security was furnished. *Wise v. Jugbandoo Bose*, 7 M.I.A. 431. The putting in an answer to the appeal, before objecting to the want of security for costs, operated as a waiver by the respondent of the want of security for the costs, required by Ben. Reg. XIV of 1829, S. 2, cl. 1. *Wise v. Jugbandoo Bose*, 7 M.I.A. 432.

(61) *Mahomed Shuffli v. Laldin Abdulla*, 3 B. 227 (referred to in 6 B. 100 (101); 14 B. 541 (548, 550); 8 M. 205 (206); 29 M. 232 (276) = 16 M.L.J. 238 = 1 M.L.T. 71; 1 L.B.R. 222 (224, 225).)

may, except in special circumstances, be ordered to give security for costs.⁽⁶²⁾

In the following cases and from the following persons the Court made an order for security for costs: (i) Creditor claiming to prove in voluntary winding up; ⁽⁶³⁾ (ii) a person moving to be admitted as a defendant to an action that he might claim the property in dispute; ⁽⁶⁴⁾ (iii) a plaintiff suing on a foreign judgment; ⁽⁶⁵⁾ (iv) a person petitioning for the taxation of a solicitor's bill; ⁽⁶⁶⁾ (v) against a foreign Sovereign or State; ⁽⁶⁷⁾ (vi) a foreign company petitioning for compulsory winding up of a company being voluntarily wound up; ⁽⁶⁸⁾ (vii) cross action by foreign company; ⁽⁶⁹⁾ (viii) attempt by plaintiff to escape security for costs by joining improperly a third person as co-plaintiff; ⁽⁷⁰⁾ (ix) although, as a general rule, a claimant under a general inquiry cannot be required to give security for costs, where an inquiry was directed as to who was entitled to a fund in Court, a foreign claimant resident out of the jurisdiction was ordered to give security upon the ground that in the special circumstances of the case the inquiry was equivalent to an interpleader issue in which the claimant was in the position of a plaintiff.⁽⁷¹⁾

Security is not required from a plaintiff who is a domiciled citizen but compelled to reside abroad on public service as, for instance, a consul or a naval or military officer.⁽⁷²⁾

(62) *Per* Buckley, J., in *Re Pretoria Petersburg Ry. Co.*, (No. 2) (1904) 2 Ch. at p. 361; and see the judgment of Davey, L.J.; *Crosat v. Brogden*, (1894) 2 Q.B. 36; see also *Re Percy, etc., Mining Co.*, (1876) 2 Ch. D. 531.

(63) *Re Pretoria Petersburg Ry. Co.*, *supra*, and see *Re Howe Machine Co., Fountaine's case*, (1889) 41 Ch. D. 118, C.A., as corrected by *Re Queensland Mercantile Agency Co.*, (1891) 61 L.J. Ch. 48.

(64) *Apollinaris Co. v. Wilson*, (1886) 31 Ch. D. 632, C.A.

(65) *Corsat v. Brogden*, (1894) 2 Q.B. 30, C.A.

(66) *Re Norman*, (1849) 11 Beav. 401; but see *Cochrane v. Fearon*, (1854) 18 Jur. 568.

(67) *The New Battle*, (1885) 10 P.D. 33, C.A.; *The Beatrice* otherwise *The Rappahannock*, (1866) 36 L.J. Adm. 10; *Vavasseur v. Krupp*, (1878) 9 Ch. D. 351, C.A.; *Republic of Costa Rica v. Erlanger*, (1876) 3 Ch. D. 62, C.A.

(68) *In re Alabama Portland Cement Co.*, (1909) W.N. 157.

(69) *New Fenix Compagnie Anonyme d'Assurances de Madrid v. General Accident, Fire and Life Assurance Corporation, Limited*, (1911) 2 K.B. 619, C.A.

(70) *Jones and Saldanha v. Gurney*, (1913) W.N. 72.

(71) *Re Milward & Co.*, (1900) 1 Ch. 405, C.A.

(72) See *Colebrook v. Jones*, (1751) Dick. 154; *O'Lawler v. Macdonald*, (1819) 8 Taunt. 736; *Lord Nugent v. Harcourt*, (1834) 2 D.P.C. 578; *Fisher v. Bunbury*, (1837)

A peer of the realm, though privileged if within the jurisdiction, must give security if he resides permanently abroad not in an official capacity.⁽⁷³⁾

Where there are several co-plaintiffs, however, if any one of them reside ordinarily within the jurisdiction, although a bankrupt, no security will be ordered from any of them.⁽⁷⁴⁾

Security will not be ordered on an affidavit that plaintiff is about to leave the kingdom; ⁽⁷⁵⁾ and he must be resident abroad, not merely gone abroad.⁽⁷⁶⁾

Where plaintiff was confined and ordered to be removed out of the Kingdom under the Alien Act, security was ordered.⁽⁷⁷⁾

An appellant (residing within the jurisdiction) who has been ordered to pay the costs of the original hearing and has not done so, cannot be required to furnish security for such costs before he be allowed to prosecute his appeal, unless his conduct be shown to be vexatious—that is, such as vindicates a wilful determination on his part not to obey the order of the Court. His not paying, if it be caused by inability to pay, is not vexatious.⁽⁷⁸⁾

(c) Further illustrative cases.

Where a plaintiff leaves the country before the case is decided, the proper course for the defendant is to apply to the Court to take security for costs before the case is decided, and, if no security be furnished, the Court will pass judgment against the plaintiff by default. But, if the defendant allows the case to go to judgment, the Court on appeal cannot pass any order calling for security for the costs of the lower Court, which must be left to be realized in execution.⁽⁷⁹⁾

San. and Bd. 625 (non-commissioned officer) *Wright v. Eberard*, (1839) San. and So. 651 (army surgeon); *Evering v. Ohifenden*, (1839) 7 D.P.C. 536; *Evelyn v. Chippendale*, (1839) 9 Sim. 497; *Clark v. Fergusson*, (1859) 1 Giff. 184.

(73) *Lord Aldborough v. Burton*, (1834) 2 My. and K. 401.

(74) *D'Harmusgee v. Grey*, (1882) 10 Q.B.D. 18; *McConnell v. Johnston*, (1801) 1 East 431; *Winthorp v. Royal Exchange Assurance Co.*, (1755) 1 Dick. 282; *Walker v. Easterby*, (1802) 6 Ves. 611; and see *The Carnarvon Castle*, (1878) 38 L.T. 786, C.A.; and cf. *Hanmer v. Mangles*, (1843) 12 M. and W. 313.

(75) *Adams v. Colthurst*, (1794) 2 Anst. 552.

(76) *Hoby v. Hitchcock*, (1800) 5 Ves. 699; *Green v. Charnock*, (1791) 1 Ves. 396.

(77) *Seilaz v. Hanson*, (1800) 5 Ves. 261.

(78) *A. bin Shaik Essa Kaliffa v. S. Essa bin Kaliffa*, 13 B. 458=13 Ind. Jur. 467 (referred to in 37 B. 572=14 Bom. L.R. 1106=17 Ind. Cas. 739; U.B.R. (1892-96) 279.)

(79) *The Calcutta and South Eastern Railway Company v. F. Woodhouse*, 8 W.R. 217.

Where the plaintiff in a suit against the executors of a will for the amount of a legacy had, on account of the conduct of the defendants, no alternative but to seek the assistance of the Court and the defendants stated that the assets were not sufficient to pay all the legacies in full, and it was therefore clear that the suit would have to proceed as an administration suit in which the plaintiff could in no event be liable for the defendant's costs: *Held*, that the Court would not order the plaintiff, although she was not in possession of any immoveable property within British India, to give security for the costs of the suit.⁽⁸⁰⁾

A plaintiff who is entitled under a will to a beneficial interest in a part of the surplus income derived from immoveable property does not become thereby "possessed of immoveable property" within the meaning of S. 380.⁽⁸¹⁾

A plaintiff being resident in Wadhwan in Kathiawar and possessed of immoveable property in the cantonment there, could not be required to give security for costs, the cantonment of Wadhwan being within the limits of British India.⁽⁸²⁾

(iv) Where the winding up company is out of jurisdiction.

Where the petitioners for a compulsory winding-up order for foreign company and the respondent company, which was being voluntarily wound-up did not deny liability but alleged no assets, it was held that security could be ordered.⁽⁸³⁾

Where a company is defending itself, it must be regarded as, in substance, a defendant, and, therefore, is not to be called upon to

(80) *In re Premchand Moonshree*, 21 C. 832.

(81) *In re Premchand Moonshree*, 21 C. 832 (followed in 33 A. 236 (237)=7 A.L.J. 1189=8 Ind. Cas. 1096; approved in 10 Bom. L.R. 337 (341)). Security for costs will not be ordered to be given on the ground that the promovent is resident in the Mofussil. If collusion and instigation by a third party is proved, security for costs will be ordered. *Govind Dass v. Ramsahoy Jemadar*, (1843) Fulton 155=1 Ind. Dec. Old Series, p. 787.

(82) *Triccam Panachand v. B. B. & C. I. Ry. Co.*, 9 B. 244; dissented from in 21 C. 177; not followed in 37 B. 152=1 Bom. Cr. Cas. 172=14 Bom. L.R. 876=13 Cr. L.J. 790=17 Ind. Cas. 534. For the purposes of S. 380 of the Code of Civil Procedure (1882) the British Cantonment of Secunderabad is a place out of British India. *Hossain Ali Mirza v. Abid Ali Mirza*, 21 C. 177.

(83) *Re Alabama Portland Cement Company*, (1909) W.N. 157. See also *New Fenix Compagnie d' Assurance de Madrid v. General Accident, Fire and Life Assurance Corporation, Limited*, (1911) W.N. 147, O.A.

give security,⁽⁸⁴⁾ but if it takes proceedings which go beyond merely defensive proceedings it may be required to give security.⁽⁸⁵⁾

Security may be ordered if the plaintiff company goes into liquidation after the trial of an action actually commenced.⁽⁸⁶⁾

Where the company appeals from a winding up order security for costs must be given.⁽⁸⁷⁾

In general any person compelled to litigate, or taking proceedings which are merely defensive, will not be ordered to give security for costs.⁽⁸⁸⁾ But co-defendants in a cross action who were not parties to the original action may obtain security for the costs of the cross suit.⁽⁸⁹⁾

If a person out of the jurisdiction whose rights are attacked comes here to defend his rights security will not be ordered.⁽⁹⁰⁾

In the matter of requiring security for costs, the substantial position of the parties must always be looked at,⁽⁹¹⁾ and even if a defendant sets up a counter-claim he will not be ordered to give security if the claim and such counter-claim are in respect of one subject-matter of action.⁽⁹²⁾ But where the counter-claim is put

(v) Where a person is merely on his defence.

(vi) Where there is a claim and counter-claim.

(84) *Accidental and Marine Insurance Co. v. Mercati*, (1866) L.R. 3 Eq. 200.

(85) *Washoe Mining Co. v. Ferguson*, (1866) L.R. 2 Eq. 371; *New Fenix Campagne Anonyme d'Assurances de Madrid v. General Accident, Fire and Life Assurance Corporation, Limited*, (1911) 2 K.B. 619, C.A. (cross action by foreign Co.); *City of Moscow Gas Co. v. International Financial Society*, (1872) 7 Ch. 235; *Pure Spriti Co. v. Fowler*, (1890) 25 Q.B.D. 235, and see *Freehold Land Co. v. Spargo*, W.N. (1868) 94, and so in the case of a counter-claim security may be ordered, *Strong v. Carlyle Press*, (No. 2), W.N. (1893) 51.

(86) *Lydney and Wigpool Iron Co. v. Bird*, (1883) 23 Ch. D. 258.

(87) *Re Photographic Artists Co-operative Supply Association*, (1888) 23 Ch. D. 370, C.A.

(88) *Vincent v. Hunter*, (1846) 5 Hare 320; *Wild v. Murray*, (1854) 18 Jur. 892; *Watteau v. Billam*, (1849) 14 Jur. 165; *Accidental and Marine Insurance Co. v. Mercati*, (1866) L.R. 3 Eq. 200.

(89) *Sloggett v. Viant*, (1842) 13 Sim. 187.

(90) *Re Miller's Patent*, (1894) 70 L.T. 270 (petition for revocation of a patent); *In re La Societe Anonyme Des Verreries de L'Etoile*, W.N. (1893) 119 (application to expunge any trade-mark).

(91) *New Fenix Campagne Anonyme v. General Accident, etc., Corporation, Limited*, (1911) 2 K.B. 619, C.A.

(92) *Mapleson v. Masini*, (1879) 5 Q.B.D. 144; *Neck v. Taylor*, (1893) 1 Q.B. 560, C.A.

forward in respect of a matter wholly distinct from the claim, an order for security for costs may be made.⁽⁹³⁾

A counter-claim is equivalent to a cross action and the Court has therefore jurisdiction to order a plaintiff to give security for damages to a counter-claiming defendant.⁽⁹⁴⁾

A defendant obtaining leave to have conduct of the cause may be ordered to give security for costs.⁽⁹⁵⁾

The same rules are applicable in the case of parties to interpleader proceedings as in the case of ordinary litigants, but the question whether a party to an interpleader issue is to be treated as a plaintiff or as a defendant must be decided by the real merits of the case and not by the mere form of the issue itself.⁽⁹⁶⁾

A defendant in the position of a quasi-plaintiff, as a defendant in a replevin, can be ordered to give security for costs.⁽⁹⁷⁾

Mere imprisonment is not a ground for security,⁽⁹⁸⁾ though formerly under English law a sentence of transportation was.⁽⁹⁹⁾

It appears that a petitioner in Divorce Proceedings resident abroad may be ordered to find security for the costs of a co-respondent.⁽¹⁰⁰⁾

A plaintiff will not be compelled to give security for costs merely on the ground of his poverty or insolvency.⁽¹⁰¹⁾

(93) *Per* Brett, M.R., *Nech v. Taylor*, (1893) 1 Q.B. 560, C.A.; *Sykes v. Sacerdoti*, (1885) 15 Q.B.D. 423, C.A.; *Lake v. Haseltine*, (1885) 55 L.J. Q.B. 205; *Winterfield v. Bradnum*, (1878) 3 Q.B.D. 324, C.A.; and *cf. The Julia Fisher*, (1877) 2 P.D. 115.

(94) *The New Battle*, (1885) 10 P.D. 33, C.A.

(95) *Mynn v. Hart*, (1845) 9 Jur. 860; and see *Smith v. Hammond*, (1833) 6 Simm. 10.

(96) *Rhodes v. Dawson*, (1886) 16 Q.B.D. 548, C.A. Thus, in *Tomlinson v. Land and Finance Corporation*, (1884) 14 Q.B.D. 539, C.A., the defendant in an interpleader issue was really in the position of a plaintiff, and being a limited company, was ordered to give security for costs. See also *Belmonte v. Aynard*, (1879) 4 C.P.D. 352, C.A.; *Smith v. Hammand*, (1833) 6 Sim. 10; *Benazeck v. Bessett*, (1845) 1 C.B. 313; *Williams v. Crosting*, (1847) 3 C.B. 957.

(97) *Selby v. Cruchley*, (1820) 1 B. and B. 505.

(98) *Buddleley v. Harding*, (1821) 6 Madd. 214.

(99) *Barrett v. Power*, (1854) 9 Ex. 398.

(100) *Redfern v. Redfern*, (1890) 63 L.T. 780.

(101) *Ross v. Jacques*, (1841) 8 M. and W. 135; *Le Mesurier v. Ferguson*, (1903) 20 T.L.R. 32, C.A.; *Worrall v. White*, (1846) 3 Jo. and Lat. 513; *Hande v. Haskew*, (1884) 1 T.L.R. 94.

(vii) Where defendant obtains conduct of the case.

(viii) Where a party is merely interpleading.

(ix) Where defendant is in the position of a quasi-plaintiff.

(x) Where party is a convict.

(xi) Where petitioner in Divorce Proceedings is abroad.

(xii) Where plaintiff is a pauper or insolvent.

So, also, the next friend of an infant cannot be ordered to give security on the ground of poverty.⁽¹⁰²⁾

Mere poverty is no ground for requiring an appellant to give security for the costs of the appeal.⁽¹⁰³⁾ Nor is poverty any ground for requiring additional security.⁽¹⁰⁴⁾

But where the appellant was, according to his own statement, a pauper, and it appeared that others, presumably able to furnish the necessary security, were interested in the matter, the case was considered a proper one in which security should be given.⁽¹⁰⁵⁾

The mere fact that a plaintiff is a poor man, and has parted with a portion of his interest in the subject-matter of the suit for the purpose of obtaining funds to carry on the suit, is no sufficient ground to ask that security for the costs of the suit may be required

(102) *Fellows v. Barrett*, (1836) 1 Keen 119. See also *Pennington v. Alvin*, (1823) 1 S. and S. 264.

(103) *Manekji Limji Mancherji v. Goolbai*, 3 B. 241, followed in 7 A. 542 (546) = A.W.N. (1885) 127; referred to in 5 Bom. L.R. 661 (662); U.B.R. (1892—1896) 279 (280).

(104) *Chitty's Archbold*, p. 1416; *Ross v. Jacques*, 8 M. and W. 135; *Armitage v. Graeton*, 10 Jur. 377; *Broughton's Civil Procedure Code* 1859, notes to S. 342; *Monohur Dass v. Khodrum Begum*, 1 Bourke 111.

(105) *Jogendro Deb Roykut v. Funindro Deb Roykut*, 18 W.R. 102. Markby, J. said:—The next objection that is raised is that there has been delay in making this application, and that is a different objection. It seems to me, this application is not made at an unreasonable time. The most important element in the costs of this case after the stamp is the preparation of the paper-book for the use of the Court; and, allowing for the time that would be necessary for making the calculation after the respective lists were filed, that element in the costs was not ascertained until sometime in the beginning of March; and I do not think it an unreasonable course for the respondent to wait and see what the result of that calculation would be before making this application, so as to enable him to state to the Court what would be the fair amount upon which to call upon the appellant to give security. I think also, looking to the circumstances of this case, that it is a proper one in which security should be given. I do not, of course, wish to give the slightest opinion as to the merits of the case. But the matter has been considered by the Judge of the Court of first instance, and, in the opinion of the Division Bench of this Court, it has been satisfactorily disposed of. That opinion will have no possible effect when the matter comes before the Court more fully to be argued. But looking to the fact that, by the plaintiff's own statement, he is a pauper, and utterly unable to meet the costs which the respondent will have to incur—looking also to the fact which is stated in the petition, and which is uncontradicted, that other persons, who are presumably able to furnish necessary security, are interested in this matter—I think it is only reasonable to give the respondent some security for his heavy outlay in this appeal. I think, therefore, that I ought to make the order that security be given for a fair sum which will cover all the costs of the appeal, and I fix that sum at Rs. 4,000.

of him ; it is otherwise where he is not the real litigant, but a mere puppet in the hands of others.⁽¹⁰⁶⁾

Illustrative
cases.

A plaintiff should not be ordered to give security for costs of the suit if it is shown that he has a substantial interest in the suit and that he is not a puppet suing for another. Merely because the plaintiff is a poor man, it is no ground for ordering him to give security.⁽¹⁰⁷⁾

A suitor *in forma pauperis* may be called on to give security for costs under S. 549 of the Civ. Pro. Code, but very special grounds must be shown to support such an application.⁽¹⁰⁸⁾

Without laying down any general rule by which the exercise of the discretion conferred by S. 549 of the Civ. Pro. Code should be governed, it was held that the mere fact of the poverty of an appellant, standing by itself, and without reference to any general facts of the case under appeal, ought not to be considered sufficient alone to warrant his being required to furnish security for costs.⁽¹⁰⁹⁾

(106) *Khajah Assenoolajoo v. Solomon*, 14 C. 533 ; referred to in U.B.R. (1892-1896) Vol. II, 279 (280) ; 18 C.W.N. 119 (121)=20 Ind. Cas. 703 (704). This was an appeal of defendants from a decision of Mr. Justice Bucknill at Chambers refusing to order plaintiff to give security for costs of this action. Defendants maintained that plaintiff ought not to be allowed to proceed with the action until proper security had been given. The facts on which this contention was based were that plaintiff who had lost a similar action against Van Cuylenburg, the Editor of a Ceylon newspaper, for a similar libel suit brought by him had not yet paid the costs ordered in that case. The plaintiff had been adjudicated a bankrupt. The libel in the first action concerned the publication in Mr. Van Cuylenburg's paper of a letter signed "Equity" and comments thereon. The present action is against the publisher of another Ceylon paper for publishing the same letter and commenting on it. The circumstances therefore were exceptional, as one jury had already decided against plaintiff who had formerly been in the Ceylon Government service but had been dismissed. Reference was made to the Annual Practice, 1904, p. 951, and it was stated that the parties had agreed to use the evidence taken in Ceylon in the previous action in this one. The Court did not accede to the application. Poverty or insolvency was no ground for ordering security. There was no statute and no precedent in support of the application. *LeMesurier v. Ferguson*, 8 C.W.N. (Journal portion). S. 342, Act VIII of 1859, does not apply to appeals from orders of the Commissioner of the Insolvent Court. The appeal from an order of a Commissioner is given by S. 73 of the Insolvent Act. The Court cannot impose on the appellant a condition that he shall give security for the cost of such an appeal. *In the matter of Ramseba Misser*, 5 B.L.R. 179.

(107) *Raja Hari Nath Singh v. Ram Kumar Bagchi*, 19 C.L.J. 59=20 Ind. Cas. 703.

(108) *Seshayyengar v. Jainulavadin*, 3 M. 66=4 Ind. Jur. 507 dissenting *Nussee-ruddeen Biswass v. Ujjal Biswas*, 17 W.R. 68 ; followed in 17 M.L.J. 583 ; referred to in 7 A. 542 (546)=A.W.N. (1885) 127 (128).

(109) *Jiwan Ali Beg v. Basa Mal*, 8 A. 203=A.W.N. (1886) 68.

Section 549 of the Civil Procedure Code was not intended by the Legislature to derogate from the right of appeal given by the law to every person who is defeated in a suit in the Court of first instance; and an application under that section cannot be granted merely on the ground that the appellant is not pecuniarily in a position to pay the costs of the appeal if it should be dismissed.⁽¹¹⁰⁾

The provision which makes it discretionary in the appellate Court to demand security for costs is not applicable to appeals *in forma pauperis*; and therefore the order of the Judge in this case, requiring security for costs from the petitioner after his appeal had been admitted, and after the Judge on inquiry had found that the appellant was a pauper, was set aside.⁽¹¹¹⁾

Lunacy is generally not by itself a ground for security for costs.⁽¹¹²⁾ (xiii) Where plaintiff is a lunatic.

A married woman under English Law without separate estate, suing alone, cannot be required to give security,⁽¹¹³⁾ but if she sues by a next friend not being a person of substance, security may be ordered.⁽¹¹⁴⁾ (xiv) Where plaintiff is a married woman—English Law.

So also in the case of an appeal by a married woman appealing without a next friend and without separate property free from restraint against anticipation, security may be ordered,⁽¹¹⁵⁾ but in such appeals it is always a matter of discretion.⁽¹¹⁶⁾

Foreign ambassadors will not be required to give security,⁽¹¹⁷⁾ but their servants will,⁽¹¹⁸⁾ and so will foreign Sovereigns.⁽¹¹⁹⁾ (xv) Where the plaintiff is a privileged person.

(110) *Lakhmi Chand v. Gatto Bai*, 7 A. 542=A.W.N. (1885) 127 and the cases referred to therein.

(111) *Nusseerooddeen Biswas v. Ujjul Biswas*, 17 W.R. 68.

(112) *Steel v. Alan*, (1801) 2 B. and P. 437.

(113) *Re Isaac*, (1885) 30 Ch. D. 418, C.A.; *Threlfall v. Wilson*, (1883) 8 P.D. 18; *Severance v. Civil Service Supply Association*, (1883) 48 L.T. 485.

(114) *Pennington v. Alvin*, (1823) 1 S. & S. 264; *Re Thompson*, (1888) 28 Ch. D. 317, C.A.; and see *Martano v. Mann*, (1880) 14 Ch. D. 419, C.A.; *Schjott v. Schjott*, (1881) 19 Ch. D. 94, C.A.

(115) *Whittakar v. Kershaw*, (1890) 44 Ch. D. 296, C.A.

(116) *Hood Barrs v. Heriot*, (1896) 2 Q.B. 375, C.A.

(117) *Duke de Montellano v. Christin*, (1816) 5 M. & S. 503.

(118) *Goodwin v. Archer*, (1727) 2 P. Wms. 452; *Adderly v. Smith*, (1763) 1 Dick. 355.

(119) *Emperor of Brazil v. Robinson*, (1837) 6 A. & E. 801; *King of Greece v. Wright*, (1837) 6 D.P.C. 12.

(xvi) Where the action is by the Attorney-General at the instance of a relator.

In an action by the Attorney-General at the relation of a relator, such relator, if without means, must give security for costs,⁽¹²⁰⁾ but the rule is otherwise if the relator is also suing in his own right.⁽¹²¹⁾

(xvii) Where plaintiff's residence is not properly described.

Where the residence of the plaintiff was not correctly stated in the writ of summons, security has been ordered.⁽¹²²⁾

Where there had been frequent changes of residence since the issue of the writ, security has been ordered, though the description was correct at the time.⁽¹²³⁾

So also, where plaintiff could not be found at the address given security has been ordered.⁽¹²⁴⁾

(xviii) Where suit is for enforcing trust.

The representatives of a testator are entitled to sue for the enforcement of the due performance of trusts created by him for religious and charitable purposes, and in which they are not personally interested, but their suit will be dismissed, unless, upon their plaint, they substantially allege a state of circumstances, which, if proved, will constitute a distinct breach of trust. Where such a suit is brought, the plaintiffs ought to be required to give security for costs.⁽¹²⁵⁾

Stay of proceedings.

It is usual to stay proceedings until the security is given, but a discretion is exercised.⁽¹²⁶⁾

An order for security may be made at any stage of the proceedings.⁽¹²⁷⁾

(120) *Att.-Gen. v. Allman*, (1906) 1 I.R. 473.

(121) *Att.-Gen. v. Knight*, (1897) 3 My. & Cr. 154.

(122) *Re Sturgis British Motive Power Syndicate*, (1885) 34 W.R. 163; *Swansy v. Swansy*, (1858) 27 L.J. Ch. 419; and *Oldale v. Whitcher*, (1859) 5 Jur. N. S. 84; and see *Redondo v. Chaytor*, (1879) 4 Q.B.D. 453, C.A., and cases therein referred to.

(123) *Player v. Anderson*, (1846) 15 Sim. 104.

(124) *Bailey v. Gundry*, (1836) 5 L. J. Ch. 199; *Manby v. Wewicke*, (1856) 4 W.R. 632 (Eng.); *Oldale v. Whitcher*, (1859) 28 L.J. Ch. 339.

(125) *Brojomohun Doss v. Hurrolohl Doss*, 6 C.L.R. 58.

(126) A defendant was allowed the costs of preparing affidavits (for use on a pending motion), notwithstanding that such affidavits were prepared after an order had been made staying proceedings by the plaintiffs until security given. *Whitley Ewer-ciser v. Gamage*, (1898) 2 Ch. 405.

(127) *Re Smith*, (1896) 75 L.T. 46, C.A.; and see *Arkwright v. Newbold*, W.N. (1890) 59; *Martano v. Mann*, (1890) 14 Ch. D. 419, C.A.; *Lydney, etc., Iron Ore Co. v. Bird*, (1883) 23 Ch. D. 358.

Proceedings will be stayed in a second action, for non-payment of the costs of the first.⁽¹²⁸⁾

Application cannot be made by a defendant before appearance, but there is no hard and fast rule that application must be before any material step is taken, and it is therefore not too late merely because it is made after delivery of defence.⁽¹²⁹⁾ When application may be made.

Security for the costs of inquiries after trial can be ordered.⁽¹³⁰⁾

An application for security for costs already incurred and estimated costs of appeal should be made promptly. It is clear, upon the authorities in the English Courts, that the application should be made promptly and in this respect the Courts in India may fairly follow those in England.⁽¹³¹⁾ Delay in applying for security for costs, effect of.

The plaintiff would be too late in requiring security if the defendant has already incurred all the expenses of preparing for the appeal.⁽¹³²⁾

The amount of the security is in the discretion of the Judge, and depends upon the circumstances of each case.⁽¹³³⁾ Amount of security.

The amount is fixed at the discretion of the Court according to the amount claimed and the nature of the action.⁽¹³⁴⁾

(128) *Sreemuttee Dossee v. Rennell*, 4th Term 1822; Cl. R. (1829), 234; Morley's Digest of Indian Cases, Vol. I, p. 109. A rule to show cause why proceedings should not be stayed in a suit in equity until the costs in a suit at law, by the defendant against the plaintiff, should be paid by the plaintiff in equity to the defendant in equity, was discharged, with costs. *Radacaunt Ghose v. Hurry Ghose*, Hyde's Notes, 2nd Feb. 1784; Sm. R. 16, Morley's Digest of Indian Cases, Vol. I, p. 109.

(129) *Re Smith, Brin v. Bain*, W.N. (1896) 88 (16) C.A.; *Martano v. Mann*, (1880) 14 Ch.D. 419, C.A.; *Lydney & Wigpool Iron, etc., Co. v. Bird*, (1883) 23 Ch. D. 358.

(130) *Brown v. Haig*, (1905) 74 L.J. Ch. 591.

(131) *Per Maclean, J. in Bhobonath v. Radhagrosad*, 5 C.W.N. 119. In the case of *Pooley's Trustee v. Whetham*, 33 Ch. D. 76 (1886), Lord Justice Cotton laid down the rule in these terms:—"The rule has always been that applications for security for costs must be made promptly not only on the ground that the respondent should apply for security for costs before he incurs them, but on the ground that it is unreasonable that security should not be applied for till the applicant has incurred the costs of the appeal, whether they have been paid by himself or by his solicitor." This view has been accepted in many other cases. *Per Maclean, J. in Bhobonath Lahiri v. Radhagrosad Lahiri*, 5 C.W.N. 119 (120) referring to *Pooley's Trustee v. Whetham*, L.R. 33 Ch. D. 76 (1886).

(132) *Manekji Limji Mancherji v. Goolbai*, 3 B. 241; *Wainright v. Bland*, 2 Cr. M. and R. 740.

(133) Yearly Practice, (1914), Vol. I, p. 1114.

(134) Yearly Practice, (1914), Vol. I, O. LXV, r. 6, p. 1114.

Security may be ordered for past as well as future costs.⁽¹³⁵⁾

The amount of the security can be increased during the proceedings.⁽¹³⁶⁾

Where a Court, acting under S. 549 of the Code,⁽¹³⁷⁾ orders an appellant to give security for costs, it is not necessary that any specific sum for which security is to be given should be named in the order for security. It is sufficient for the order to direct the appellant to furnish security within a time to be stated "for the costs of the appeal" or "for the costs of the original suit," or "for the costs on the appeal and of the original suit".⁽¹³⁸⁾

Sufficiency of security.

In deciding upon the amount of security to be ordered, regard must be had to the probable cost to which the defendant will be put so far as this can be ascertained.⁽¹³⁹⁾

Failure to give security—Effect.

If a plaintiff fail to give security for costs within a reasonable time after the order for security or within the time named in the order, the action may be dismissed for want of prosecution.⁽¹⁴⁰⁾

Security for costs in appeal.

In exercising discretion under S. 549 of the Civil Procedure Code, 1882, the appellate Court may well be guided by the provisions of S. 380 of the Code.⁽¹⁴¹⁾

(135) *Massey v. Allen*, (1879) 12 Ch. D. 807; *Brocklebank v. King's Lynn Steamship Co.*, (1878) 3 C.P.D. 365 and see *Willmott v. Freehold House Property Co.*, (1885) 33 W.R. 554 (Eng.).

(136) *Paxton v. Bell*, W.N. (1876) 249; *Sturla v. Freccia*, W.N. (1878) 161; *Republic of Costa Rica v. Erlanger*, (1876) 3 Ch.D. 62, C.A.; *Bentzen v. Taylor Sons & Co.*, (1893) 2 Q.B. 193, C.A.

(137) Act XIV of 1882.

(138) *Lekha v. Bhauna*, 18 A. 101 (F.B.)=A.W.N. (1895) 238; followed in 30 A. 143=5 A.L.J. 109=A.W.N. (1903) 53=3 M.L.T. 221; 8 Ind. Cas. 436 (437)=9 M.L.T. 117 (118); L.B.R. (1893—1900) 556; referred to in 21 A. 133; 9 Ind. Cas. 748=14 O.C. 40; 4 L.B.R. 17; U.B.R. 1903, Limitation, II, 178, p. 5; overruling *Thakur Das v. Kishori Lal*, 9 A. 164.

(139) *The Dominion Brewery Limited v. Foster*, (1897) 77 L.T. 507, C.A. and see *Imperial Bank of China, India and Japan v. Bank of Hindustan, etc.*, (1866) 1 Ch. 437; *Freehold Land, etc., Co. v. Spargo*, W.N. (1868) 94.

(140) *Giddings v. Giddings*, (1847) 10 Beav. 29; *LaGrange v. McAndrew*, (1879) 4 Q.B.D. 210; and similarly in the case of an appeal (*Vale v. Oppert*, (1877) 5 Ch. D. 633, C.A.). See also *Grant v. Ingram*, (1869) 20 L.T. 70. The application to dismiss may be made by summons in Chambers (*Re Hurter's Trade Mark*, W.N. (1887) 71).

(141) *Ramsing v. Balubai*, 5 Bom. L.R. 661. Chandavarkar, J. said in the course of the judgment:—This is an application made under S. 549 of the Code of Civil Procedure by the respondent asking this Court to call upon the appellant to give security for the costs of the appeal and of the original suit. The ground of the application is that the appellant is practically a pauper, who has brought this suit as a mere speculation at the instigation and with the help of one Baburao, who, as the Subordinate

It has been held in an old Calcutta case that "there is no reason why a respondent, who is admittedly the legal heir of the deceased proprietor, should be required to give security at the instance of the appellants, who are mere strangers."⁽¹⁴²⁾ Illustrative cases.

The Court can require an appellant from an order made under S. 244 of the Civil Procedure Code ⁽¹⁴³⁾ in execution of a decree to give security for the costs of the appeal and of the original suit.⁽¹⁴⁴⁾

Judge, from whose decree the appeal is preferred, as found, is really at the bottom of this litigation. Whether this Court will come to the same conclusion when it has heard the appeal is another matter which need not be considered now. But the respondents are entitled to ask the Court to bear the fact found by the lower Court in mind in deciding whether this is a fit case for the exercise of our discretion under S. 549. Besides, the appellant has not paid the costs of the suit although on her own showing she is possessed of sufficient means to pay them. On the other hand, in exercising that discretion we must not ignore certain considerations special to the kind of litigation in which the parties here are engaged. The appellant is a Hindoo widow claiming her husband's share in a partnership business. The first respondent claims to be the son adopted by a senior co-widow of the appellant. This is then a dispute arising out of an alleged adoption in a Hindoo family and in such disputes it would work great hardships on the widow denying an adoption and failing to prove it in her suit if she were required to give security for costs in an appeal, merely because she was poor in the sense that she had no means of her own apart from what she could get out of her husband's estate. In exercising our discretion under S. 549 we think we may well be guided by the provisions of S. 380, the 2nd clause of which provides that in a suit for money security for costs may be required from a plaintiff who is a woman if the Court is satisfied that she does not possess any sufficient immoveable property within British India independent of the property in suit. The present was in reality a suit for money, for the appellant claims a share in certain partnership business. It may be that part of the property belonging to the partnership is immoveable property but nevertheless the share which the appellant claims must come out of the assets after it is realized by sale or otherwise. The appellant's affidavit shows that she is possessed of ornaments worth Rs. 800. Having regard to all the circumstances of the case the proper order, we think, is to require the appellant to give security for costs for Rs. 509. See 5 Bom. L.R. 661. Security for costs is never required in appeals from the decisions of Munsiffs. An order for such security, if made by the appellate Court, is not a legal one. *Hurree Kishen Shome v. Suffer Bibi*, 4 Sud. Dew. Adaw. Rep. Bengal (1848) 742=10 Ind. Dec. Old Series, p. 523. An appellant (residing within the jurisdiction) who has been ordered to pay the costs of the original hearing and has not done so, cannot be required to furnish security for such costs before he be allowed to prosecute his appeal, unless his conduct be shown to be vexatious—that is, such as indicates a wilful determination on his part not to obey the order of the Court. His not paying, if it be caused by inability to pay, is not vexatious. *A. bin Shaikh Essa Kalifa v. S. Essa bin Kalifa*, 13 B. 458=13 Ind. Jur. 467; referred to in 37 B. 572=14 Bom. L.R. 1106=17 Ind. Cas. 739; U.B.R. (1892—1896) 279.

(142) *Bhugobutty Churn Bhattacharjee v. Issur Chunder Chatterjee*, 16 W.R. 311.

(143) Act XIV of 1882.

(144) *Dagdu Jaitram v. Chandrabhan*, 24 B. 314=1 Bom. L.R. 837.

A plaintiff who resided out of British India paid a sum of money into Court as security for costs, under S. 34 of Act VIII of 1859. He subsequently obtained a decree against the defendant, and the defendant appealed against that decree. *Held*, that the defendant was not entitled to an order detaining in Court, pending the appeal, the money which had been paid in under S. 34.⁽¹⁴⁵⁾

The issue of a preliminary notice to show cause why an appellant should not furnish security for the costs of appeal is not equivalent to a demand, and if the order to furnish the security is made in the absence of the appellant, the order must be communicated to him before he can be held to have disobeyed it.⁽¹⁴⁶⁾

The rule (190 of the Bombay High Court Rules, 1885) that an appellant shall, with the memorandum of appeal, deposit in Court the sum of Rs. 500 as security for costs of respondent in the appeal, is one which, though possibly not without exception, is generally applicable to all cases independently of any consideration as to what the costs of the appeal will amount to.⁽¹⁴⁷⁾

The plaintiff, who was a non-resident of British India and who had no moveable property within its limits, filed a suit on the Original Side of the Bombay High Court, which occupied eight days in the hearing. During the progress of the suit, the defendant made no application for security for costs. The plaintiff filed an appeal and deposited Rs. 500, as security for costs of appeal under the Rules of Bombay High Court. The defendant applied to require the plaintiff to deposit in Court a sum of Rs. 7,500 for the costs of the suit and the appeal: *Held*, (1) that the Court, sitting on appeal from the original suit heard by the Bombay High Court, was not governed by O. XLI, r. 10, but by r. 725 of the Bombay High Court Rules. (2) That the plaintiff having complied with r. 725 and the defendant having abstained from applying for security of the costs of the original hearing, there was no reason for the exercise of the Court's discretion to require security from the plaintiff for the costs of the original hearing.⁽¹⁴⁸⁾

⁽¹⁴⁵⁾ *Fleming v. Shearman*, 4 B.L.R.O.C.J. 92.

⁽¹⁴⁶⁾ *Timmu v. Deva Rai*, 5 M. 255.

⁽¹⁴⁷⁾ *A. bin Shaik Essa Kaliffa v. S. Essa bin Kaliffa*, 13 B. 458=13 Ind. Jur. 467.

⁽¹⁴⁸⁾ *Nawab Behram Jung v. Haji Sultanali Shustry*, 14 Bom. L.R. 1106=37 B. 572=17 Ind. Cas. 739.

The appellate Court is competent to order the appellant to furnish security for the costs of the appeal, but not for costs of the original suit.⁽¹⁴⁹⁾ Powers of
appellate
Court.

A respondent in an appeal preferred under Art. 15 of the Letters Patent against the decision of a single Judge of the High Court in a case from the mufussil cannot apply for an order on the appellant to give security for the costs of an appeal. Section 549 of the Civil Procedure Code applies to only appeals preferred to the High Court from subordinate Courts subject to its appellate jurisdiction and not to appeals preferred to the High Courts, under Art. 15 of the Letters Patent, from the judgment of one of its own Judges. Nor does S. 647 apply to the appeals under the Letters Patent so as to extend the provisions of S. 549 to such appeal.⁽¹⁵⁰⁾

The power given to the Court under the Civil Procedure Code to order security for costs is discretionary, and one which the Court ought or ought not to exercise according to the circumstances of each case; and unless it is shown that the exercise of the power is necessary for the reasonable protection of the defendant, the Court ought not to interfere.⁽¹⁵¹⁾

No doubt when a power or faculty is given to the Court that it may be exercised for a particular purpose or for the benefit of particular persons under certain specified circumstances, and it is shown that the particular circumstances exist under which it was

(149) *Bamasundari Dasi v. Ramnarayan Mitter*, 7 B.L.R. App. 59.

(150) *Sesha Ayyer v. Nagarathna Lala*, 27 M. 121.

(151) *In re Premchand Moonshree*, 21 C. 832; approving *Degumbari Dabi v. Aushotosh Banerjee*, 17 C. 613. Sale, J. said in the course of the judgment:—It has been contended on the part of the defendants that the power is not discretionary but obligatory, and that the word "may" in the latter clause of the section must be read as "shall." I am not aware of any cases now regarded as authorities which can be cited for the proposition that the word "may" is, in any connection, to be read as meaning "shall" though, as explained in the case of *Delhi and London Bank v. Orchard*, the word "shall" may under certain circumstances be substituted for the word "may." On the contrary, in *Julius v. Bishop of Oxford*, Lord Selbourne speaking of the words "may," "it shall be lawful," and the like, says "they are potential and never in themselves significant of any obligation." And Lord Cairns in the same case says of the same words: "They confer a faculty or power, and they do not of themselves do more than confer a faculty or power." So also Cotton, L.J., says: "I think that great misconception is caused by saying that in some cases 'may' means 'must.' It never can mean 'must' so long as the English language retains its meaning, but it gives a power, and then it may be a question in what cases where a Judge has a power given him by the word 'may' it becomes his duty to exercise it."

contemplated that the power should be exercised, then it may be that an obligation is cast upon the Court to exercise that power. In that sense words which are in themselves *enabling* merely may under certain circumstances impose an obligatory duty. 7

The object of the section clearly is to provide for the protection of defendants in certain cases where in the event of success they may have difficulty in realizing their costs.⁽¹⁵²⁾

The Court was entitled, as a discretion was given it under the section, to exercise that discretion only upon certain terms which it was entitled to impose on the plaintiff.⁽¹⁵³⁾

It has been held in an old Calcutta case that an appellate Court had no power under S. 370, Act VIII of 1859, to annex to its order the condition that the party allowed to appeal should give security for costs.⁽¹⁵⁴⁾

An appeal lies against an order passed by a Judge sitting on the Original Side of the High Court requiring security from a woman under S. 380, Civil Procedure Code. Such an order is a judgment within the meaning of cl. 15 of the Letters Patent.⁽¹⁵⁵⁾

No appeal will lie from an order refusing to re-admit an appeal which had been rejected under S. 549 of the Code of Civil Procedure on account of non-compliance with an order to furnish security for costs.⁽¹⁵⁶⁾

An appeal, although it may have been rejected by the appellate Court, under S. 549 of the Code of Civil Procedure upon failure by the appellant to furnish security demanded under that section, may be restored, on sufficient grounds, at the Court's discretion.⁽¹⁵⁷⁾

The High Court having apparently treated an appeal as though, after rejection of it under the above section, a petition tendering security to the amount demanded, and asking for restoration of the

(152) 21 C. 832.

(153) *Namubai v. Daji Govind*, 35 B. 421=12 Bom. L.R. 1071=8 Ind. Cas. 1055.

(154) *Nusseerooddeen Biswas v. Ujjul Biswas*, 17 W.R. 68.

(155) *Sonabai v. Tribhowandas*, 32 B. 602=10 Bom. L.R. 337; following *Seshagiri Row v. Nawab Askur Jung Aftab Dowla*, 26 M. 502.

(156) *Pirozi Begam v. Abdul Latif Khan*, 30 A. 143=5 A.L.J. 109=A.W.N. (1908) 5=3 M.L.T. 22; following *Lekha v. Bhauna*, 18 A. 101; distinguishing *Kuar Bahwant Singh v. Kuar Doulat Singh*, 13 I.A. 57.

(157) *Bahwant Singh v. Daulat Singh*, 8 A. 315.

Appeal from order requiring security.

Appeal from order refusing to re-admit a dismissed appeal.

Restoration of appeal dismissed on failure to furnish security in appeal to Privy Council.

appeal, was not entertainable and could not be considered, *held* by the Judicial Committee that restoration was within the Court's discretion and that there were grounds for it, upon the appellant's giving approved security within such time as the Court might fix. (158)

By S. 647 of the Civil Procedure Code, (159) the procedure in respect of suits is made applicable to applications. Therefore, where an application under S. 549 of the Civil Procedure Code, praying that an appellant might be required to give security for the costs of the appeal, was dismissed after notice issued to the appellant, owing to the non-appearance of both the parties, *held*, on an application to restore the application to the file, that S. 99 applied to the case. (160)

Restoration of application of application, praying for security for costs.

The proper mode of proceeding to put a bond to secure the costs of an appeal in suit, is to move upon affidavits showing a breach of the condition of the bond, for a rule *nisi*, calling upon the obligor and sureties to show cause why the Court should not order that the bond be assigned to some person named in the rule. (161)

Enforcement of order against surety—Practice.

The assignee of a security bond, which was given to a District Judge under S. 349 of the Code of Civil Procedure for the production of a judgment-debtor when called upon to appear, is entitled to maintain an action upon that bond. (162)

A judgment-debtor was released from custody on finding a surety for his production at a specified time. Before the expiration of that time the judgment-debtor died. The decree-holder thereupon obtained an order enforcing the decree as against the surety. *Held*, that the order was illegal. The Court had no jurisdiction to enforce the obligation as a decree against the surety. Moreover the obligation of the surety was discharged by the death of the judgment-debtor. (163)

(158) *Balwant Singh v. Daulat Singh*, 8 A. 315 (316).

(159) Act XIV of 1882.

(160) *Lakshmi Chand v. Gatto Bai*, 7 A. 542=A.W.N. (1885) 127.

(161) *Poyner Bibee v. Nujoo Khan*, 5 C. 497=5 C.L.R. 524, relied on in 7 Ind. Cas. 917 and referred to in 19 B. 694 (696); 31 C. 162.

(162) *Gopi Nath Chowdhry v. Benode Lal Roy Chowdhry*, 31 C. 162, referring to *Mingale Antone Kane v. Ramchandra Baje*, 19 B. 694.

(163) *Krishnan Nayar v. Itinan Nayar*, 24 M. 637. Appeal by the surety to the High Court treated as a revision petition.

On the 9th June 1888 a decree-holder applied for leave to execute his decree (which was one for costs) against a person who had become surety for the costs of an appeal which had been dismissed with costs; this application was refused on the ground that the law, as it then stood, did not authorize such an application, the remedy of the decree-holder being by regular suit against the surety. Subsequently to the passing of the Act of VII of 1888 the decree-holder made a fresh application for such execution under S. 46 of that Act. The Court, after referring to S. 6 of the General Clauses Act, rejected the application, on the ground that the proceedings against the surety had been commenced before Act VII of 1888 had come into force: *Held*, on appeal, that the application should have been allowed.⁽¹⁶⁴⁾

Extension
of time
for payment
of security.

Where the High Court, under S. 549, Civil Procedure Code, has demanded security from an appellant, it has power to extend the time for complying with this order on application made, as well after as before the time first fixed has expired, and may nevertheless reject the appeal, under that section, if the security is not in the end furnished.⁽¹⁶⁵⁾

Time for
demanding
costs in
appeal.

The Court has discretion at any time before the hearing of the appeal to make an order demanding security for costs from the appellant.⁽¹⁶⁶⁾

Practice.

The Court cannot, upon an application for security for costs to be given by a plaintiff, go into the merits of the action.⁽¹⁶⁷⁾

In some cases the Court will require security to be given for the costs up to a certain stage in the proceedings, and then allow the application to be renewed.⁽¹⁶⁸⁾

Res judicata.

In this suit on a promissory note, the plaintiff objected to the defendants being permitted to put forward, as their defence, the matters set forth in their written statement, inasmuch as they had been the matters in issue in a previous suit between them in which the present defendants were plaintiffs and the present plaintiff was

(164) *Abdul Wahed v. Fareedoonnissa*, 16 C. 323.

(165) *Badri Narain v. Sheo Koer*, 17 C. 512 (P.C.) = 17 I.A. 1 = 5 Sar. P.C.J. 498; (*Haidri Bai v. The East Indian Ry. Co.*, 1 A. 687, overruled. In this case, the Registrar was directed to allow only the costs applicable to the question argued and decided.

(166) *Jogendra Deb Roykul v. Funindro Deb Roykul*, 18 W.R. 102.

(167) *Per Davey, L.J., Crozat v. Brogden*, (1894) 2 Q.B. p. 36, C.A.; cf. *Keegan v. Keegan*, (1881) 7 L.R. Ir. 101.

(168) *Western Canada Oil Co. v. Walker*, (1875) L.R. 10 Ch. 628.

the defendant. The previous suit had been dismissed on account of the then plaintiff's failure to comply with the Court's order in that suit for giving security for the defendant's costs. *Held* that, although, under the words of the S. 13 of the Civ. Pro. Code, "suit or issue," the answer of the *res judicata* is admissible to estop a defendant from defence as well as a plaintiff from attack, there had been no final hearing or decision of the matter in the previous suit. The Court cannot properly be said to have *heard and decided* a matter, which it was actually relieved from hearing and deciding by reason of the plaintiff's default, whether such default be his non-appearance or his failure to furnish the ordered security. (169)

(169) *Rungrav Ravji v. Sidhi Mahomed Ebrahim*, 6 B. 482. *Quære*: Whether a plaintiff, whose suit had been dismissed under S. 381 of the Code could be allowed to litigate again the subject-matter of the dismissed suit (possibly, the reference to S. 373 may be found sufficient to preclude him from so doing). (*Ibid.*)

CHAPTER XVI.

PRACTICE OF PRIVY COUNCIL AS TO COSTS.

General rule.

Costs on reversal of lower Court's decree.

Costs where appeal was affirmed on wholly different grounds.

Costs in case of slight modification of lower Court's decree.

Costs in case of remand to lower Court.

Costs where compromise decree was set aside.

Costs, how affected by party's delay.

Costs where a party makes unsuccessful charges of fraud and forgery.

Costs where tenable grounds and untenable grounds of appeal are joined to increase valuation.

Costs not given to successful party, cases of.

Costs where there are several defendants.

Costs where several appellants have a common interest in appeal.

Costs where defendant set up an exclusive title in which he has failed.

Costs against Government.

What items allowed :

- (i) Costs of translation and printing.
- (ii) Costs occasioned by insertion of unnecessary manuscript in record.
- (iii) Costs occasioned by the manner in which issues were framed by lower Court.
- (iv) Costs where there had been irregularity in reception of evidence by lower Court.

Costs, if included in fixing valuation for appeal.

Appeal as to costs only.

Appeal when the two Courts differ only as to costs.

Costs, security for, in Privy Council.

Set off of costs.

Refund of costs.

Taxation of costs.

Proportionate costs.

Costs out of estate.

Interest on costs.

General rule.

THE general rule that, in apportioning costs, the Court looks to the conduct of the parties, holds good in cases heard and decided by the Privy Council just in the same manner and to the same extent as it obtains in other Courts. We shall briefly refer to some of the leading cases in which the Privy Council departed from the general rule that costs follow the event, the conduct of one or other of the parties.

We shall also see what items are generally allowed to be recovered and what items are disallowed to the party in whose favour the Privy Council makes an order for costs.⁽¹⁾

As a general rule costs in India and upon appeal would be allowed to the appellant upon a reversal of the decree of the Court below.⁽²⁾

Costs on reversal of lower Court's decree.

On reversal by the Judicial Committee of the decree of the High Court, such costs as were allowed by the practice of the Courts in India to a successful plaintiff suing in *forma pauperis*, and paid, were ordered to be restored to the defendants.⁽³⁾

In reversing the decree of the *Sudder* Court, the order of that Court that the costs of the application to readmit the appeal should be paid by the appellants, was confirmed; but, as the appellants were successful in obtaining a reversal of the decree of the Court below, the costs of the appeal in *England* against such decree were ordered to be paid by the respondents.⁽⁴⁾

Where an appeal was affirmed upon wholly different grounds from those relied upon by the Court below, the dismissal was ordered to be without costs.⁽⁵⁾

Costs where appeal was affirmed on wholly different grounds.

(1) On the subject-matter of this chapter, see Amir Ali's Code of Civil Procedure, Sanjiva Row's Commentaries on the Code of Civil Procedure, Sarkar's Civil Procedure Code, and Mullah's Civil Procedure Code, O. XLV and notes thereunder; Sanjiva Row's Privy Council Rulings, cases collected under heading "Practice of Privy Council," and also cases under the same heading in Sanjiva Row's All India Digest, Civil; Chand's Law of Costs, pp. 111, 112.

(2) *Cheyti Ram v. Chowdhree Nowbut Ram*, 5 W.R. 3 (P.C.)=7 M.I.A. 207=1 Suther 319=1 Sar. 617. See, also, *Sumbhoolal v. Collector of Surat*, 4 W.R. 55 (P.C.)=8 M.I.A. 1=1 Suther 387=1 Sar. 713.

(3) *Rajendra Nath Haldar v. Jagendra Nath Haldar*, 7 B.L.R. 216 (P.C.)=15 W.R. 41=14 M.I.A. 67.

(4) *Anundmoyee Dossee v. Poornoo Chunder Roy*, 1 Sar. 820=9 M.I.A. 26. Costs awarded to a successful appellant upon appeal, and in all the proceedings in India from the commencement of the suit. The costs incurred in India to be recovered there. *Banundoss Mookerjee v. Omeish Chunder Raae*, 1 Sar. 542=6 M.I.A. 289. Decree appealed from reversed, with all the costs a purchaser had been put to in the proceedings in India and upon appeal. The costs of the execution-creditor ordered to be paid by the purchaser, and charged by him in his costs against the Government. *Sumbhoolall Girdhurlall v. The Collector of Surat*, 4 W.R. 55 (P.C.)=1 Sar. 713=1 Suther 387=8 M.I.A. 1. As the respondents had not applied in the first instance to dismiss the appeal on the ground of incompetence, but had allowed the case to proceed to the hearing of the appeal, costs *nomine expensarum* only were allowed. *Moonshee Amir Ali v. Maharanee Inderjeet Singh*, 9 B.L.R. 460=2 Suther 479=2 Sar. 731=14 M.I.A. 203.

(5) *Fischer v. Kamala Naicker*, 3 W. R. 33 (P.C.)=1 Suther 395=1 Sar. 733=8 M.I.A. 170.

Costs in case of slight modification of lower Court's decree.

Where a partial alteration was made by the appellate Court in the decree of the Court below, as to the rate of interest awarded, but in other respects the decree was confirmed, both parties were directed to pay their own costs of appeal.⁽⁶⁾

In another case a slight modification as to the rate of interest was *held* not sufficient to deprive the respondent of costs of appeal.⁽⁷⁾

Costs in case of remand to lower Court.

In reversing the judgment of the Court below, the Judicial Committee remitted the cause with certain directions, leaving the question of the allowance of costs in the discretion of the Court below.⁽⁸⁾

In another case where the suit was remitted to *India*, with liberty to amend pleadings, costs of appeal were ordered to abide the result of the re-hearing.⁽⁹⁾

Costs where compromise decree was set aside.

A decree of an appellate Court in *India* obtained after a compromise was *held* in the circumstances, fraudulent, and set aside with costs.⁽¹⁰⁾

Costs, how affected by party's delay.

Where there had been great and unexplained delay, after special leave to appeal had been granted, in bringing the appeal to a hearing, the Judicial Committee, in reversing the decree, refused the successful appellant his costs.⁽¹¹⁾

In ordinary circumstances, an Order in Council obtained upon an *ex parte* petition, which omitted to state the true facts, will be discharged with costs; but if there has been laches in applying to discharge the order on the part of the respondent, no costs will be given.⁽¹²⁾

Costs where a party makes unsuccessful

In this case, charges of fraud, forgery and perjury, having been made by the respondents against the appellant, the party who propounded the Will, costs of the Court in *India*, and upon appeal

(6) *Murtunjoy Chuckerbutty v. Cockrane*, 4 W.R. 1 (P.C.)=2 Sar. 124=1 Suther 592=10 M.I.A. 229.

(7) *Lalla Bunseedhur v. Koonwur Bindsee Dutt Singh*, 2 Sar. 167=10 M.I.A. 454.

(8) *Gopeekrist Gosain v. Gungapersaud Gosain*, 4 W.R. 46 (P.C.)=1 Sar. 498=6 M.I.A. 53.

(9) *Ikbaloodeulah v. Sah Bunarsee Doss*, 2 Sar. 463=R. & J.'s No. 8 (Oudh)=12 M.I.A. 507.

(10) *Rajmohun Gossain v. Gourmohun Gossain*, 4 W.R. 47 (P.C.)=1 Sar. 723=1 Suther 378=8 M.I.A. 91.

(11) *Pattabhiramier v. Vencatarow Naicken*, 15 W.R. 35 (P.C.)=7 B.L.R. 136=2 Sar. 628=2 Suther 410=13 M.I.A. 560.

(12) *Mohun Lall Sookul v. Bebes Doss*, 1 Sar. 792=1 Suther 458=8 M.I.A. 193.

to England, were, upon the reversal of the decree of the *Sudder* Court, ordered to be paid by the respondents.⁽¹³⁾

charges of fraud and forgery.

If grounds of appeal which are absolutely untenable are joined with grounds which are tenable, in order to bring a case within the rule as to the value authorizing an appeal as of right, this matter may be considered in regard to the question of costs.⁽¹⁴⁾

Costs where tenable grounds and untenable grounds of appeal are joined to increase valuation.

In one case the Privy Council, on an examination of all the accounts and documents, found that the decrees of the lower Courts were not wrong on any clear point, and affirmed the decrees; but, finding that there was a considerable delay in plaintiff's bringing his suit, and finding also that the case was attended with suspicious circumstances, refused to the respondent his costs before it and before the lower appellate Court.⁽¹⁵⁾

Costs not given to successful party, cases of.

In another case as the heir-at-law in contesting the appointment of an adopted son had a decree of the High Court in his favour, no costs of appeal were given on such reversal.⁽¹⁶⁾

Where only one defendant appeals successfully to the Privy Council and obtains his costs, his co-defendants who did not appeal are not entitled to their costs.⁽¹⁷⁾

Costs where there are several defendants.

In an appeal from the Sadar Courts, the appellants, by the leave of the Court, appealed separately to the Queen in Council. On reversal of the Sadar Court's decree, it appearing that the two appellants had a common interest, only one set of costs of appeal

Costs where several appellants have a common interest in appeal.

(13) *Nana Nurain Rao v. Huree Punth Bhao*, Marsh 436=1 Sar. 843=9 M.I.A. 96.

(14) *Hurro Durga Chowdhurani v. Surat Sundari Debi*, 8 C. 332=9 I.A. 1=4 Sar. 304.

(15) *Baboo Ulruk Singh v. Beny Persad*, 5 W.R. 77=1 Suther 13.

(16) *Rajendro Nath Holdar v. Jogendro Nath Banerjee*, 15 W.R. 41 (P.C.)=7 B.L.R. 216=2 Sar. 666=2 Suther 422=14 M.I.A. 67. A mortgagee holding two mortgages of the same property, sells under the second mortgage of the plaintiff, and subsequently under the first mortgage to his son *benamsee* for himself;—*Held*, in a suit against the mortgagee and the *benameedars*, that the plaintiff was entitled to set aside this second sale and to redeem, but that, the mortgagor not being a party, the Court was wrong in introducing into the decree a declaration to the effect that the plaintiff was entitled "as second mortgagee", and had not acquired the equity of redemption belonging to the mortgagor. Such a declaration should, in appeal, be struck out as embarrassing to the plaintiff's title, at the expense of the respondent who resisted. *Chooranum Singh v. Shaik Mahomed Ali*, 9 I.A. 21=11 C.L.R. 1=Bald 426=4 Sar. 329.

(17) *Maharanes Brojo Soonduree Debia v. Anund Moyee Debia*, 16 W.R. 302.

were allowed in moieties to the separate appellants upon one appeal.⁽¹⁸⁾

Costs were refused by the Privy Council where the defendant had set up, as his defence, an exclusive title, in which he had failed.⁽¹⁹⁾

In circumstances respecting the enforcement by Government of their claim to resume *Ghatwally* lands, the Judicial Committee, in reversing the decree of the Special Commissioners, decreed all the costs incurred in the proceedings in *India* and in this Court to be paid by the Bengal Government.⁽²⁰⁾

Costs of printing and translation, certified by the Deputy Registrar of the High Court, are a necessary part of the costs of an appeal to the Privy Council.⁽²¹⁾

The amount of such costs is left to be ascertained by the High Court, and is not assessed by the Privy Council Office.⁽²²⁾

Where the Privy Council reversed the decrees of three Courts in India with costs in each, and dismissed the suit with costs specifying a sum as the costs of the appeal to itself: *Held* that such sum did not include the costs of translation, etc., incurred in the High Court.⁽²³⁾

Although, upon ordinary principles, where an order directs payment of costs, and afterwards specifies a particular sum, such sum comprises all costs, yet as it has never been the practice of the Privy Council to make a specific order as to costs incurred here for preparation and transmission of the record, and as it had been too long the practice of the High Court to allow such costs, to

(18) *Shah Makhanlal v. Srikrishna Singh*, 2 B.L.R. (P.C.) 44=11 W.R.P.C. 19=12 M.I.A. 157=2 Suther 190=2 Sar. 403.

(19) *Lachmeswar Singh v. Manowar Hossein*, 19 C. 253 (P.C.)=19 I.A. 48=6 Sar. 133.

(20) *Rajah Lelanund Singh Bahadoor v. The Government of Bengal*, 4 W.R. 77 (P.C.)=1 Sar. 505=1 Suther 243=6 M.I.A. 101. Suit by Government to recover costs incurred by the East India Company in prosecuting, under Statute 3rd and 4th Will. IV, c. 41, a dormant appeal. *The Government of Bengal v. Mussamat Shur-rufuloonnissa*, 3 W.R. 31 (P.C.)=1 Sar. 749=1 Suther 405=8 M.I.A. 225.

(21) *Ram Coomar Ghose v. Prosunno Coomar Sannyal*, 10 C. 106.

(22) *Ibid.*

(23) *Mussamat Omatool Fatima v. Ashur Ali*, 15 W.R. 356=9 B.L.R. App. 23.

adopt now a different rule, and as there had not been unnecessary expenses in this case, the Court allowed such costs.⁽²⁴⁾

In one case directions were given by the Privy Council in taxing costs to disallow all expenses occasioned by the insertion in the manuscript of unnecessary matters.⁽²⁵⁾

(ii) Costs occasioned by insertion of unnecessary manuscript in record.

Matter which had no bearing on the question raised on the appeal having been introduced into the record, it was ordered that all such costs as might have been so occasioned should be disallowed by the Registrar, on the taxation of costs.⁽²⁶⁾

Where irrelevant matter had been introduced into the record, the Registrar was directed to tax the costs as if the record had not contained what he might consider to have been inserted unnecessarily.⁽²⁷⁾

The practice of including in the transcript record prepared and printed in *India*, under the Order in Council, 13th June, 1853, voluminous accounts and receipts, unnecessary to the question at issue was *condemned* by the Privy Council.⁽²⁸⁾

As the miscarriage of the suit was occasioned by the manner in which the issue was framed by the Judge, the costs of appeal were directed to be costs in the cause.⁽²⁹⁾

(iii) Costs occasioned by the manner in which issues were framed by lower Court.

Where there had been an irregularity in the Court below in the reception of evidence, the Judicial Committee, in affirming the judgment of the Court below, refused to give costs of appeal.⁽³⁰⁾

(iv) Costs where there had been irregularity in reception of evidence by lower Court.

(24) *Saroda Prasad Mullick v. Lachmipat Singh Dugar*, 9 B.L.R. App. 23 N.=18 W.R. 89. (Followed in *Madan Thakur v. Lopez*, 9 B.L.R. App. 22=18 W.R. 253 and referred to in *Asgur Ali v. Nugendro Chunder Ghose*, 21 W.R. 463).

(25) *Tarakant Bannerjee v. Puddomoney Dossee*, 5 W.R. 63 (P.C.)=2 Sar. 184=1 Suther. 631=10 M.I.A. 476.

(26) *Bishenmun Singh v. Land Mortgage Bank, India*, 11 O. 244 (P.C.)=12 I.A. 7=4 Sar. P.C.J. 558=9 Ind. Jur. 85.

(27) *Pittapur Raja v. Buchi Sitayya*, 8 M. 219=12 I.A. 16=4 Sar. 598.

(28) *Tarakant Bannerjee v. Puddomoney Dossee*, 5 W.R. 63 (P.C.)=10 M.I.A. 476=1 Suther. 631=2 Sar. 184.

(29) *Rajah Sahib Perhlad Sein v. Run Bahadoor Singh*, 12 W. R. 6 (P.C.)=2 B.L.R. 111 (P.C.)=2 Sar. 430=2 Suther. 225 (239)=12 M.I.A. 289.

(30) *Rajah Bommarause Bahadur v. Rangasawmy Mudaly*, 1 Sar. 536=6 M.I.A. 282.

Costs, if included in fixing valuation for appeal.

In an early case, it was doubted whether, in estimating the appealable value, for appeal to the Privy Council, costs of suit can be added to the principal and interest decreed.⁽³¹⁾

In a later case, however, it was laid down that when, apart from other reliefs claimed in an appeal, the appellant claims relief in respect of the assessment and apportionment of costs in the lower Court, the appeal ought to be valued and stamped in respect of such costs.⁽³²⁾

An objection to an appeal, on the ground that the amount in dispute is below the appealable amount, comes too late when made to the Privy Council at the hearing of the appeal.⁽³³⁾

Appeal as to costs only.

The Judicial Committee will not entertain an appeal merely for costs.⁽³⁴⁾

Appeal when the two Courts differ only as to costs.

The last clause of S. 596 of the Code of Civil Procedure⁽³⁵⁾ relates to the subject-matter of the suit and therefore there is no right of appeal when the two Courts differ only as to costs.⁽³⁶⁾

Costs, security in Privy Council.

The words in the Code of Civil Procedure, relating to the time for, within which security for costs is to be given, are directory only; and although they are not to be departed from without cogent reasons, the Court from which the appeal is preferred has the right of extending the time.⁽³⁷⁾

In this case, a satisfactory explanation having been given of delay in giving security until after the time limited by the above section had *expired*, held that the Court had rightly exercised discretion in extending the time.⁽³⁸⁾

(31) *Nilmadhub Doss v. Bishumber Doss*, 12 W.R. 29 (P.C.) = 3 B.L.R. 27 (P.C.) = 2 Sar. 489 = 2 Suther. 257 = 13 M.I.A. 85.

(32) *In re Makhi*, 19 M. 350. But see *Nilmadhub Doss v. Bishumber Doss*, 12 W.R. (P.C.) 29.

(33) *Nilmadhub Doss v. Bishumber Doss*, 12 W.R. 29 (P.C.).

(34) *Mussumat Keemee Bae v. Latchmandas Narraindas*, 5 W.R. 59 (P.C.) = 1 M.I.A. 470 = 1 Suther. 75 = 1 Sar. 141.

(35) Act XIV of 1882.

(36) *Thakur Baldeo Bakhsh Singh v. Thakur Lalji Singh*, 10 O.C. 65, dissenting *Raja Sreenath Roy Bahadoor v. Secretary of State for India in Council*, 8 C.W.N. 294.

(37) *Burjore and Bhawani Pershad v. Bhagana*, 10 C. 557 = 11 I.A. 7 = 4 Sar. 498 = R. & J.'s No. 76 (Oudh). See also *Wise v. Jugbundoo Bose*, 12 W.R. 229 = 1 Sar. 698 = 7 M.I.A. 431.

(38) *Burjore and Bhawani Pershad v. Bhagana*, 10 C. 557 = 11 I.A. 7 = 4 Sar. 498 = R. & J.'s No. 76 (Oudh).

Security for costs in appeal to the Privy Council may be given in the form of mortgage-bonds of immoveable property ; but parties must take the risk of not being within time if in consequence of the time taken in testing the value of the security it is not accepted within the time allowed for giving security.⁽³⁹⁾

No security of immoveable property should be accepted except a first mortgage by registered deed of freehold or absolutely held property. In every case the value of the property should exceed by at least one-third, or if consisting of buildings, by at least one-half the amount of security required.⁽⁴⁰⁾

In accordance with the order of the Court the petitioner tendered at the office four pieces of $3\frac{1}{2}$ per cent. Government Promissory Notes of the value of Rs. 4,000 each duly endorsed as security for the respondent's cost in P.C. appeal, but the office refused to accept the same as sufficient and demanded an additional amount of Rs. 300 to make up the discount at which these notes were sold then. *Held*, the deposit of Government securities amounting Rs. 4,000 comes within the express words of the rule requiring the deposit of Government securities to the extent of Rs. 4,000 and should be accepted as sufficient.⁽⁴¹⁾

It is not the usual practice, when costs of an interlocutory proceeding have been disposed of, to consider that an award of the general costs of the suit interferes with the order as to the partial costs. A prior decree having given the costs incurred on the disposal of a preliminary point to the party successfully raising it, a later decree, without expressly referring to the former, gave the costs of the suit, generally, to the opposite side. *Held* that the costs due under the prior decree should be set off against those due under the later. Although an appellant only partly succeeded in his appeal, the whole of his claim having been opposed in the Courts below on an untenable ground, *held* that there was no reason for departing from the general rule that the defeated party should pay the costs.⁽⁴²⁾

(39) *Ma Me Gale v. Ma Sa Yi*, 1 L.B.R. 177.

(40) *Ibid*.

(41) *Bibi Golap Kumari Shaheba v. Gonesh Chandra Mitter*, Cal. Case-Law, Vol. I, 994 (1995).

(42) *Radhapershad Singh v. Ram Parmeswar Singh*, 13 C.L.R. 22=9 C. 797=10 I.A. 133=4 Sar. 421. A defendant did not appeal from an interlocutory decree, but proceeded in the Master's office in respect of the matters included in the accounts ; but, before the general report was made by the Master, he appealed from such interlocutory

Refund of
costs.

Upon a reversal of a decree of the *Sudder Court*, costs of the suit already paid by the appellant were ordered to be refunded, and the Court below was directed to deal with those costs and all other costs, including those of the appeal, according to the result of the enquiry.⁽⁴³⁾

Where a restitution is made in execution of the decree of the appellate Court reversing the decree of the lower Court, under which a certain amount has been paid by the party defeated in the lower Court, it was *held* the latter will be entitled to interest on the amount so paid during the period he was out of pocket.⁽⁴⁴⁾

On reversal by the Judicial Committee of the decree of the High Court, such costs as were allowed by the practice of the Courts in *India* to a successful plaintiff suing *in forma pauperis*, and paid, were ordered to be restored to the defendant.⁽⁴⁵⁾

Taxation of
costs.

As a general rule, costs of appeal to the Privy Council would be directed to be taxed and to be costs in the cause to be dealt with by the High Court.⁽⁴⁶⁾

decree to *England*. In reversing such decree, the Judicial Committee ordered him to pay the costs of the proceedings in the Master's Office, and remitted the cause to the Court below, with directions, that the costs payable to the defendant upon the dismissal of the bill, and the costs payable by him consequent upon his proceedings in the Master's Office, should be set off, the one against the other, and the balance paid to the party entitled to the same. *Mc. Keller v. Wallace*, 8 Moo. P.C. 378=1 Equity Rep. 309=1 Sar. 453=5 M.I.A. 372.

(43) *Raja Lelanund Singh Bahadoor v. Maharajah Moheshur Singh Bahadoor*, 3 W.R. 19 (P.C.)=1 Suther. 578=2 Sar. 74=10 M.I.A. 81.

(44) *Rama Sahai v. The Bank of Bengal*, 8 A. 262=A.W.N. (1886) 87.

(45) *Rajendro Nath Holdar v. Jogendro Nath Banerjee*, 15 W.R. 41 (P.C.)=7 B.L.R. 216=2 Sar. 666=2 Suther. 422=14 M.I.A. 67. *Held* on a remittal of the case to the High Court, that, if the respondent failed to appear in the High Court, or if the appeal should be decided against him, the respondent was to pay the appellant's costs of the appeal in *England*, and the costs (if any) paid under the decree of the High Court were to be repaid to him. *Kales Pershad Tewarree v. Lalla Bindu Lall*, 2 Sar. 476=12 M.I.A. 343.

(46) *Rajah Sahib Perhlad Sein v. Doorgapersaud Tewarree*, 12 W.R. 6 (P.C.)=2 B.L.R. 111 (P.C.)=2 Sar. 429=2 Suther. 225=12 M.I.A. 286. In one case, appellant's costs in the Court below was allowed, and the suit was referred back to the Master of Supreme Court to tax the same. *Sreemutty Rabutty Dossee v. Sibchunder Mullick*, 1 Sar. 404=6 M.I.A. 1. The Supreme Court cannot tax the costs of an appeal to the Privy Council, which, in its decree, reverses the decree of the Supreme Court, and takes no notice of costs. And if costs had been paid under the original decree of the Supreme Court which was reversed, they must be refunded, the whole decree being reversed, including the costs, and no costs having been given by the Privy Council. *Bruce v. The East India Company*, 11th Dec. 1818; East's Notes, Case 92; Morley's Digest of Indian Cases, Vol. I, p. 113. Where there is a condition to pay costs, it is the duty of the party who has to pay the costs to issue a summons immediately, and get the

The plaintiff claimed as damages a larger sum than the appellate Court ordered. No costs were given in the appeal. *Held*, following the practice of the Courts in *India*, that, as the plaintiff recovered a less amount than he laid claim to in his plaint, his costs in the Court below were to be apportioned to the amount recovered, and not to the sum claimed.⁽⁴⁷⁾

Costs incurred by a Hindu widow as guardian of her husband's adopted son, in an appeal which was withdrawn when he came of age, were directed to be recouped from the adopted son's estate.⁽⁴⁸⁾

Where an order of the Judicial Committee is silent as to interest upon the costs decreed, the Judge of the lower Court which has to execute the decree has no power to direct payment of those costs with interest.⁽⁴⁹⁾

Where the decree of the first Court, confirmed by the Privy Council, allowed interest on costs incurred, the decree-holder was held entitled to interest on the costs incurred on account of translation and printing, because the Privy Council had adopted the decree of the lower Court and made it a dominant decree as regards costs in all Courts. The effect of that decree is that the Privy Council decree became a decree for costs and interest expressly.⁽⁵⁰⁾ But if no provision for interest on the specific sum mentioned, as costs in the Privy Council, is made in the order of the Privy Council, then no interest will be allowed on that sum.⁽⁵¹⁾

costs taxed and paid. *Livingstone v. Rajnarain Bysack*, 2nd Term 1827; Cl. Ad. R. 1829, 45; Morley's Digest of Indian Cases, Vol. I, p. 113. And the complainant not having done so, he was let in again, on payment of costs, and undertaking to speed the cause. *Lachersteen v. Rostan*, 10th April 1831, Cl. R. 1834, 35; Morley's Digest of Indian Cases, Vol. I, p. 113.

(47) *Mudhun Mohun Doss v. Gokul Doss*, 5 W.R. 91 (P.C.)=2 Sar. 202=1 I.J. N.S. 269=1 Suther. 644=10 M.I.A. 563.

(48) *Ranes Bistoopria Putmadave v. Nund Dhul*, 15 W.R. 19 (P.C.)=6 B.L.R. 190 (P.C.)=2 Sar. 631=2 Suther. 391=13 M.I.A. 602.

(49) *Forester v. Secretary of State*, 4 I.A. 137 (144)=3 C. 161 (170)=3 Suther. 405=3 Sar. 717=1 P.R. 1877 and the cases cited there; cf. *Ram Sahai v. Bank of Bengal*, 8 A. 262.

(50) See Amir Ali's Civ. Pro. Code, 2nd Ed., 1916, pp. 1345, 1346.

(51) *Muddun Thakoor v. Morrison*, 18 W.R. 253=9 B.L.R. App. 22; cf. *Dakhina Mohun v. Saroda Mohun*, 23 C. 357, 360 following *Forester v. Secretary of State*; cf., however, *Nil Madhub v. Bisumbhur*, 21 W.R. 411, where Jackson, J., allowed interest though the Privy Council decree was silent about it.

On the other hand, if the decree of the Privy Council and the decree of the local Court, confirmed by the Privy Council, are silent on the question of interest, no interest will be allowed.⁽⁵²⁾

Where a decree of the Privy Council gives interest but does not clearly specify the rate, the Court should ascertain if possible, from other parts of the decree itself, or from other documents which may be read in conjunction with the decree, what rate was intended to be given.⁽⁵³⁾

Where the decree gives interest upon the principal sum recovered only, but not upon costs, the plaintiff is not entitled to such interest.⁽⁵⁴⁾

(52) *Lekhraj v. Mahtab Chand*, 21 W.R. 147; *Dakhina Mohun v. Saroda Mohun*, 23 C. 357. In this case it is not mentioned whether the decrees of the lower Court, confirmed by the Privy Council, allowed interest or not. See also *Broja Sundaree v. Anand Moyee*, 16 W.R. 302 cited in *Forester v. Secretary of State*, 3 C. 161, 170; *Ameeroonissa v. Meer Mahomed*, 18 W.R. 103; *Mahtab Chunder v. Ram Lall*, 3 C. 351; *Gooroo Dass Roy v. Stephens*, 21 W.R. 195.

(53) *Ameeroonissa Khatoon v. Meer Mahomed Mozuffur Hossein Chowdhry*, 18 W.R. 103. Markby, J. said :—The first ground which has been raised for our consideration is, at what rate it was intended that the plaintiff should have interest. Now, the rule that we have thought best to act upon in cases of this kind, which come not unfrequently before this Court, is, when the interest is not clearly specified, to see whether from the other parts of the decree itself or from other documents, if there are any, which one is at liberty to read in conjunction with the decree, it can be ascertained what rate the Court intended to give. If that cannot be ascertained in that way, my own opinion is that we should not be at liberty to take the course which has been suggested to us by the appellant now before us, namely, to allow such a rate of interest as we should think reasonable.

(54) *Ameeroonissa Khatoon v. Meer Mahomed Mozuffur Hossein Chowdhry*, 18 W.R. 103.

CHAPTER XVII.

TAXATION OF COSTS—ATTORNEY AND CLIENT.

General.

Attorney and client—Practice—Lien for costs—Taxation.

Attorney's lien for costs—Enforcement of.

Attorney's lien, how affected by compromise of suit by parties.

Discharge of Attorney—Change of Attorney—Change of sides.

Taxation of costs in trust and charity cases.

Certain items allowed or not in taxation.

THE subject of "Taxation of costs" would find a place more General. properly in a Solicitor's handbook rather than in a work intended for Lawyers. The working out of the details of a Bill of Costs is more the work of a Solicitor or a Lawyer's clerk than that of a lawyer.

"It has been well remarked that no one in a Solicitor's office—not excepting the principal himself—can make money so quickly or so easily as a good costs clerk. There is a great art in drawing costs, more especially costs which have to undergo the fiery ordeal of taxation, and it is possible for a first rate man to make a bill of costs come to double the amount that an indifferent hand would obtain from the same materials. And this not by the expert making unjust or dishonest charges, but through the inefficient man's want of knowledge of what is or is not chargeable, and of his lack of skill in framing charges. An item which, drawn in one way would be disallowed by a taxing-master, might, if framed in another way, be allowed as a strictly proper charge. The successful—I might say the scientific—preparation of costs therefore involves not only an intimate knowledge of the rules relating to costs and of the various scales applicable, but also an acquaintance with the procedure in the various Courts."⁽¹⁾

(1) The Solicitor's clerk, by Charles Jones, 8th Ed., 1913, p. 199; on the subject-matter of this chapter also see Cordery on Solicitors, 3rd Ed., p. 105, etc.; White on Solicitors, (Ed. 1894), p. 112, etc.

The Indian High Courts have framed detailed rules with regard to the method of taxations, the items and amounts to be allowed in particular cases and for particular works.⁽²⁾

(2) The following are the rules framed by the Madras High Court for observance on its Original Side. Similar rules exist for the Appellate Side of the High Court and for observance by the Mofussil Courts.

21. In every Bill of Costs, the professional charges shall be entered in a separate column from the disbursements, and the items shall be specified as shortly and concisely as possible. The date of each proceeding, or disbursement, shall be accurately stated; and, where a disbursement is to be vouched in the Office of the Registrar, or of the Sheriff, the date of filing the Stamp, or of payment shall be given. The bill shall be signed by the pleader, or if the party appears in person, by the party, by whom it is left for taxation, including any pleader or party who is entitled to participate in the costs to be taxed.

22. Within three months from the date of the issue of the decree or order awarding costs, the party claiming the same shall leave the bill, and the vouchers in support of any disbursements therein, with the taxing officer, and obtain an appointment for taxation. Provided that, if costs of an interlocutory application or hearing have been awarded, and have not been previously taxed or paid, they may be included in the bill for the whole case.

23. Notice of the appointment shall be served upon the party to be charged or his pleader three clear days before, and an affidavit of service thereof shall be filed on the day preceding the day so appointed; on which day, or on any other day to which the taxation is adjourned, the taxing officer shall, if service of the said notice has been proved, or the party to be charged appears or consents, proceed to tax the bill; and if the pleader presenting the bill does not attend at the taxation, the taxing officer may disallow the sum of Rs. 3-8, or other sum charged in the bill, for his costs of attendance.

24. Notice of taxation shall not be necessary in any case where the party to be charged has not appeared at the hearing of the case, in person, or by pleader, or guardian.

25. If, within the said period of three months, an appointment to tax is not applied for, or service of notice is not proved, the taxing officer shall return the bill.

26. If the bill is returned by the taxing officer, or if default has been made under r. 22 or 23, the taxing officer shall not receive or tax the bill, except under an order of the Court, to be obtained upon summons in Chambers, supported by affidavit.

27. The taxing officer may disallow the costs of any pleading or proceeding, or of any part thereof, which is improper, vexatious, or unnecessary, or contains vexatious or unnecessary matter, or is of unnecessary length, or is caused by misconduct or negligence.

28. Unless the Court otherwise orders, no allowance shall be made for the costs of, or occasioned to any party by, the amendment of any pleading.

29. As between party and party, no costs shall be allowed which do not appear to the taxing officer to have been necessary and proper for the conduct of the case, or for defending the rights of the party, or which appear to the taxing officer to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party.

30. In respect of all fees and allowances which are in the discretion of the taxing officer, he shall take into consideration the other fees and allowances to the pleader

Particulars to be set out in Bill of Costs.

Bill of costs to be lodged within 3 months of decree or order and appointment obtained.

Service of notice of appointment on opposite party or pleader. Taxation of Bill and costs of pleader taxing Bill.

Notice of taxation when unnecessary.

When Bill to be returned by Taxing Officer.

Taxing Officer not to receive returned Bill except under order of Court for taxing.

When costs of pleading, etc., may be disallowed.

Costs of amendment not generally allowed.

Costs unnecessarily or negligently incurred to be disallowed.

Taxing officer to consider all circumstances in discretionary cases.

We will, in the course of this chapter only refer to such of the cases as have laid down matters of principle rather than go into details as to what items are allowed and what not allowed in the taxation of costs by Civil Courts.

or advocate, if any, in respect of the work to which the fee or allowance applies, the nature and importance of the suit, appeal, or matter, the amount involved, the interest of the parties, the fund or person to bear the costs, the general conduct and costs of the proceedings, and all other circumstances of the case.

31. Where it is made to appear to the taxing officer that a party is a *pardanashin* female, who by the custom of the country, or her caste, is not allowed to appear in public, and that an attendance upon or by her agent is not sufficient or proper, he may allow, as between party and party, the costs of the attendance of her pleader, or of an officer of the Court, upon the said female. Costs of attendance on *pardanashin* female.

32. Unless the Court otherwise orders, the costs of obtaining or briefing notes of evidence, and a copy of the judgment of the Court, shall not be allowed as between party and party except upon an appeal. Cost of obtaining or briefing notes of evidence, etc., allowed only on appeal.

33. If, on a taxation of costs as between attorney and client, one-sixth part of the amount of the bill is disallowed, the pleader presenting the bill shall pay all costs of preparing the bill, and incidental to the taxation thereof, and the same shall be deducted by the taxing officer. Cost of preparing and taxing bill in or out of India according to scale allowed to attorney.

34. If, in any case, it is necessary to employ a legal practitioner to act as agent beyond the local limits of the jurisdiction of the Court, the taxing officer may allow costs of the agent, and of instructing him. If the agent is employed in India, his costs shall be taxed according to the scales of fees prescribed by these rules; if he practises and is employed out of India, his costs shall be taxed according to the scale of fees in force at the place where he practises. Costs of legal practitioner in or out of India according to scale prevailing therein.

35. In any case in which a party entitled to receive costs is liable to pay costs to any other party the taxing officer may tax the costs the party is liable to pay, and may adjust the same by way of deduction or set-off, and issue his allocatur for the balance only, or may, if he thinks fit, delay the allowance of the costs the party is entitled to receive, until he has paid or tendered the costs he is liable to pay; or the taxing officer may tax, and issue his allocatur for the costs to be paid to the party. Setting off opposite party's costs and issuing allocatur for balance, etc.

36. If so requested by any party attending the taxation, the taxing officer shall take a note of any objection made by the party to the allowance or disallowance of any item or any part thereof, and of his decision thereon, and shall, on payment of the proper charges, give a copy of his note to any party to the case. Note of objection to be made by taxing officer and copy thereof.

37. A party, who is dissatisfied with a decision of the taxing officer, may, within twenty days from the taxation, apply by summons in Chambers to review the taxation, and the Court may thereupon make such order as it thinks just. The summons shall, if objection is taken with respect to particular items, specify the same shortly; and shall, in any case, be accompanied by a copy of the notes of the taxing officer with reference to the objection made by the party. Notice of the application shall be given to all parties appearing on, or entitled to notice of, the taxation, other than the applicant. Chamber application by Court for review of taxation how made. Notice.

38. If a party considers that the maximum fee allowed by these rules is sufficient, or that a few ought to be allowed in respect of any matter not provided for by these rules, he may, upon the taxation of the bill, apply to the taxing officer to certify the amount which the officer is of opinion ought to be allowed and may then apply for a Review of taxation where maximum fee allowed by rules considered insufficient.

Attorney and
client—Prac-
tice—Lien for
costs—Taxa-
tion.

The following are some of the important cases bearing on the subject of taxation of costs of the relation between an attorney and his client, the lien of the former for his costs of suit and the practice as to taxation.

An attorney is not entitled to any donation for services rendered by him beyond his just professional remuneration, during the subsistence of the relationship of attorney and client. An attorney will be entitled to any such benefit, if he can show to the satisfaction of the Court, that the client, by whom the benefit has been conferred, had competent and independent advice in conferring the same.⁽³⁾

An attorney cannot split up his functions, he cannot partly act as attorney and partly as agent of one and the same client.⁽⁴⁾

Any work which an attorney does jointly for several parties together, he can only make one charge for. Where he appears for any number of parties before the taxing officer at the taxation of the costs of a suit, he must be taken to represent them jointly. The taxing officer ought not to issue separate summonses to the different parties who appeared by the same solicitor. He should include them all in one summons.⁽⁵⁾

There is no rule preventing an attorney from taking security or otherwise, arranging with his client, for payment of costs, which have actually become due, or from agreeing for any fair amount of interest in making such an arrangement, though a stipulation for interest on future costs stands on a wholly different footing.⁽⁶⁾

or fee not
provided for
claimed.

review of the taxation, in a manner hereinbefore prescribed. At the hearing of the application, the Court may allow such fee, or may refer the bill to the taxing officer with such directions as it thinks fit, or may make such other order as it thinks just.

N B.—Similar rules are also made by the other High Courts and Chief Courts and Courts of the Judicial Commissioners in India.

(3) *Turrel v. Bank of London*, (1862) 10 H.L.C. 26 (44); *Brojendra Nath v. Luckhimoni*, 29 C. 595=6 C.W.N. 816; following *O'Brien v. Lewis*, (1862) 32 L.J. Ch. 569; *Holman v. Loynes*, (1854) 4 De G.M.G. 270; *Rhodes v. Bate*, (1865) L.R. 1 Ch. A.C. 252 (257); *Morgan v. Minnett*, (1877) L.R. 6 Ch. D. 638; *Liles v. Terry*, (1895) 2 Q.B. 679; and referring *In re Whitcombe*, (1844) 8 Beav. 140; *Lawless v. Mansfield*, (1841) 1 Dru. and War. 557 (605); distinguishing *Holditch v. Carter*, (1873) L.R. 3 P. and D. 115.

(4) *Brojendra Nath Mullick v. Luckhimoni Dassas*, 29 C. 595=6 C.W.N. 816 (referred to in *Ganga Ram v. Devi Das*, 61 P.R. 1907=45 P.W.R. 1907=23 P.L.R. 1907).

(5) *Henrietta Kenny v. The Administrator-General of Bengal*, 7 B.L.R. App. 50.

(6) *Monohur Doss v. Romanauth Law*, 3 C. 473 (distinguished in *Shamaldhona Dutt v. Lakshimani Debi*, 36 C. 493=12 C.W.N. 1102).

Where an attorney made series of advances on the security of mortgages to his client, then considerably indebted, part of which went towards payment of a large sum, which the client owed the attorney himself for costs upon a settlement of accounts between them, it was *held*, in a suit by the attorneys to recover the moneys due on the mortgages, that the client was entitled, in view of the fiduciary relation between the parties to re-open the account and to have bills of costs taxed, though he had formerly declined the attorney's offer to tax them and had allowed a long time to elapse.⁽⁷⁾

As between attorney and client, the existence of fiduciary relationship alone, or the fact that certain bills of costs were not taxed but were settled out of Court by execution of a deed, will not justify a Court in re-opening accounts settled on which the bond is based, unless sufficient grounds of suspicion exist, or the bills are *prima facie* shown to be extortionate.⁽⁸⁾

Under the practice obtaining in the Original Side of the High Court at Calcutta taxation of bills of solicitors is deemed to be optional with the client and bills of costs are not infrequently adjusted without taxation.⁽⁹⁾

There is no specific provision in the Limitation Act, or anywhere else, fixing a period of time within which an application for enforcement of payment of costs by a solicitor against his client, by the summary method provided by Rule 859 of the High Court Rules, should be made.⁽¹⁰⁾

Solicitors can recover costs due to them by a client in different suits by one summons. It is not necessary to take out a separate summons for costs due in each suit.⁽¹¹⁾

Subsequent proceedings taken in connection with the taxation of an opponent's costs are not part of the suit or application itself.⁽¹²⁾

(7) *Monohur Dass v. Romanauth Law*, 3 C. 473.

(8) *Shamuldhone Dutt v. Srimutty Susila Bala Debi*, 12 C.W.N. 1102=36 C. 493 (following *Lambert v. Still*, (1894) 1 Ch. 73 (1893); distinguishing and explaining *Lawless v. Mansfield*, 1 Drury and Warren 557 (1841).)

(9) *Shamuldhone Dutt v. Srimutty Susila Bala Debi*, 12 C.W.N. 1102=36 C. 493. The case of *Monohur Dass v. Romanauth Law*, 3 C. 473, was decided on the special circumstances of that case and does not lay down any general rule of law.

(10) *Wadia Gandhi & Co. v. Purshotum Shivji*, 9 Bom. L.R. 508=32 B. 1.

(11) *Ibid.*

(12) *Watkins v. Fox*, 22 C. 943.

Where a firm of attorneys brought a suit against their clients to recover the costs of an application to the High Court : *Held*, that limitation began to run from the date of the judgment in the application.⁽¹³⁾

Items of an attorney's bill for work done, subsequently to the judgment, in opposing the taxation of the opponent's costs, although done on his client's instructions, will not take the matter out of the Limitation Act. Such items do not form part of the costs of the original application.⁽¹⁴⁾

A suit can ordinarily be said to terminate when there is nothing more to be done in it except execution. The fact that the attorney may have to appear in the execution-proceedings cannot postpone his right of suit.⁽¹⁵⁾

An attorney can obtain an order in taxation of his costs although his client disputes his retainer as to the whole bill.⁽¹⁶⁾

The solicitor's lien in the High Courts of India is governed exclusively by the law as it existed in English Courts before the passing of 23 and 24 Vict., cap. 127, by which that lien was very much extended. By that law, the solicitor had a lien for his costs on any funds or sum of money recovered for, or which became payable to, his client in the suit.⁽¹⁷⁾

Attorney's
lien for
costs—
Enforcement
of.

There exists a summary jurisdiction in the High Court to enforce the solicitor's lien, but the exercise of that jurisdiction is discretionary.⁽¹⁸⁾

Although the High Court possesses a summary jurisdiction to enforce the solicitor's lien, upon the fruits of his exertion, it will not do so when the circumstances would make it unfair to any of the parties or would compel the Court to go into complicated questions of fact especially when charges of fraud or collusion are

(13) *Watkins v. Fox*, 22 C. 943 (approving *Balkrishna Pandurang v. Govind Shivaji*, 7 B. 518 and *Rothery v. Munnings*, 1 B. & Ad. 5).

(14) *Watkins v. Fox*, 22 C. 943 (referred to in *Nathubhai Narandas v. Manordas Laldas*, 36 B. 360 (365) = 14 Bom. L.R. 325 = 15 Ind. Cas. 512; *Balaram Kunbi v. Sadoba Mali*, 17 C.P.L.R. 178 (190).

(15) *Administrator-General of Bengal v. Chunder Cant Mookerjee*, 22 C. 952 (Note).

(16) *In re Madhavji Kamdar & Chhotubhai*; *In re Dada Mahomed*, 11 Bom. L.R. 83 = 12 C.W.N. 201 = 33 B. 667, following *In re Jones*, (1887) 86 Ch. D. 105.

(17) *Devkabal v. Jefferson, Bhaishankar and Dinsha*, 10 B. 248; see, also, *Cullianji Sangjibhoy v. Raghovji Vijpal*, 30 B. 27 = 6 Bom. L.R. 879; *In the matter of Costs due to Messrs. Tyabji & Co.*, 7 Bom. L.R. 547.

(18) *In the matter of Costs due to Messrs. Tyabji & Co.*, 7 Bom. L.R. 547.

made, or when a solicitor has deliberately taken additional fresh security for the purpose of securing his costs and has not relied on his lien under the summary jurisdiction.⁽¹⁹⁾

(19) *In the matter of Costs due to Messrs. Tyabji & Co.*, 7 Bom.L.R. 547. Tyabji, J., said in the course of the judgment:—It is not disputed that these costs are justly due to the petitioners from Mr. Manchersha Bomanji Ohothia. But the question has been raised, as to whether, in the particular circumstances of this case, the Court would make the order as asked for in the summons. Two main points have been discussed before me. The first was as to the existence of any summary jurisdiction in the Court to make an order as prayed for, and the second as to the desirability or propriety of making the order, having regard to the rights of the third parties involved in the case, namely, the Commercial Bank and Vithaldas. As there appears to be some doubt as to the exact nature of the jurisdiction exercised by this Court in matters of solicitor's lien for costs, and, as to the occasion on which such jurisdiction (if any) should be exercised, I thought it desirable to take time to consider my judgment, and I have carefully looked into the authorities, and am now prepared to give my decision. As to the general jurisdiction of the Court, it does not seem to me that there can really be any doubt that the High Court now possesses the summary jurisdiction which is sought to be invoked. The solicitors and attorneys of this Court have always been regarded by the High Court as, in some sense, officers of the Court, and, therefore, entitled to special protection for the payment of their costs. And it has been hardly disputed before me that the Courts in England, prior to the establishment of the High Courts in India, exercised such summary jurisdiction and gave to the solicitor's lien upon the fruits of their exertions, for the due payment of their costs. The present jurisdiction of the High Court has been inherited from the Supreme Court, and the jurisdiction of the Supreme Court was admittedly of the same character and nature as the jurisdiction exercised by the Courts in England, both on the Common Law Side, and on the Chancery Side. Whatever was the summary jurisdiction of the Supreme Court on this point is now vested in the High Court, and it has not been in any way affected or interfered with by any enactments, either of the Imperial Legislature of England, or of the Legislature in India. The Solicitors' Act, 23 and 24 Vict., c. 127, passed in England, has not in any way been extended here, and, therefore, the jurisdiction which I can exercise here, is the jurisdiction which was vested in the Supreme Court—that is to say, in the Courts of England, before the Act in question was passed. Now the nature of the jurisdiction prior to the passing of the Solicitors' Act in England is indicated by the case of *Haymes v. Cooper*, (1864) 33 Beav. 431, where the marginal note is:—"The lien of a solicitor for his costs on a fund recovered by his exertions, cannot be affected by an assignment of the fund by the client, nor by a stop order obtained by the assignee." And the Master of the Rolls at page 433 says:—"My opinion is, that the solicitor's lien is the first charge on the fund. I do not think that it was intended by the Solicitors' Act (23 and 24 Vict., c. 127 s. 28) to deprive solicitors of any right then existing, but merely to enable the Court to give solicitors a charge on the property recovered. I have always understood the law to be, that a solicitor had an inherent equity to have his costs paid out of any fund recovered by his exertions; and that the Court would not part with it until these costs had been paid, except by consent of the solicitor. It is not a question of priority, because it is an existing equity of the solicitor, which could not be divested by any assignment by the client. If a sum of £1,000 were recovered for A.B. by the exertions of his solicitor, and A.B. assigned it to C.D., who obtained a stop order on the fund and gave notice of it to the Accountant-General, then, although C.D. would have priority over other incumbancers who had not got a stop order, yet he could only claim that which the client could give him, namely, the fund subject to the solicitor's right. Again, it is not a

In the case of *Shaik Domun v. Shaik Emaum* (7 C. 401) it has been decided that "It is not the practice to make an order directing a client to pay his attorney the costs of suit when taxed.

question of notice, because every man who knows that there is a fund in Court, knows also that it is liable to the lien for costs of the solicitor, through whose exertion that fund has been obtained, and the assignee has the benefit of those exertions as well as the assignor. If the statute had not been passed, I should not have had any doubt on the subject, but this Act declares the Court shall have power to declare that the solicitor is entitled to a charge for his costs, and that all conveyances to defeat it, unless to a *bona fide* purchaser for value without notice, shall be void. My opinion is, that where a man knows that there is a fund in Court, he knows also that it is subject to the solicitor's lien for his costs in recovering it, and that he is entitled to be paid in the first instance." This doctrine was stated in plain terms and was recognized in the case of *Devkabal v. Jefferson, Bhaishankur and Dimsha* (10 B. 248), and at page 253 the learned Chief Justice, Sir Charles Sargent, says:—"It is to be borne in mind that the solicitor's lien in the High Courts of India is governed exclusively by the law as it existed in English Courts before the passing of 23 and 24 Vict., c. 127, by which that lien was very much extended. By that law the solicitor had a lien for his costs on any funds or sum of money recovered for, or which became payable to, his client in the suit." The matter came up before the High Court of Calcutta in the case of *Khetter Kristo Mitter v. Kally Prasunno Ghose* (25 C. 887). That was the decision of our present Chief Justice, Sir Lawrence Jenkins, when he was acting as a Puisne Judge of the High Court of Calcutta, and the head-note is:—"The decree obtained by the plaintiff in a suit was satisfied by defendant behind the back of the plaintiff's attorney, although he had notice of the lien for costs of the plaintiff's attorney. The plaintiff's attorney thereupon applied for an order upon the plaintiff and the defendant, or either of them, to pay his costs: *Held*, that the High Court has general jurisdiction over its suitors; that although a defendant has the right to compromise with a plaintiff without the knowledge of the plaintiff's attorney, such compromise must be made with the honest intention of ending the litigation, and not with any design to deprive the attorney of his costs, and he cannot make a payment to the plaintiff under that compromise, if he has notice of the lien for the costs of the plaintiff's attorney." This decision ran somewhat counter to the previous authorities in Calcutta, according to which, apparently, it was not usual for the Calcutta High Court to make the order asked for under the summary jurisdiction of the Court; and, when the matter came up in the Calcutta High Court again in the case of *Ramdayal v. Ramdeo* (27 C. 269), Mr. Justice Sale declined to follow the decision in *Khetter Kristo Mitter v. Kally Prasunno Ghose* (25 C. 887) to which I have just referred. In other words the question is not as to the existence of the summary jurisdiction, but as to the discretion of the Judge, under the special circumstances of each case, whether he would or would not exercise the summary jurisdiction. This, I think, is the principle on which Mr. Justice Sale went. Therefore, when I examine the question in the light of the decided cases I find that it is not a question whether the summary jurisdiction is vested in the Court or not. As to that all the Judges before whom the matter came up are agreed that it is vested in the High Court. But the question is, whether under the particular circumstances of each case, it would be right for the Judge to exercise the summary jurisdiction or not. Moreover, it must be remembered that the practice in the Calcutta Court appears to have been not to exercise the summary jurisdiction of this kind. It does not appear that there is any such Rule of the Calcutta High Court as exists here in the Bombay High Court Rules, such as Rule No. 859 which runs as follows:—"An

Such an order can only be made in a regular suit by the attorney against his client." In this case the plaintiff applied to be allowed

attorney, when he has taxed his bill of costs against his client, may apply in Chambers on summons for an order against his client or the legal representatives of such client for payment of the sum allowed on taxation or such sum as may then remain due. The Judge on hearing the summons may make such order or refer the parties to a suit. Such order if made may be executed under Chap. XIX of the Code of Civil Procedure as a decree for money." So that under this rule even the order directly against the client for the payment of the money—and even when the interests of third parties are not concerned, is not a matter of course, but is, more or less, in the discretion of the Judge, either to grant or refuse; and that rule is not a new rule, but merely embodies in succinct words the practice of the High Court of Bombay ever since I have known it. The practice of the Bombay High Court is illustrated by a recent case which came up before Mr. Justice Chandavarkar, *Cullianjee v. Raghawjee* (6 Bom. L.R. 879). The headnote is:—"The High Court of Bombay has a summary jurisdiction over its suitors for the purpose of enforcing a solicitor's lien for costs; and in enforcing it the Court must be guided by the principles of English law. Hence, a solicitor engaged by a party to a suit has a right to come in and say that before any order is passed on the basis of a compromise arrived at privately between the parties effect should be given to his lien. Whether the solicitor moves the Court by an application of his own or appears to oppose a motion of the party against whom the lien for costs is alleged to arise, in either case he calls in aid the equitable interference of the Court under its summary jurisdiction. Where the compromise arrived at between the parties to a suit is collusive or fraudulent and made with a view to deprive a solicitor of his costs, the Court will order the award of costs to the solicitor." At page 883 he says "that this Court has a summary jurisdiction over its suitors for the purpose of enforcing a solicitor's lien for costs, and that in enforcing it the Court must be guided by the principles of English law." The above authorities establish very clearly the existence of the summary jurisdiction, but as I said before it does not follow that the Court would exercise it in every case. I have referred to cases where the Courts declined to exercise the summary jurisdiction owing to the allegations of fraud and collusion, I may now refer to a case, decided by the Courts in England, where such an order as is asked for here, was refused, though there were no allegations of fraud. In *Groom v. Cheesewright*, (1895) 1 Ch. 730, it was decided as follows: "A solicitor who has already accepted from his client a mortgage or other security for his costs in a pending action, to which the client is a party, cannot obtain a charging order for his costs under S. 28 of the Solicitors' Act, 1860, upon the property 'recovered or preserved' in the action." I need not refer to the facts of this case more in detail, but it shows that having regard to the fact that the solicitor had taken another security, the Court considered that it would not be proper to exercise its summary jurisdiction. The above authorities clearly establish the principle that although the Court possesses a summary jurisdiction to enforce the solicitor's lien upon the fruits of his exertion, it will not do so when the circumstances would make it unfair to any of the parties, or would compel the Court to go into complicated questions of fact, especially when charges of fraud or collusion are made, or where a solicitor has deliberately taken additional fresh security for the purpose of securing his costs, and has not relied on his lien under the summary jurisdiction. These, then, being the principles upon which the Court acts under its summary jurisdiction, the question arises whether this is a simple case—the facts of which can be easily ascertained on affidavits—where I should not be doing injustice to any one by giving effect to the doctrine? Or is it a case of complicated and disputed

to withdraw his suit on the terms of each party paying his own costs. Counsel for the plaintiff asked the Court to fix the scale on which the costs should be taxed. Counsel for the defendant consented to the application, and asked for an order directing the defendant to pay the attorney's costs of suit when taxed, and referred to *Iswar Chandra Dutt v. Iswar Chandra Ghose* (9 B.L.R. App. 19). Mr. Belchambers, the Registrar of the Court, stated that that case had not been correctly reported, and that it was not the practice to make an order for payment of costs as between attorney and client, except in a regular suit against the client. Cunningham, J., asked the Registrar to furnish a note as to the practice. The Registrar has furnished the following note: "The order asked for by Counsel for defendant was an order against his own client. The effect of such an order would be to place the client at a disadvantage, for it would deprive him of the opportunity afforded him, when sued for costs, of raising questions of negligence, which are altogether excluded from the adjudication of the Taxing Master, and questions of set-off, which are beyond the functions of that officer to decide except under a special reference to him, and would render the client liable to immediate execution in respect of the amount allowed on taxation, although there might be a good defence to the whole or a part of the claim. This suggestion, of what would be the position of the client if proceeded against summarily, furnishes a sufficient reason for the practice which exists, and has always existed, of not directing the payment of costs as between attorney and client, except in a regular suit

facts where I should be in a difficulty in ascertaining them, or where I should be improperly prejudicing the rights of third parties by making the order asked for? As to the facts there is substantially no dispute. There is nothing complicated about the case. It is simple and clear; and the question is whether Messrs. Tyabji and Dayabhai are now entitled to the relief they seek. If I decline to give them the relief, I merely relegate them to institute a regular suit, without in any way involving the examination of any fresh facts, or the consideration of any further rights. The only effect of this would be additional delay and costs to all parties without benefit to any. That being so, and this being a perfectly plain and perfectly simple case, and there being no complicated facts for me to enquire into, I do not consider that I should be justified in declining to exercise a jurisdiction which is as beneficial as it is effective when exercised with due caution and discretion—unless indeed I should be unduly prejudicing the rights of third parties. Therefore, on a consideration of all the affidavits, I think this is a simple case, and as the facts are undisputed, and the rights of the parties are quite clear—and no injustice would be done to third parties, by the order asked for, it seems to me that, having regard to the practice of this Court, I should be wrong in not exercising the very beneficial summary jurisdiction which is vested in this Court. In the matter of Costs due to Messrs. Tyabji & Co., 7 Bom. L.R. 547 at pp. 550—558.

against the client. I am not aware of any instance in which this practice has been departed from. It was certainly not departed from in the case of *Iswar Chandra Dutt v. Iswar Chandra Ghose* (9 B.L.R. App. 19), although in that case the client compromised without the intervention or knowledge of his attorney, then refused to pay his attorney's costs, and finally failed to appear upon the application made against him upon notice. The order, as drawn up in that case, directs the taxation of costs, but does not direct payment, thus leaving the attorney to his ordinary remedy by suit." After perusing the above report the Judge said:—"It is clear that, upon this statement of the practice, Mr. Mitter's application cannot be granted."⁽²⁰⁾

Rule 544 of the Rules of the Bombay High Court does not empower a Judge to make an order on an attorney's application for taxation of his bill of costs for business not transacted in Court, unless such order be by consent, and the Court has not any inherent power on which the jurisdiction can be vested.⁽²¹⁾

Rule 544 of the High Court Rules is not exhaustive. It gives a party chargeable with the bill power to apply to have his attorney's bill taxed but it makes no corresponding provision enabling the attorney to apply to have his bill taxed without the consent of the party chargeable there with.⁽²²⁾

Apart from the Rule the Court has inherent jurisdiction to make any order that seems to the Court reasonable and necessary in the interests of justice when one of its officers applies to the Court for an order for taxation of his costs due to him by his client.⁽²³⁾

(20) *Shaikh Domun v. Shaikh Emaum*, 7 C. 401.

(21) *Bai Dossibai v. Crawford, Brown & Co.*, 32 B. 428=9 Bom. L.R. 1014; see same case reported as *In re Framji*, 10 Bom. L.R. 76 (following *Sayers v. Walond*, (1832) 1 Sim. & St. 97).

(22) *In re Framji Cawasji Markar*, 9 Bom. L.R. 1014=32 B. 428.

(23) *In re Framji*, 9 Bom. L.R. 1014=32 B. 428. The Court, Devar, J., said in the course of the judgment:—"On the other point my mind was not free from doubt and I took time to consider the matter before passing my orders on the summons. Rule 544 provides that the Taxing Master, besides taxing his bill of costs on every side of the Court, etc., "shall also tax all such attorneys' bills of costs as he may be directed to tax by a Judge's order on consent of the parties or on the application of any party chargeable with the bill. This rule gives a party chargeable with the bill power to apply to have his attorney's bill taxed but it makes no corresponding provision enabling the attorney to apply to have his bill taxed without the consent of the party chargeable therewith. If the rule was exhaustive it would be manifestly unfair to the attorneys."

Rule 183 of the High Court Rules provides that "an Attorney, when he has taxed his bill of costs against his client, may obtain an order in Chambers for payment of the sum allowed on taxation, and such order may be executed under Chap. XIX of the Code of Civil Procedure." (24)

I could hardly conceive that the Court when framing the rule and providing a summary remedy in favour of a party would intend to deprive its own officers of the benefit of that summary procedure and leave them to recover their claims by a suit. I do not think the rule is exhaustive. Apart from the rule the Court has, I think, inherent jurisdiction to make any order that seems to the Court reasonable and necessary in the interests of justice when one of its officers applies to the Court for an order for taxation of his costs due to him by his client. The English practice on this subject and other matters relating to solicitors is mainly governed by the Solicitor's Act, 1843 (6 & 7 Vict., c. 73) and other later legislative enactments. See Annual Practice, 1907, p. 406 of Vol. II. That these enactments are not exhaustive and have not taken away from the Court its inherent jurisdiction in matters such as the one now before me appears clearly from the pronouncements of the Lord Chancellor, Lord Halsbury in the case of *Storer & Co. v. Johnson*, (1890) 15 App. Cas. 303, where he states as follows:—"I think it is quite clear that the Solicitor's Act did not deprive the Court of the jurisdiction which they always possessed to do justice in the premises when dealing with one of their officers and they might therefore order that the costs should be taxed although not in terms of the Solicitor's Act. . . . The moment it was taken out of the region of the Solicitor's Act and brought within the general jurisdiction of the Court then the Court could exercise its own jurisdiction in the way it might think fit." In this matter Mr. Ranchordass' client admits that he is one of the parties chargeable with the bill and he has expressed his willingness to be taken as making this application for the taxation of the applicant's bills if I came to the conclusion that Rule 514 precludes my making the order that is now applied for. I do not think this would help very much as his consent would only affect himself and could not bind the objecting parties. I think I have power to make the order asked for independently of Rule 514 and I accordingly make the summons absolute and direct that the applicant's bills mentioned in Mr. Tenant's affidavit of the 25th of July 1907 be lodged with the Taxing Master and that the Taxing Master do proceed to tax the same. In taxing these bills the Taxing Master is to have regard to the questions as to which of the respondents are responsible for which of the bills taxed by him or for how much under each particular bill. The Taxing Master will also take into consideration whether any of the costs were unnecessarily or wantonly incurred and if so he will apportion such costs personally against the party or parties incurring the same. He will state in his allocatur what costs are payable out of the deceased's or the trust estates and what costs are to be payable personally by the respondents or any and which of them. The applicants are entitled to their costs of this summons. It was necessitated by disputes amongst the respondents *inter se*. I direct that the applicant's costs of this summons to be paid in the first instance by the respondents. I reserve the question as to which of the respondents are liable to pay these costs as between themselves till after the bills are taxed. If the question is not amicably arranged between themselves I reserve liberty to any of the respondents to apply to me in Chambers after the bills have been taxed in the manner I have indicated above. *In re Framji*, 9 Bom. L.R. 1014 (1016—1018)=32 B. 428.

(24) *Asur Purshotam v. Ruttonbai*, 16 B. 152.

It was held in this case, that the heirs or representatives of the client are not included in the words of this rule, and the attorney's claim cannot, under it, be enforced against them.⁷⁵⁾

(25) *Assur Purshotam v. Ruttonbai*, 16 B. 152. The question has been raised whether under the rule above referred to, a summary order for the payment of costs can be made as against his personal representative. It appears from the judgment of Bayley, J., in *Abba Haji Ishmail v. Abba Thara*, 1 B. 253, that a rule—No. 149 of the Common Law Rules—authorizing the summary enforcement of attorneys' claims for their costs without a regular suit, was first made by the late Supreme Court as far back as 1825, and the learned Judge there points out that the "novel practice" introduced under that rule "has never been questioned down to the present time"—that is to say, till 1876. In the case above referred to, that rule was enforced by Bayley, J., and his decision was approved by the Court of appeal. Since then new rules have been made by the Judges, and there is now substituted for that old rule the one under which this application is made. The new rule runs as follows:—"No. 183. An Attorney when he has taxed his bill of costs against his client may obtain an order in Chambers for payment of the sum allowed on taxation, and such order may be executed under Chap. XIX of the Code of Civil Procedure." Now it is to be remarked that both in the old Common Law Rule No. 149, and the present Rule No. 183, it is only the client that is expressly referred to. There is nothing in the words of either rule expressly authorizing the enforcement of the attorneys' claim against any one other than the client himself; and the question is, whether on the true construction of the rule the heirs or other representatives of the client can be deemed to be included under the words used. It appears to me that there are many considerations which ought to induce the Court not to construe the rule so widely. In the first place, as pointed out by Bayley, J., in the case above cited, the proceeding sanctioned by the rule is one of a special character and one which did not exist in England when it was originally introduced here. It confers a special privilege on attorneys and solicitors, and although the objections pointed out in the case cited by Mr. Brown, of *Shaikh Domun v. Shaikh Emaum Ally*, 7 C. 401, are of no force under our practice whereby it is open to the party against whom the application is made to come in and show cause against the issue of the order for payment, still it is a well established principle that where a law creates a special privilege it is to be strictly construed; see Maxwell on Statutes (2nd Ed), pp. 256, 263, *et. seq.* and cf. *Brunskill v. Watson*, L.R. 3 Q.B. 418. Again, it is to be noted that the later stages of this summary proceeding were at first treated as constituting a proceeding in contempt (see *Abba Haji Ismail v. Abba Thara*, 1 B. 253 (254), and in England the attorney could enforce payment of the amount of the *allocatur* by attachment among other remedies; *In re Woodhouse*, 2 C.B. 290. It can hardly be said that the proceeding in contempt is an appropriate remedy as against representatives of the client who themselves never entered into any undertaking at all to the attorney. Further, it is remarkable that in England, where the summary remedy for payment of costs has now been adopted for many years, there appears to be no case in which it has been employed by the Courts against the representatives of the client. I find no reference to the employment either at Law or in Equity of such a remedy against a client's representatives, in either Cordery's or Pulling's Text Books on the Law of Attorneys; and in Seton on Decrees, to which Mr. Brown referred, there is no form of order given suited to such a case. Form No. 36, S. I, is limited to the client only (p. 605). Form No. 2, S. V, is for a case where the client's representative moves in the matter (p. 624). Form No. 1 (p. 623) is against the solicitor's representative. Nor, again, is it unworthy of remark that although, as already pointed out, this rule or one substantially identical has been

An attorney, having a lien for costs against C on the title-deeds of property belonging to him, delivered them to another attorney M,

in force here since 1825, the applicants have not been able to adduce more than two instances in which any order such as the one now applied for has been made in this Court. With those two instances I shall presently deal. But the paucity of actual instances both here and in England is certainly a circumstance entitled to no little weight in the decision of the point now under consideration. Before proceeding to those instances, however, I may perhaps refer to a case, *Jefferson v. Warrington*, 7 M. and W. 187-8 Dowl. 880, which is not without an important bearing upon the point before me. There the executrix of a deceased plaintiff obtained an order for the taxation of the bill of the plaintiff's attorney. Under Stat. 2, Geo. 2, c. 23, S. 23, less than one-sixth having been taken off on taxation (as to this compare Seton, p. 604, Form No. 1), the attorney applied for an order for payment of the costs of the taxation by the executrix and by her husband in right of her. It was there argued for the executrix and her husband, that the executrix was not the client but only his representative. The Court decided against them; but it is important to notice that it did so not on the ground that the representative of the client was the client within the meaning of the Statute, but on the ground that the executrix having obtained an order for taxation, which only a party chargeable with the bill was entitled to obtain, could not, after taxation, be heard to say that she was not so chargeable. And Alderson, B., expressly said:—"If it had been the testator who had made the application to tax, the executrix ought not to have been held liable." It seems to me to follow from those words of Baron Alderson, as well as from the fact that the general ground of a client's representative being the client for this purpose was not there taken, that it was considered alike by the Court and the counsel that that ground would not be tenable. In spite, however, of the considerations above discussed, I should have probably considered myself bound to follow the practice—if one had been established here—of making a summary order for payment of costs against the representative of a client, for, as said by Lord Esher in the very recent case of *Joynes v. Weeks*, L.R. 2 Q.B.D. (1891) 49, "an inveterate practice amounts to a rule of law" (cf. *Nenbai v. Haim Musoji*, 4 B.H. C.R. O.C.J. 119 (129), per Westropp, C.J.). And a question of the character of the present one—involving merely the form of proceeding to be resorted to to enforce an existing right—is a question on which an inveterate practice should be specially treated as binding. But no such practice, "inveterate" or otherwise, appears to have prevailed in this matter. In one of the cases relied on as proving the existence of such a practice (suit No. 395 of 1886), an order such as is asked for here was, no doubt, made in Chambers, but it was made *ex parte*, and there is nothing to show that the point now raised was even considered by the learned Judge who made the order, or was in any way present to his mind; and, therefore, the rule laid down by the Privy Council for itself, even as a Court of ultimate appeal, in regard to *ex parte* decisions, is *a fortiori* applicable here, viz., that their Lordships are "at liberty to examine the reasons upon which an *ex parte* decision was arrived at, and if they should find themselves forced to dissent from these reasons, to decide upon their own view of the law"; *Ridsdale v. Clifton*, L.R. 2 P.D. 308, approved in *Tooth v. Power*, L.R. App. Cas. (1891) 292. In the other case, which was relied on by Mr. Viccaji as indicating the established practice of the Court, *Jeannissa Ladli Begam v. Navab Mir Abaul Rasul*, Suit No. 417 of 1886 (not reported), the order referred to appears also to have been made *ex parte*, and is on other grounds of even less authority as the precedent in the present case than the one last considered. There apparently an order was, in fact, made, in the first place, against client, and the order relied upon by Mr. Viccaji was only an order under S. 248 of the Civil Procedure Code for enforcement as against the

who was acting for an intending purchaser, at the request of C, the second attorney undertaking to return them to the former attorney without claiming any lien on it. The former attorney ceased to act for C and the property sold. *Held* that the former attorney was entitled to have re-delivery of the deeds, even independently of the express contract to return them.⁽²⁶⁾

Litigants can compromise the suit without the acquiescence or even the knowledge of their attorneys, but no payment can be made under the compromise to the prejudice of the attorney's claim for costs, after notice of it has been given to the person by whom the payment is made.⁽²⁷⁾

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Where, however, the compromise decree is so satisfied, although the party had notice of the attorney's lien, the attorney can apply to the Court for an order to pay his costs and the Court has power to interfere summarily.⁽²⁸⁾

representatives of the client of the order for payment already made against the client himself. The order of enforcement in such a case was almost a matter of course, but it has no bearing on the question before me. Whether the original order for payment made in that case was rightly made may, perhaps, admit of doubt. But that order too was made *ex parte*, and was made against the client at a time when he was dead, a circumstance which would rather seem to indicate that it was probably made *per incuriam*. Upon the whole, it appears to me that the only two precedents which have been relied upon in support of the argument about the practice of the Court fail to afford a sufficient basis for that argument. I must, therefore, act on the view I have expressed above about the true construction of Ru'e 183; and under the circumstances which exist here, I cannot give any effect to the warrant in favour of Messrs. Mansukhlal Damodar and Jamsetji, which appears to have been signed by Lalbai after the death of Assur Purshotam. The result is that the order applied for must be refused. But under all the circumstances, and especially having regard to the fact that in two cases such applications have been allowed, I think the parties must bear their own costs, respectively—*Per Telang, J. Assur Purshotam v. Rultonbai*, 16 B. 152 at (154—158.)

(26) *In the matter of J.N. Mackertich*, 15 B.L.R. App. 15.

(27) *Khetter Kristo Mitter v. Kally Prosunno Ghose*, 25 C. 887=2 C.W.N. 508 (distinguishing *Shaikh Domun v. Shaikh Emaum Ally*, 7 C. 401; *Mahomed Zohoruddeen v. Mahomed Noorooddeen*, 21 C. 85; followed in 30 B. 27=6 Bom. L.R. 879=7 Bom. L.R. 547; Diss. in 27 C. 269 (271)=4 C.W.N. 209).

(28) *Khetter Kristo Mitter v. Kally Prosunno Ghose*, 25 C. 887=2 C.W.N. 508 (distinguishing *Shaikh Domun v. Shaikh Emzum Ally*, 7 C. 401; *Mahomed Zohoruddeen v. Mahomed Noorooddeen*, 21 C. 85). The Court said:—"This claim on the part of the applicant is based on the right commonly known as an attorney's lien on the fund recovered in suit. Whether that is the most appropriate mode of description it is unnecessary to discuss, for the nature of the right is free from doubt. It is a claim on the part of the attorney to have secured to him his due reward out of the fruit of his labour, and for that purpose to call in aid the equitable interference of the Court. But while the right is clear, it must be conceded that the litigants themselves are

After the filing of the plaint, a suit was compromised out of Court by the parties without the intervention or knowledge of the

really masters of the suit, and that it is within their power to compromise it without the acquiescence or even the knowledge of their attorneys. The exercise of this right, however, is subject to important qualifications. In the first place the compromise must have been made with the honest intention of ending the litigation, and not with any design to deprive the attorney of his costs; and, secondly, no payment can be made under the compromise to the prejudice of the attorney's claim after notice of it has been given to the person by whom the payment is made. These principles appear to me to be the clear result of the authorities in England; and founded, as they are, on justice, equity and good conscience, I see no reason why they should not apply in this country. Now the applicant on this occasion claims that both conditions to which I have referred exist, though it is clear it would suffice for his purpose, if he can establish either of them. The facts on which he relies as establishing his position by virtue of notice given are set forth in that part of his affidavit which commences with para. 6. He says: "I personally informed the defendant for whom I acted as attorney in a suit in this Honourable Court, being suit No. 770 of 1894, wherein Gooroo Prosunno Ghose was the plaintiff and the defendant herein was the defendant, of my said lien for costs, and at the time when I informed the defendants as aforesaid, Babu Prosunno Chunder Roy, a vakil of this Honourable Court, who was instructing me on the defendant's behalf in the said suit, No. 770 of 1894, was present. That I have personally and repeatedly informed Babu Peari Mohun Chatterji, Dewan or Manager of the defendant's affairs, of my said lien." The facts set forth in the paragraphs which I have just read are uncontradicted, and it is admitted on the part of the defendant that he had notice of the claim for a lien, so that the case would appear to come within the second of the qualifications I have mentioned. It has, however, been urged by Mr. Woodroffe, who has argued the case very fully and ably for the defendant, that it is not open to me to make the order asked for, and he has urged several objections. The principal objection is one which goes to the root of the whole matter, and I will, therefore, deal with it first. He contends that the Court has no jurisdiction *brevi manu* to make such an order as is asked for, and in support of the objection he refers to the absence of any practice justifying such a procedure as is sought to be used on this occasion. In addition he has referred to two cases: one the case of *Domun v. Emaum Ally*, 7 C. 401; and the other the case of *Mahommed Zohuruddeen v. Mahommed Noorooddeen*, 21 C. 85. The first of the two cases seems to have no application to the matter now under consideration. It simply refers to the question whether, on summary application, an order could be made directing a party to pay his attorney the costs of suit when taxed. It was held that such an order could not be made. That is a wholly different case from the present. In the same way the case of *Mahommed Zohuruddeen v. Mahommed Noorooddeen*, 21 C. 85, appears to me to throw no light on the point. The facts are shortly these: An attorney had by way of securing his costs taken a deposit of title-deeds, and made a summary application in a suit to which he was no party to have that equitable lien enforced. It was held he should, if he desired to enforce his equitable lien, commence a suit of his own. I fail to see how a decision on those facts can in any way negative the applicant's right to proceed in the manner he has selected. The present application appears to me to be based on the principle that the Court has general jurisdiction over its suitors, and I see no reason why that jurisdiction should not be as fully vested in a Court here as it is in the English Courts. I therefore think it is open to the Court to deal with this particular question on a summary application framed as the present is. The other objections raised by Mr. Woodroffe were not of

attorneys. The plaintiff's attorney applied to his client for payment of costs and on his refusal to pay, he applied to the Court that his bill should be taxed and that his client should thereupon pay it, and the Court granted the application. (29)

A plaintiff's attorney is not entitled to have a compromise, *bona fide* entered into between the parties without his knowledge, set aside on the ground that he might thereby be deprived of costs. A clear case of fraud and collusion must be made out to entitle him to the interference of the Court. (30)

Where the parties to a suit fraudulently and collusively compromise a suit with a view to deprive the attorney of his costs, it is inconvenient for the Court to dispose of the issues by affidavits alone. (31)

so far-reaching a character. He referred to *Price v. Crouch*, (1891) 60 L.J.Q.B. 767, as authority for the proposition that notice of lien must be of a more definite character than the notice given in this case. I find nothing in the decision given in that case which calls for the conclusion that the notice given by the applicant in the present case was insufficient, for there it was simply held as a matter of fact that the notice was insufficient, because it was not in any sense a notice of lien, but merely of an expectation that provision would be made for costs. In the present case the attorney has given, in the clearest terms that could have been used, notice that he did claim a lien for his costs of the suit. Another point urged by Mr. Woodroffe was this: He contended that inasmuch as part of the aggregate claim consists of costs paid to a prior attorney, no lien to that extent can be claimed, and in support of that proposition he referred to the case of *Christian v. Field*, (1842) 2 Hare 177. That case is not an authority for the broad proposition in support of which it was cited. Be this however as it may, the state of facts on which the argument is based has no existence here, for I do not find that the unpaid balance of costs is in any way made up of the amount paid by Babu Mohini Mohun Chatterji to Messrs. Gregory and Jones. That amount was the earliest item in the account, and if Mr. Woodroffe's argument is correct, it is unsecured, and I certainly should presume that the payments already received were, under the circumstances, attributed in the first place to the discharge of that amount. I have now dealt with all the points raised except that as to the proper form of the order. I hold in this case that sufficient notice of lien was given by the attorney, Babu Mohini Mohun Chatterji, to the defendant before payment was made by him under the compromise, and I, therefore, come to the conclusion that Babu Mohini Mohun Chatterji's present application is rightly conceived. I may add, I think, it is very desirable in this country, both in the interests of attorneys and in the interests of litigants themselves that the Court should possess a power to interfere summarily, as has been done in this case. I direct payment of the amount of costs, which have been taxed, and subsequent costs when they have been taxed, by the plaintiff and the defendant, including the costs of this application. *Rhetter Kristo Miller v. Kally Prosunno Ghose*, 25 C. 887 = 2 C.W.N. 508.

(29) *Iswar Chandra Dutt v. Iswar Chandra Ghose*, 9 B.L.R. App. 19.

(30) *Ramanath Dutt v. Matunginee Dossee*, 12 B.L.R. 110.

(31) *Ramdayal v. Ramdeo*, 27 C. 269 = 4 C.W.N. 208.

The practice of the Court is not to interfere summarily between attorneys and their clients, as regards claims for costs by the former.⁽³²⁾

The High Court of Bombay has a summary jurisdiction over its suitors for the purpose of enforcing a solicitor's lien for costs; and in enforcing it the Court must be guided by the principles of English Law.⁽³³⁾

Hence, a solicitor engaged by a party to a suit has a right to come in and say that before any order is passed on the basis of a compromise arrived at privately between the parties effect should be given to his lien. Whether the solicitor moves the Court by an application of his own or appears to oppose a motion of the party against whom the lien for costs is alleged to arise, in either case he calls in aid the equitable interference of the Court under its summary jurisdiction.⁽³⁴⁾

Where the compromise arrived at between the parties to a suit is collusive or fraudulent and made with a view to deprive a solicitor of his costs, the Court will order the award of costs to the solicitor.⁽³⁵⁾

The plaintiff got a decree against the defendant. But before satisfaction, the amount of the decree was attached in the hands of the defendant by a third person having a decree against the plaintiff. The plaintiff's attorney applied for the payment of his costs of suit, by the defendant, out of the sum attached in the defendant's hands and wherein the attorney claimed to have a lien. *Held*, that the attorney had a lien for his costs on the amount so attached, but that the only order that the Court could make was an order to the defendant not to pay the sum attached to any one without giving due notice to the attorney.⁽³⁶⁾

Where an attorney had by way of securing his costs taken a deposit of title deeds, and made a summary application in a suit to which he was no party to have that equitable lien enforced on the

(32) *Ramdoyal Serowjee v. Ramdeo*, 27 C. 269=4 C.W.N. 208 (dissenting from *Khetler Kristo Mitter v. Kally Posunno Ghosh*, 25 C. 887=2 C.W.N. 508 and following *Shaik Domun v. Shaik Emaum Ally*, 7 C. 401; *Mahomed Zohoruddeen v. Mahomed Nooroodeen*, 21 C. 85.)

(33) *Cullianjee Sangjibhoy v. Raghawjee Vijpal*; *Lakshmidai v. Cullianjee Sangjibhoy*, 6 Bom. L.R. 879=30 B. 27.

(34) *Cullianjee Sangjibhoy v. Raghawjee Vijpal*, 6 Bom. L.R. 879=30 B. 27.

(35) *Ibid*.

(36) *Nawab Nasim of Bengal v. Heeralall Seal*, 10 B. L. E. 444.

amount in the hands of the Receiver of the Court to the credit of his client in the said suit, *held*, that he should, if he desired to enforce the equitable lien, commence a suit of his own. It is not the practice of the Court to make an order for payment of costs between an attorney and his client except in a regular suit against the client.⁽³⁷⁾

An attorney, having undertaken to act for a client is bound to continue to act for him so long as the relationship between them of attorney and client subsists, and unless discharged by the client, it is his duty to proceed with the diligent prosecution of the business or matter for which he has been retained.⁽³⁸⁾

Having once undertaken the conduct of a case, an attorney is bound, whether the client is rich or poor, to prosecute the case with due diligence, and he cannot say that, unless a large sum is paid to him, he will not continue to conduct the case.⁽³⁹⁾

Where a client himself discharges his attorney on record, the latter is entitled to hold the cause papers till his costs are paid, or an undertaking given for their payment. But where the attorney discharges himself expressly or by implication he has no such right; he must give up the papers to the new attorney to whom the client proposes to go, only retaining his usual lien on such papers.⁽⁴⁰⁾

(37) *Mahomed Zohoruddeen v. Mahomed Noorooddeen*, 21 C. 85 (following *Shaik Doman v. Shaik Emaum Ally*, 7 C. 401). See also on this point *Bai Kesserbai v. Naranji Walji*, 4 B. 353.

(38) *Basanta Kumar Mitter v. Kusum Kumar Mitter*, 4 C.W.N. 767. On the subject-matter of this Chapter see also White on Solicitors, 1894 edition, p. 119 and Cordery on Solicitors, (3rd edition), p. 105.

(39) *Atul Chunder Mookerjee v. Soshi Bhushan Mullick*, 29 C. 63.

(40) *Atul Chunder Mookerjee v. Soshi Bhushan Mullick*, 29 C. 63. (*Heslop v. Metcalfe*, (1837) 3 Myl. and Cr. 183; *Robins v. Goldingham*, (1872) L.R. 13 Eq. 440; *Wilson v. Emmett*, (1854) 19 Beav. 283, relied upon). Ameer Ali, J. said in the course of the judgment:—This is an application on the part of the plaintiff for change of attorney. The application is resisted by the attorney on the record, on the ground that the order can be obtained only on the usual terms of paying the costs due to him, and that, so long as the attorney to whom the plaintiff proposes to entrust the conduct of the case does not pay the costs due to the attorney on the record, or give an undertaking for such payment, he should not be compelled to make over the papers in the suit. The law relating to the question of an attorney's lien on papers held by him for his client is well settled. If the client himself discharges the solicitor, the latter is entitled to hold the papers till his costs are paid or a satisfactory undertaking given that such costs would be paid. But where the attorney discharges himself expressly or by implication, he has no such right, and he has to make over the papers to the attorney, to whom the client proposes to go, retaining his lien on such papers. As early as the year 1837 the question was settled by the decision in *Heslop v. Metcalfe*.

No attorney has a right to insist on the payment of past costs

(1837) 3 Myl. and Cr. 183. There the same objection as is now raised was put forward before the Lord Chancellor, and the inconvenience and hardship to which the attorney would be exposed if, after embarking in a cause, he was not provided with sufficient funds and the case was changed to other hands, were pointed out. The Lord Chancellor dealing with this argument and proceeding upon the judgment of Lord Eldon in the case of *Colegrave v. Manley*, (1823) 1 Turn. and Russ. 400, held that, under the circumstances of that case, the solicitor was bound to make over the papers to the new solicitors, retaining his usual lien on the same. That case has been followed in many other cases. I shall refer only to two. In *Robins v. Goldingham*, (1872) L.R. 13 Eq. 440, the Vice-Chancellor, after referring to the case of (*Colegrave v. Manley*, (1823) 1 Turn. and Russ. 400) and (*Heslop v. Metcalfe*, (1837) 3 Myl. and Cr. 183) made an order to the effect that the papers should be made over by the solicitor on the record to the new solicitors "on their undertaking to receive and hold them without prejudice to any right of lien, and to return them undefaced in reasonable time." The same course was taken in the case of *Wilson v. Emmett*, (1854) 19 Beav. 233, and the order was in similar terms. The Master of the Rolls there said:—"I must follow *Heslop v. Metcalfe*, (1837) 3 Myl. and Cr. 183. Sir James Wigram, in *Griffiths v. Griffiths*, (1854) 12 L.J. Ch. 397, made a like order, on the ground of discharge. The same order must be made here as in *Heslop v. Metcalfe*, (1837) 3 Myl. and Cr. 183, and the paper must be given up to the new solicitors." It is unnecessary to refer to the case of *Basanta Kumar Mitter v. Kusum Kumar Mitter* (4 C.W.N. 767). I proceed now to deal with the facts of the present case. The plaintiff states in his petition that he has paid to the attorney on the record, Babu Romesh Chunder Mitter, a considerable sum of money and that he with the consent of the attorney took briefs to counsel to whom they were delivered some time ago. Thereafter the attorney called on the plaintiff to pay a large sum of money, which he was unable to do, but he on his side made an offer, which the attorney refused. Thereupon Babu Romesh Chunder Mitter did not attend Court to instruct counsel and practically refused to prosecute his case. The plaintiff's statements contained in his affidavit are corroborated by the statements of counsel in Court. Mr. Sinha stated that he had sent for the attorney himself and spoken to him, and that the attorney had told him and his junior not to appear at the hearing of the case when called on. The case came on for hearing on the 3rd of December and on the statement of counsel, Babu Romesh Chunder Mitter not being present, I sent for him to ascertain his reason for not prosecuting the plaintiff's case. He appeared after some delay and stated to the Court, what has been alleged on his behalf, that a considerable sum was due to him and he was not in a position to prosecute the plaintiff's case, and he admitted in terms that he had not been properly instructed and that therefore had told counsel not to appear, and that was why he did not attend himself. The attorney has filed an affidavit in which he states that the plaintiff does not live in Calcutta, that he had taken the briefs from him and delivered them to counsel of his own choice without consulting him, and that, if he was to make over the papers to the new attorney, he would not be in a position to recover his costs. It appears to me that when he took up the plaintiff's case it was his duty to assure himself whether the plaintiff was a person of substance. In my opinion, having once undertaken the conduct of a case, an attorney is bound, whether the client is rich or poor, to proceed with due diligence in prosecuting the claim. The law has provided him with means for realising his costs from his client. He cannot, to use the language of the learned Judges, to whom I have referred, turn round and say that, unless a considerable sum is paid to him, he will not do what he is bound to do; viz, to conduct and prosecute his client's case with diligence and honesty. It appears to me that the attorney in this case discharged himself by telling the counsel not to appear and by making it impossible

as a condition to the further prosecution of his client's cause.⁽⁴¹⁾

By declining to act further for a client until costs already incurred are paid, an attorney discharges himself and the client is entitled to a change from him without prepayment of his costs.⁽⁴²⁾

It is doubtful whether an attorney still has a lien on the papers and documents in his hands, after he has discharged himself as aforesaid.⁽⁴³⁾

for the plaintiff to proceed with the action. I will make the order on the same terms as the Vice-Chancellor in the case of *Robins v. Goldingham*, (1872) L.R. 13 Eq. 440. I order the change of attorney. Babu Romesh Chunder Mitter is directed to make over the papers to Baboo Radhika Lal Mookerjee on the latter's undertaking to receive and hold them without any prejudice to any lien possessed by Babu Romesh Chunder Mitter, and to return them undefaced within a fortnight from the conclusion of the suit. If the attorney (Babu Romesh Chunder Mitter) seeks for inspection of those papers, I will allow the same. *Mr. Bell* :—I ask for an order for costs of this application as against Babu Romesh Chunder personally on the ground that he has been wrong throughout : *Robins v. Goldingham*, (1872) L.R. 13 Eq. 440. *The Court* :—In my opinion Babu Romesh Chunder Mitter has been clearly wrong and I will make the same order as in that case and make him pay the costs of this application. I certify for counsel. *Atul Chunder Mookerjee v. Soshi Bhushan Mullick*, 29 C. 68 at pp. 65-68.

(41) *Basanta Kumar Mitter v. Kusum Kumar Mitter*, 4 C.W.N. 767.

(42) *Ibid.*

(43) *Basanta Kumar Mitter v. Kusum Kumar Mitter*, 4 C.W.N. 767. *Sale, J.* said in the course of the judgment :—I do not think there can be any reasonable doubt as to what the order in this application ought to be. The applicants are two persons who have been committed to jail for contempt of Court on the application of a Receiver appointed by this Court. Three persons appeared through one attorney to show cause why they should not be committed and the applicants are two of those persons. It appears that the applicants are now desirous of purging their contempt and obtaining their release, and the Receiver has consented to the application on certain terms. The applicants then applied to their former attorney and asked him to make the application. He declined to do so at first, alleging that he could only act for all three. Subsequently he agreed to make the application if the applicants would pay all costs already incurred by them, but he declined to act unless those costs were paid, and he objected to their going to any other attorney to act for them without his costs being first paid. The result of this is that the attorney insists on these men remaining in jail, till his costs are paid. Now obviously this is an extremely unfair and dangerous power to put into the hands of an attorney, and the present case aptly illustrates the dangerous consequences that may arise if the proposition relied on is correct that an attorney may, at any time, say to a client, "I refuse to act further for you unless you pay me all costs already incurred, and I object, at the same time, to your going to any other attorney." I should be very sorry if that were a correct proposition, but in my opinion it is not. The rule is that an attorney having undertaken to act for a client, is bound to continue to act for him so long as the relationship between them, of attorney and client subsists. If the client discharges him then he has a lien on his client's papers for his costs, and he may object to a change of attorney, except upon the terms of the payment of his costs, but failing a discharge by his client it is his duty, once he has undertaken to act for a client, to proceed with the

An attorney having discharged his client cannot change sides.⁽⁴⁴⁾

On a change of attorneys, during the pendency of a suit, with the consent of the first attorney, the first attorney has a lien on the costs recovered by the second attorney, with notice of his claim and is entitled to recover them from the second attorney, if he has parted with the amount.⁽⁴⁵⁾

Where there was a written agreement between the defendant and his attorney, whereby the latter agreed to conduct a suit by accepting a certain sum for his personal services, (and not in respect of costs out of pocket and counsel's fees) and in the event of the client being successful to refund the amount received and to recover full costs from the plaintiff, *held*, on the client insisting on a change of attorneys, he could do so, on the attorney being paid his taxed costs.⁽⁴⁶⁾

diligent prosecution of the business or matter for which he has been retained. It is said that the rule, if applied strictly, would operate as a hardship on attorneys, inasmuch as it would hold out an encouragement to dishonest clients not to pay what is due to their attorneys. The answer is that attorneys can always protect themselves, in cases where they doubt the credit or honesty of their clients, by insisting on a sufficient advance being made at the outset to cover probable costs. Moreover, it is the rule of this Court to decline to sanction a change of attorney where the former attorney has not discharged himself so long as his costs remain unpaid. I think the authorities cited show that no attorney has a right to insist on the payment of past costs as a condition to the further prosecution of his client's cause. By so doing he discharges himself. I think the cases cited support this view, and the practice of this Court has certainly been in accordance therewith, and I should be sorry to see it altered. The present application is only for change of attorney. No question at present arises as to any papers or documents that may be in the hands of the attorney at present on the record, and I say nothing as to the claim of lien if such there be, but I am of opinion that in this matter the attorney on the record has discharged himself, assuming that his retainer was not discharged when the order of committal was made; therefore the order for change must be made as prayed. *Mr. Sinha*:—I ask for costs of this application and for a certificate. *The Court*:—Yes. *Mr. Garth* submits the costs of this application should be allowed to be set off against the costs due to the attorney. *Mr. Sinha*:—We deny that there are any costs due. *The Court*:—If there be any costs due by the clients to the attorney, he would be entitled to set them off. *Bāsanta Kumar Mitter v. Kusum Kumar Mitter*, 4 C.W.N. 767 at pp. 768, 769. On the subject-matter of this Chapter, see also White on Solicitors, 1894 edition, p. 119 and Cordery on Solicitors, (3rd edition), p. 105.

(44) *Ramlal Agarwallah v. Moonia Bibee*, 6 C. 79 (following *Earl Cholmondeley v. Lord Clinton*, 19 Ves. 261) and referred to in *Ali Muhammad v. Sham Lal Mukhtar*, 2 P.L.R. 1904, Ori.=45 P.L.R. 1904; *Rai Durgapershad v. Mt. Baiyan Bi*, 12 C.P.L.R. 35.

(45) *Orr v. Norendra Nath Sen*, 19 C. 368.

(46) *Ghassee Jemadar v. Nassiruddin Mistry*, 26 C. 769. Stanley, J. said in the course of the judgment:—In this case there was an agreement in writing between

When an attorney refuses to proceed with a suit because the client does not put him in funds, even in respect of fees payable to counsel, the attorney discharges himself.⁽⁴⁷⁾

The contract of the attorney being an entire contract to carry on the litigation to its termination subject to his being paid, the fact that the client expressly promised to put the attorney in funds but failed to do so does not operate as a discharge by the client.⁽⁴⁸⁾

It makes no difference whether the promise to put the attorney in funds is made prior to or during the suit.⁽⁴⁹⁾

An executor desiring to change an attorney who had been employed by the testator and continued in such employment by him, must pay not only the costs incurred since such employment by him but the past costs incurred in the lifetime of the testator.⁽⁵⁰⁾

the defendant and his attorney, whereby the attorney agreed to accept Rs. 150 for his personal services in addition to costs out-of-pocket and Counsel's fees, but in the event of the client being successful the attorney was to refund the Rs. 150, and in that event to recover full costs from the plaintiff. Some misunderstanding appears to have arisen between the defendant and his attorney, and the defendant in consequence desires to change his attorney, and thereby preclude him from carrying on the case to a termination with the chance of success and profit therefrom to the attorney. It is said by Mr. Bonnaud that the attorney agreed to conduct the case for Rs. 150, and has been paid that sum, and he is not entitled to have his costs taxed in the usual way. I am of opinion that on the terms of the agreement the attorney is entitled, upon his ceasing at the instance of the defendant to act as attorney for him, to have his costs taxed in the usual way. The special agreement has been rescinded by the client by his insisting upon a change of attorneys; he cannot therefore base any claim upon a contract to which he himself has not adhered. Mr. Bonnaud's client must pay the costs of this application, and I certify for counsel. Application for change of attorney without payment of costs is refused. 26 C. 769 at pp. 771, 772.

(47) *Mohespore Coal Co. v. Jotindra Nath Gupta*, 17 C.W.N. 278 (following *Robins v. Goldingham*, L. R. 13 Eq. 440=20 W.R. 277; *Basanta Kumar Mitter v. Kusum Kumar Mitter*, 4 C.W.N. 767, and *Atool Chandra Mukerjee v. Shoshee Bhusan Mukerjee*, 6 C.W.N. 215).

(48) *Mohespore Coal Co. v. Jotindra Nath Gupta*, 17 C.W.N. 278, citing *Bluck v. Lovering & Co.*, 35 W.R. 232 (1897).

(49) *Mohespore Coal Co. v. Jotindra Nath Gupta*, 17 C.W.N. 278.

(50) *Girindra Coomar Dutt v. Amulya Charan Ghose*, 6 C.W.N. 306. Sale, J., said in the course of the judgment:—The question in this application is whether one of the executors can be permitted to change the attorney employed by both the executors for the purpose of continuing an action instituted by the testator without payment of all costs already incurred in that suit by the attorney. The question arises owing to disputes between the two executors as to the course to be adopted in the conduct of the suit. They are defendants. If they had been plaintiffs it is quite clear they would not have been permitted to employ different attorneys. The Court ought not however to prevent them from employing different attorneys unless it is quite clear they should be prevented from doing so. It appears from a passage cited from *Cordery*

Taxation of costs in trust and charity cases.

The costs of all parties to a suit in respect of a proper scheme for the management of a certain charitable endowment, were ordered by the Court to be paid out of the Trust funds. The solicitors of the trustees of the Funds furnished the latter with certain bills of costs due to them in respect of the preparation of the scheme and other matters connected with the carrying out of the decree of the Court. Objection was taken by one of the trustees to the amount mentioned in the bill as exorbitant, while the two other trustees (there being only three trustees) intimated that the amount "should be paid off." In spite of the protest by the former, the latter paid the bill without taxation. The dissenting trustee obtained a summons calling upon the other two trustees and the solicitors to show cause why the bill should not be taxed and why they should not re-pay any sum which had been overpaid. The solicitors contended that the Court had no jurisdiction to order costs to be taxed after payment, on the ground that such jurisdiction is in England given by statute and there is no like statute applicable to India. *Held*, (1) that the dissenting trustee was entitled to have the bill taxed even though it had been paid, and (2) that, upon a proper case being made out, the Court has jurisdiction to call a solicitor to account in respect of the amount of his bill after it has been paid. Although Acts (similar to those in force in England) regulating the admission, duties and liabilities of attorneys are not in force in India, there is no reason why the High Court should not exercise a jurisdiction of this kind over its officers

or Solicitors that the common law in England implied a contractual liability on executors not only for future but also for past costs, the contract of employment in a suit being regarded as an entire contract for the conduct of the suit until its termination. There being this continuance of employment, it seems reasonable that there should be an implication of liability of executors for past costs incurred in the lifetime of the testator. I think this is a reasonable doctrine. The case of *Shamray Pandurang v. Trustees of Bhagvandas*, 5 B.H.C. 163, shows that there is no such implication where the trustee of an insolvent carries on a suit previously instituted by the insolvent, but I think there is a distinction between the case of a trustee of an insolvent and the executors of a deceased plaintiff or defendant. The trustee of an insolvent is not the representative of an insolvent in the same sense as the executors of a deceased person are his representatives and from that point of view the continuance of an action by the trustee of an insolvent not being for the benefit of the insolvent himself can hardly be said to imply a continuance of employment of the insolvent's attorneys. I think therefore that the case has not the same bearing as the passage from Cordery which I have quoted. That being so, I think I must refuse the present application with costs. Certified for counsel. *Mr. Mitra* :—We are entitled to a change on payment of the costs of the suit. We are prepared to do that. *The Court*.—I will make the order on payment of all costs including the costs of this application. *Girindra Coomarr Dutt v. Amulya Charan Ghose*, 6 C.W.N. 806 (307, 308),

according to equity and good conscience guided by the general principles obtaining in England.⁽⁵¹⁾

(51) *Jijibhoy Muncharji Jijibhoy v. Byramji Jijibhoy*, 18 B. 189. The following observations of Stirling, J. may also be noted:—"Now it was argued that the Court has no jurisdiction to order costs to be taxed after payment, on the ground that such jurisdiction is in England given by Statute, and that there is no Statute applicable here. It is true that various Acts have been passed in England regulating the admission, duties and liabilities of attorneys there, and that by them the Courts in England have to be guided in their decisions; it seems also that the first Act so passed was in 1729. Consequently none of these Acts are in force in this country. What the practice was before 1729, I am unable to say, and I know of no treatise from which the information could be obtained. It is also true that there are no such Acts in India, and the only rules we have are rules of the High Court regulating the admission of attorneys and their right to recover their costs in a summary manner, but that to my mind is no reason why the Court should not exercise a jurisdiction of this kind over its officers according to equity and good conscience guided by the general principles laid down by English cases. Consequently, I am of opinion that, upon a proper case being made out, the Court can in a proper manner call a solicitor to account in respect of the amount of his bill even after it has been paid. It was then argued that, if the Court has such a power, it will not exercise it summarily, but only on a proper suit being filed; that may have been the case in former years, but in the latest case reported, where an alleged agreement between the attorney and the client was in question—*In re Frappe* (L.R. 1893, 2 Ch. 295)—Lindley, L.J., says: "Upon this appeal it was argued that if there is reason to suppose the agreement is unfair or unreasonable, yet you cannot impeach it on such a summons as this, but that some kind of formal proceeding—which, I suppose, according to the present practice, would be an action to set it aside—must be instituted. The language of the Act seems rather to favour that view. But when you consider it carefully, it appears to me there is really nothing in the argument; because so long as the solicitor has a proper opportunity of resisting taxation, it cannot matter whether the application to tax is by writ, or by a special petition to tax, or a summons to tax, as in this case. The client may say "I want an order to tax, notwithstanding the agreement." The agreement can be no answer to that, if he can show reasons why there ought to be a reference to the Taxing Master to enquire into that agreement." That was, in my opinion, a much stronger case for not going into the matter on a summons in Chambers than the present one, and I shall follow the spirit of that ruling and hold that the present matter can be enquired into under the present summons. Has, then, a case been made out for referring these bills to the Taxing Master? "The old rule that you must show either gross fraud or pressure or overcharge, does not obtain as an absolute rule. A decision in the Court of appeal *In re Boycott* (29 Ch. D. 571) intimates that it is not an absolute rule;" *per* Kay, L.J., *In re Frappe*. Of course under ordinary circumstances I should not think of making an order to tax a bill, if it had been paid by a client who was *sui juris*, and dealing with his own money, after he had had an opportunity of examining it, and especially after he had discussed the matter with his solicitor and obtained from him a reduction in the amount. But that is not the case in the present instance. Messrs. Ardesir, Hormasji and Dinsba were solicitors for trustees, and they knew that the Court had ordered that certain costs taxed as between attorney and client were to be paid out of the Trust funds, and they must have known that, if the trustees' accounts were called in question, no proof of the correctness of the payments to them would be accepted except the *allocatur* of the Taxing Master. Consequently, it was their duty to have so advised

Certain items
allowed or
not in
taxation.

In a suit to set aside a settlement, two accountants were employed at the plaintiff's instance, and not by order of Court, to examine the settlor's books and give evidence. *Held*, that the investigation being most useful to the Court, and adapted to the ends of justice, the taxing master was right in allowing their expenses.⁽⁵²⁾

In a suit to obtain probate of a will, the defence was that the will was a forgery. The defendant's solicitor failing to obtain an expert in handwriting made a special study of the subject occupying 128 hours, and arrived at the conclusion that the will was not genuine. He then, notwithstanding counsel's opinion to the contrary, got the suit decided in his client's favour. In his bill of costs, the defendant's solicitor claimed his extra fees for the special work; but the taxing master disallowed the claim: *Held*, in review of taxation, that the solicitor was entitled to a special remuneration for his work in qualifying himself as an expert in handwriting.⁽⁵³⁾

Where a suit is not decided on the merits after contest but is withdrawn, the Court acts rightly in awarding the defendant only half his pleaders' fee as costs.⁽⁵⁴⁾

their clients, and it was their duty also to have had their bills taxed before they demanded payment of the balance. The fact that none of these things was done seems to me to be a very sufficient reason why the amount of the bills should be inquired into. It was further argued that as two out of three trustees agreed to pay the bills without taxation, their action binds the third, and that he, consequently, cannot now ask to have the bills taxed. I do not think so, especially as the Funds were Trust funds and could only be dealt with in carrying out the trust or under an order of this Court. It is quite clear that on the 12th June, 1893, the present applicant, whatever might have happened before, expressed his opinion that the costs ought to be taxed. In spite of this, the other two trustees on the 21st June, without obtaining the consent of their co-trustee or giving him any notice, paid the costs without taxation. On the 13th July, the applicant asked for an explanation from Messrs. Ardesir, Hormasji and Dinsha and again on the 7th August, but to neither of these letters did he get any reply, though as one of their clients, I think, he was by courtesy entitled to some explanation. Was he, then, to let the matter drop and run the risk at some future time of being called to an account for this payment at a time possibly when his means of proving it was proper payment even on taxation might be absent? In my opinion, he was not bound to do so, but was entitled to bring the matter before the Court and prevent himself being hereafter harassed by a suit. I, therefore, hold that these bills of costs must be taxed. *Per* Starling, J., in *J. Muncharji Jijibhoy v. Byramji Jijibhoy*, 18 B. 189 (193—196). In another case as to the practice of taxation in charity cases, see *Advocate General of Bombay v. Moulei Abdul Kadur Jitakur*, 20 B. 301.

(52) *Macnair v. Hogg*, 2 Hyde 89.

(53) *Dahibai v. Sunderji*, 9 Bom. L.R. 819=31 B. 430.

(54) *Kunwar Mahomed Eeatmed Ali Khan v. Bibi Ahmadi Begam*, 5 Ind. Cas. 121.

Where a person being a trustee, chooses to employ a solicitor for the purpose of conducting the affairs of the trust, which, of course, the solicitor is well aware of, there is a distinction between his employing that same solicitor for exactly similar purposes with regard to which he is not a trustee.⁽⁵⁵⁾

Where certain acts are asked to be done by the solicitor which are not strictly required for the purposes of the administration of the trust, the charges therefor are not to be put into the bill of costs which will have to be paid out of the trust estate; but the trustee will have to bear them personally.⁽⁵⁶⁾

It is for the Taxing Master to determine in each case, whether it is proper or necessary or fit for the administration of the trust that certain things should be done. And the question of *quantum* and *quoties* is one in which the opinion of the Taxing Master as to how much of the trustee's bill ought to be charged against the *cestui qui trustent* ought to be accepted.⁽⁵⁷⁾

As a general rule, costs should follow the result. Where a debt had been long due, the claim being one for foreclosure of a large sum, and the defendant contested part of the claim, the plaintiff was justified in employing a pleader and should not be deprived of his costs, which had been awarded by the first Court. It was not necessary for the plaintiff to have waited for the result of some proposal for the liquidation of the debt.⁽⁵⁸⁾

Full costs cannot be allowed where the parties are only entitled to costs in proportion to the value of their separate interests in the suit.⁽⁵⁹⁾

The general rule is that if a plaintiff recovers a less amount than he claimed in the plaint, his costs should be apportioned according to the amount recovered and not to the sum claimed.⁽⁶⁰⁾

Costs (in respect of pleader's fees) must be awarded to a defendant according to the rules. The plaintiff cannot take any advantage of any private arrangement between the defendant and his *vakil*.⁽⁶¹⁾

(55) *Advocate-General of Bombay v. Moulvi Abdul Kadur Jitakur*, 20 B. 301.

(56) *Ibid.*

(57) *Ibid.*

(58) *Mt. Uma Bai v. Mt. Kallu Bai*, 3 C.P.L.R. 185.

(59) *Luchman Chunder Geer Gossain v. Ram Joy Musoomdar*, 7 W.R. 159.

(60) *Velu Pillai v. Ghose Mahomed*, 17 M. 293 = 4 M.L.J. 140.

(61) *Umartanath Jah v. Raghunath Pershad Roy*, 6 W.R. Mis. 35.

At the hearing of a rule obtained, in an insolvency proceeding, against a purchaser of property of an insolvent, to show cause why his purchase should not be set aside, and alleging improper conduct on his part, the purchaser was represented by two Counsel; on taxation of the costs of the purchaser, the Court, holding that the objection of the other parties was ill-founded allowed the costs of two Counsel.⁽⁶²⁾

A decree in favour of the plaintiff recorded the costs of the several defendants separately each being credited with full pleader's fee. This decree was reversed on appeal preferred by all the defendants jointly. The appellate decree ordered the plaintiff to pay the defendants the costs of the appeal, the details and amount of which were given, and the costs incurred by them in the lower Court. *Held*, that the defendants were entitled to the separate costs as entered in the decree of the first Court.⁽⁶³⁾

In an originating summons, parties are entitled to instruct counsel: and without any certificate the costs of one counsel must be allowed on taxation.⁽⁶⁴⁾

Master should allow counsel's fees on taxation where plaints in short cases are drawn by counsel, if he is of opinion that it was not unreasonable to submit them to the counsel to be drafted or settled.⁽⁶⁵⁾

(62) *In the matter of Beer Nursing Dutt*, 24 C. 891.

(63) *Raghunandan Lal v. Rajendra Prosad Narain Singh*, 11 C.L.J. 207 = 14 C. W.N. 556 = 5 Ind. Cas. 342.

(64) *Fatma Bibi v. Sheikh Hussain*, 9 Bom. L.R. 1071.

(65) *Gunnaji v. Makanji*, 10 Bom. L.R. 969.

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